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Who is Looking out for the Public Interest: Thoughts about the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations

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**WHO IS LOOKING OUT FOR THE PUBLIC
INTEREST? THOUGHTS ABOUT THE UCC
REVISION PROCESS IN THE LIGHT
(AND SHADOWS) OF PROFESSOR
RUBIN'S OBSERVATIONS**

*Donald J. Rapson**

I. INTRODUCTION

When I agreed to write an article for this Symposium, I decided to say something about the Uniform Commercial Code (UCC) revision process. At the present time, I am involved with that process as an American Law Institute (ALI) member of the Article 9 Drafting Committee. Although not a member of the Article 5 and Article 8 Drafting Committees, I have also been pressing them concerning certain issues.

I was also an ALI member of the Article 6 Drafting Committee which ultimately adopted my recommendation favoring repeal,¹ and I played a role in the 1990 Amendments to Article 2A.² In addition, I was on the drafting committees as an ALI representative for the revisions of Articles 3 and 4³ and the new Article 4A. Before that I was on the ill-fated "3-4-8 Committee" of the Permanent Editorial Board for the UCC (PEB) which drafted the New Payments Code. Although I can and will discuss those experiences, I am primarily interested in offering something constructive about the revision process in the context of the Symposium's question "Is the UCC Dead, or Alive and Well?" I am honored to have been involved in that process and generally proud of the accomplishments. At the same time, how-

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1. See Donald J. Rapson, *U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"?*, 38 BUS. LAW. 1753 (1983) (reprinted in 88 COM. L.J. 600 (1983)).

2. See Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988).

3. See Donald J. Rapson, *Loss Allocation in Forgery and Fraud Cases: Significant Changes Under Revised Articles 3 and 4*, 42 ALA. L. REV. 435 (1991).

ever, I am somewhat uneasy about a process that in its genuine desire to be "open," participatory, and accessible to all interests, may inadvertently be inhibiting the attainment of complete objectivity and fairness in the emerging drafts.

In recounting Homer Kripke's contribution to the development of Article 9, Professor Grant Gilmore stated that Professor Kripke was preeminent in his contribution—not only in his willingness to share his extensive knowledge but even more in the absolute integrity with which he was able to distinguish between what the private interest of the professional lenders seemed to require *and what the public interest demanded*.⁴

I have tried to follow that credo in the revision process. The title of this article reflects my concern, however, as to whether the structure of the UCC revision process gives sufficient attention to and concern for the demands of the public interest.

In the earlier Symposium of the academics on this topic, Professor Edward L. Rubin wrote thoughtfully and provocatively about that process.⁵ His article serves as a useful starting point for an examination and analysis of the process, with a view to making constructive suggestions for its improvement. Part II of this article analyzes Professor Rubin's criticisms of the revision process for UCC Articles 3 (Negotiable Instruments) and 4 (Bank Deposits and Collections). Part III reflects my own views with respect to the overall UCC revision process in terms of its efficacy in serving the public interest. Part IV discusses the need for improving that process, focusing upon the pending revision of Article 5 (Letters of Credit) and the ongoing revision of Article 9 (Secured Transactions).

II. PROFESSOR RUBIN'S CRITICISMS

In his article, Professor Rubin describes his unhappy experience as chairperson of the subcommittee on Articles 3 and 4 of the Ad Hoc Committee on Payment Systems of the Section on Business Law of the American Bar Association (ABA). His conclusions about the revision process were bitter and overwrought:

In the process of drafting and enacting the revisions of Articles 3 and 4, however, one of the major forces was not

4. Grant Gilmore, *Dedication to Professor Homer Kripke*, 56 N.Y.U. L. REV. 9, 12 (1981) (emphasis added).

5. Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

present. Banks were well represented; corporate users were represented intermittently; but consumers were virtually unrepresented. The result was that the banking industry and its attorneys dominated the entire process, save for a few brief interludes. This domination was amplified by the fact that the representatives involved were lawyers, with their characteristic tendency to bond with their client group.

The banking industry is entitled to be represented, of course, and it can be expected to lobby assiduously for its positions. But the American Law Institute and the National Conference of Commissioners on Uniform State Laws should not lend their names to the bankers' enterprise. When they do, as occurred with the Article 3 and 4 revisions, they give the banking industry the ability to clothe itself with public policy, and to overwhelm most state legislatures with a false aura of public-oriented impartiality. This was a disgrace. If the ALI and NCCUSL cannot do better under their present structure, both organizations should be extensively reformed or entirely abolished.⁶

Having been a member of the Articles 3 and 4 Drafting Committees and also a member and regular attendee at Professor Rubin's ABA subcommittee meetings, I share some of his same concerns about the process, but disagree with and am puzzled by some of his observations. In particular, I reject his characterization of the process for the Articles 3 and 4 revisions as a "disgrace." Professor Rubin has gone astray in castigating the ALI and National Conference of Commissioners on Uniform State Laws (NCCUSL) because of his disappointment with the subcommittee of the ABA. The drafting committee is, of course, an entirely different committee appointed by ALI and NCCUSL. I do not recall whether Professor Rubin ever attended meetings of the drafting committee.

I was completely surprised by Professor Rubin's vote to disapprove the Articles 3 and 4 revisions and his subsequent resignation as chair of the ABA subcommittee. Indeed, although I was aware of his position on certain consumer issues, I was not aware of the depth of his general opposition to the Articles 3 and 4 revisions. I have always been and remain on good terms with Professor Rubin, but have no recollection of his having ever indicated to me his intention to vote as he did. Nor do I have any recollection of his having written any letter

6. *Id.* at 787-88.

or memorandum to the drafting committee or to any of its members—including myself—setting forth his opposition to the revisions or attempting to persuade or dissuade the drafting committee concerning particular substantive provisions. I have spoken with Roland Brandel and William Davenport who sequentially chaired the ABA Ad Hoc Committee on Payment Systems (of which Professor Rubin's subcommittee was a part) and who also attended the drafting committee meetings. They were equally surprised by Professor Rubin's vote and have the same recollection about the absence of efforts on his part to convince the drafting committee on substantive matters.

It is not my primary purpose to respond in depth to Professor Rubin's criticism of Articles 3 and 4 although some comments are in order. He has rendered an important service by making us think about the process even though one may disagree with his conclusion. Professor Rubin's recitation of his experiences as chairperson of the ABA subcommittee and eventual resignation suggests, in and of itself, a different but larger problem. Have the academic community and practicing bar generally failed to elevate themselves above special interests and personal points of view in drafting new or revised UCC provisions? Considering that Professor Rubin, as chairperson of an important ABA subcommittee, had a unique opportunity to be part of the process and to influence the result, and yet became so critical of that process, it may be useful to ask what went wrong and why? Did the process fail to consider Professor Rubin's positions—or did he fail to adequately assert those positions? Would the end result have been any different?

Professor Rubin's letter of resignation took a more conciliatory tone than his article in explaining his position:

I should add that I do not regard my resignation as a criticism of either the ABA Subcommittee or of the Drafting Committee for the Article 3-4 revisions. I think the Drafting Committee and its Reporters did a very creditable job of fulfilling the assignment given to them by the UCC's sponsors, and that the members of the Subcommittee were thoughtful and responsible in their deliberations.

I adopted my position on the proposed revisions because I do not think that the mission given to the Drafting Committee represents good public policy, from the perspective of either social equity or economic efficiency. When I became Chair, I did not believe that the ABA Subcommittee had any prior commitment to approve the sponsor's mission;

I hoped it would disapprove any revisions, however, technically adept, that were based on that mission, or that it could persuade the UCC sponsors to change the mission to reflect a more desirable policy. I am sure, however, that each Subcommittee member acted on the basis of his or her own view of what is best for the payment system, and for the nation as a whole. I am resigning only because my substantive position on the issue differs from that of most subcommittee members.⁷

By "mission given to the Drafting Committee," I believe that Professor Rubin is referring to his perception of an understanding between NCCUSL and the banking industry:

A new revision process would be initiated to modernize Articles 3 and 4 in light of changes in technology that had occurred since the original UCC was promulgated in 1951. The revision would not attempt to unify payment law; it would simply update the existing Articles 3 and 4, and add one new article—designated 4A—to govern wholesale wire transfers. It was further agreed that the new revision would not alter the balance between banks and consumers that existed in the original Articles 3 and 4, nor would it add any new provisions dealing with consumer protection.⁸

Professor Rubin's disagreement with the performance of that "mission" was reflected in another article written after his resignation:

The revisions of Articles 3 and 4 are superbly drafted, and represent high levels of technical achievement. Underneath their polished surface, however, they are deeply flawed. They perpetuate the one-sided, pro-bank perspective of the original, to the exclusion of any cognizable social policy. The revisions fail to achieve a policy of economic efficiency. While they may minimize bank costs, they generate excessive social costs by imposing unnecessary losses on consumers and providing too few protections. Moreover, the revisions are inequitable; they fail to consider the consumer's powerless position and give banks too much leeway to be arbitrary, careless, or positively oppressive. This is hardly

7. Letter from Edward L. Rubin to William B. Davenport (Nov. 26, 1990) (on file with the *Loyola of Los Angeles Law Review*).

8. Rubin, *supra* note 5, at 746.

surprising, since the drafting process of the revisions, like that of the original, was dominated by banking interests.⁹

This should be contrasted with his perception of the "real debate" written three years earlier:

One may question the language of particular changes that the revisers have suggested or the techniques they utilize to achieve particular goals. But questions of this nature will always arise in connection with complex, technical statutes like articles 3 and 4. Those who have reviewed the revision have generally been impressed with the technical quality of the drafting and the imaginative nature of the solutions to some long-standing interpretive problems. The real debate concerning the revision is likely to focus on the norms or policies that motivated the proposed changes. The revision reflects a strong preference for operational reliability, coupled with a general belief that those responsible for the operation of the system will share this preference and implement it more reliably than outside experts. Evaluation of the proposed revision, if it is to be as serious and as comprehensive as the importance of the statute justifies, must focus on this choice of policy and on the alternatives that the contemporary debate has proposed.¹⁰

Professor Rubin's failure to be wholly objective and fair must be noted. In characterizing the revisions to Articles 3 and 4 as a "bankers' enterprise," he failed to mention important substantive changes that generally benefit users and not just consumer users. A prime example is the expansion of "good faith" from the purely subjective test of "honesty in fact" to also include "reasonable commercial standards of fair dealing."¹¹ Most assuredly that change was not generated by bankers.¹² It was not suggested by Professor Rubin. Nor was it suggested by consumer advocates. Rather, it was suggested by the membership of the drafting committee and supported by the reporters. Most consumer advocates, and I suspect Professor Rubin as well, enthusiastically support that change.

9. Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 592 (1991).

10. Edward L. Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC*, 43 BUS. LAW. 621, 663-64 (1988).

11. U.C.C. §§ 3-103(4), 4-104(c) (1990).

12. The expanded definition was set forth in UCC § 4A-105(a)(6) without objection. It was then written into Articles 3 and 4 in the interests of consistency.

Another important part of the revisions is the recognition that a bank has a duty to exercise ordinary care in the manner in which it allows accounts to be opened and in connection with activities involving that account.¹³ For example, a bank may be liable for allowing a defrauder to open an account in the name of or one similar to a payee, and then accepting checks for deposit to that account over a period of time under irregular circumstances. This was not mentioned by Professor Rubin.

The codification of the common-law rule governing "full payment" checks as a means of accomplishing an accord and satisfaction¹⁴ is another example of an important revision which was certainly not bank-motivated. The use of that device as an "easy, inexpensive, and convenient method for effecting settlements in a wide range of types of disagreement"¹⁵ is clearly for the benefit of users generally. In addition, the revision provides a mechanism for unwinding an inadvertent accord and satisfaction.¹⁶ This can be particularly helpful in a consumer context, for example, hasty deposits by accident victims of settlement checks from insurance companies which contain releases of claims. Again, there is no mention of this change by Professor Rubin.

I could go further but it is unnecessary. By using words such as "disgrace" and "bankers' enterprise," Professor Rubin not only does a disservice to those of us on the drafting committee who worked hard to accomplish these kinds of changes, but more importantly, detracts from his essentially valid point that we should be examining the revision process.

III. THE EFFICACY OF THE UNIFORM LAWS PROCESS IN SERVING THE PUBLIC INTEREST

Despite these reservations about the objectivity and fairness of Professor Rubin's comments about the revision of Articles 3 and 4, I fully agree that there should be consumer representation in the drafting process. Indeed, that need has been recognized and implemented by ALI and NCCUSL. There are a number of consumer representatives serving as observers to the Article 9 Drafting Committee, includ-

13. See, e.g., U.C.C. § 3-405 cmt. 4.

14. *Id.* § 3-311.

15. Albert J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48, 57 (1978).

16. U.C.C. § 3-311(c)(2) (1990).

ing a number of the people mentioned by Professor Rubin.¹⁷ Similarly, the disparate interests and bargaining positions of small businesses as distinguished from "corporate America" should also be recognized. Again, there are several persons representing the perspective of the lower-middle and middle markets acting as advisers to the Article 9 Drafting Committee.

I also agree with Professor Rubin's view that the banking industry should not be allowed to dominate the revision process.¹⁸ I have some concerns about the pressures from bank interest groups placed upon the Article 5 Drafting Committee and will say more about this below. No group—including consumers—should dominate the process. Professor Rubin is also correct when he attributes the problem to the tendency of lawyers, involved in the drafting process, to think according to "traditional patterns of common-law adjudication"¹⁹ and their "identifying with the client or negotiating with the opposition."²⁰ These lawyers include law professors who also act as consultants. It is, however, the last observation in his article which raises the really critical issue about the revision process:

Opinions will vary about whether these adversarial patterns are detrimental to good social decision making. One thing is clear, however: If the adversary process is employed, those who employ it must be scrupulous about ensuring that all relevant interests are represented. In the absence of a representative, no one will speak for that interest because all the other participants are committed to, and indeed conditioned by, their own perspective. To derive a proper rule or policy from the clash of opposing forces seems to be a questionable strategy, but it does not even offer the possibility of good results if the opposing forces are not present.²¹

Professor Rubin did not explore the issue of whether the public interest is best served by an adversarial process in drafting statutory change. More recently, however, Professor Kathleen Patchel provided a detailed and thoughtful analysis of "whether the uniform laws process is an adequate mechanism for drafting" commercial law stat-

17. For example, Gail Hillebrand of Consumers Union in San Francisco, David McMahon of West Virginia Legal Services, Inc., and Yvonne Rosmarin of the National Consumer Law Center in Boston.

18. See Rubin, *supra* note 5, at 787-88.

19. *Id.* at 773.

20. *Id.* at 768.

21. *Id.* at 787.

utes in modern times.²² In the remainder of this article, I want to examine the issue posed by Professor Rubin in the context of Professor Patchel's analysis and the question in the title of this article—*Who Is Looking Out for the Public Interest?*

A. *Defining the "Public Interest"*

I start with the basic premise that the public interest is best served by having clear, concise, and efficient statutory rules so that the parties to a transaction can anticipate the issues and answers that may arise and guide their actions accordingly. To be *efficient* the rule must also be *fair* because rules that give one party an undue advantage over the other inevitably lead to disputes and are counterproductive. A party to a commercial transaction expects to be dealt with fairly by the other party. That objective is more likely to be achieved if both parties are required to deal fairly.

In addition, the concepts or rationale underlying the rule should be understood so that aberrant, capricious, or arbitrary behavior within the letter, but not the spirit of the rule, will be deterred. The official comments can often promote such an objective. For me, the concept of "good faith," defined to include "reasonable commercial standards of fair dealing," admirably accomplishes the latter goal. Thus, the statutory rule should fulfill two functions: first, as a guideline for the conduct of behavior and second, as an explication of the criteria for measuring the propriety of the behavior.²³

22. Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 86 (1993). Regrettably, Professor Patchel somewhat diminishes the credibility of her thoughtful article with statements such as "revised Articles 3 and 4 are even more pro-bank than were their predecessors." *Id.* at 110. In doing so, she demonstrates the same lack of objectivity and fairness as Professor Rubin in failing to consider the provisions that benefit users. See *supra* text accompanying note 11.

23. Steven L. Schwarcz, *Revising Article Nine: A Bickelian Approach to Statutory and Drafting Obsolescence* (Aug. 10, 1994) (unpublished manuscript, on file with the *Loyola of Los Angeles Law Review*) proposes that statutory changes should be judged in light of the principles—meaning the fundamental consensus goals—underlying the statute. He identifies clarity, flexibility, fairness, simplicity of implementation, consistency, and completeness as the principles underlying Article 9's construction as a statute, and uses them to examine changes currently being proposed to Article 9.

Schwarcz observes that there are actually several aspects to fairness. Fairness helps to preserve expectations by ensuring that parties are governed by neutral rules. Fairness also can mean, in more limited circumstances, that the law should protect weaker parties—such as those with less bargaining power—and that opportunistic advantage-taking should be prevented in circumstances that could not have been contemplated in advance. *Id.* at 20-24.

In the earlier Symposium, Professor Peter Alces questioned my preference for the drafting approach of Article 9 over that of Article 2.²⁴ I wrote to him that Article 9 generally “endeavors to prevent the disputes by anticipating the issues and furnishing answers,” and in contrast, Part 5 (Default) of Article 9 “uses the Article 2 technique of setting forth a ‘commercial unreasonableness’ standard that has generated litigation.”²⁵ Professor Alces responded as follows:

Even if it were accurate that Article 2 generates more litigation than most of Article 9, one could argue that the measure of a commercial statute is not the volume of litigation it engenders or discourages, but the quality of the results that courts can reach when they correctly apply the statute’s provisions. That is, wouldn’t we prefer commercial law that accommodates our getting the right answer when we do litigate over law that discourages the very litigation that might guide us toward that answer? Certainly we could draft a statute that precluded litigation and denied transactors access to the courts, but that would not be desirable, even if efficacious. The answer lies in balance, a balance between rules that provide predictable results and those that guide us toward the best results. It would be inappropriate to conclude that commercial law that emphasizes “the sense of the situation”—essentially factual determinations—is deficient because it is less predictable before the fact.²⁶

I agree with that statement. It is wholly consistent with my premise. Regrettably, Professor Alces seems to have interpreted my comments to mean that I would sacrifice the *best results* for *predictable results*. Not so. The trouble with the Article 9, Part 5’s “commercial reasonableness” standard is that it merely states a concept. Standing alone in its uncertainty, that concept has invited too much litigation and fails entirely to fulfill the first function of providing a guideline for the conduct of behavior.²⁷ Consequently, “commercial reasonableness” also fails to serve the second function, because without a guideline as to what that behavior should be, there can be no meaningful criteria for

24. Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 545-46 (1993).

25. *Id.* at 545 (quoting letter from Donald J. Rapson to Peter A. Alces (Mar. 31, 1986) (on file with the *Loyola of Los Angeles Law Review*)).

26. *Id.* at 546.

27. I have elsewhere criticized the “commercial reasonableness” standard, particularly in connection with deficiency actions. See Donald J. Rapson, *Repurchase (of Collateral?) Agreements and the Larger Issue of Deficiency Actions: What Does Section 9-504(5) Mean?*, 29 IDAHO L. REV. 649, 680-92 (1992-1993).

determining the propriety of that behavior. The result is that “commercial reasonableness” does not “guide us to the best results.” I hope that Professor Alces will apply his “balance between rules that provide predictable results and those that guide us toward the best results” in his evaluations of revised Articles 5 and 8 that are now emerging and to all future revisions of the UCC.

The crucial question then is whether the process presently being followed by the UCC drafting committees promotes or inhibits the development of the kind of statutory rules that will best serve the public interest.

B. NCCUSL's Perspective

At the outset, it is important to understand and appreciate the perspective of NCCUSL with respect to the function of the drafting committees. NCCUSL genuinely believes that the existing process best serves the public interest. In the earlier Symposium, Professor Fred Miller, the NCCUSL Executive Director, spoke of “the national consensus reached through the NCCUSL and the ALI process”²⁸ and described that process:

To answer the latter two queries first, the slogan of the NCCUSL suggests one response: “diversity of thought, uniformity of law.” States must realize that each uniform law is not drafted in isolation, but is shaped by input from various sources. Participating sources include NCCUSL commissioners and ALI members from each state, participants from state bars or law revision commissions, observers and advisors from groups interested in the legislation, and the American Bar Association. These sources share experiences with the legal subject under the diverse state laws. In short, experimentation has largely occurred before a uniform law is formulated, and the best results from that experimentation go into the uniform product.²⁹

Professor Miller's description of the process is essentially correct. Indeed, it is fair to say that in the effort to build a consensus, the drafting committees have come increasingly to look and sound like “mini-legislatures” or “mini-legislative committees.” Since 1986 the committees have functioned under NCCUSL's normal uniform laws

28. Fred H. Miller, *Is Karl's Kode Kaput?*, 26 *LOY. L.A. L. REV.* 703, 712 (1993).

29. *Id.* at 709.

procedures.³⁰ Their membership is comprised of appointees who are commissioners on Uniform State Laws, with the exception of some appointees from ALI. For example, the Article 9 Drafting Committee has nine commissioners and three ALI members. In addition, in a genuine and sincere effort to have representation from as many interests as possible, the drafters invite numerous advisers and observers to attend and participate in the meetings. At the most recent Article 9 meetings, approximately seventy-five to one hundred people attended. The meetings are open and everyone is free to speak out on the issues—indeed, there is much free-ranging discussion. Since most of those attending represent “interest groups” and understandably believe that they have a responsibility to air the views of their constituencies, such discussion is hardly surprising. Professor Rubin’s wish has been fulfilled—consumer representatives play as active a role in the process as do the various creditor groups.

The drafting committees meet for two-and-a-half days approximately three times a year over a three-year period. Between meetings drafts are submitted by the reporters and there is some exchange of correspondence and memoranda among the participants. At the end of the process, a final draft with proposed comments prepared by the reporters is approved by the drafting committee and then submitted to NCCUSL and ALI for their approval. Thereafter, it is the responsibility of NCCUSL to arrange for the approved version to be introduced into the various state legislatures and to urge enactment in that form.

Clearly, extensive time, effort, and expense, most of which is borne by NCCUSL, goes into this process. NCCUSL should be praised, not castigated—but for its efforts, the recent and on-going revisions to the UCC would probably not have happened. NCCUSL’s criterion for measuring the success of this effort is the extent and rapidity of legislative enactment uniformly throughout the states.³¹ Thus, NCCUSL’s mind-set is that the final draft emerging from the drafting committee is the product of a consensus arrived at through

30. Agreement Describing the Relationship of the American Law Institute, The National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code, reprinted in 64 A.L.I. PROC. 769, 772-75 (1987). Prior to that time, revisions to the UCC were accomplished under ALI procedures used for revisions to the *Restatements of the Law*. NCCUSL takes the position that the ALI procedures are less open than those of NCCUSL. See Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 410 & n.10 (1991). On the other hand, the ALI procedures may be more *deliberative*.

31. Patchel, *supra* note 22, at 92.

open debate and discussion of the issues by and among the interested parties, and should not be disturbed thereafter. NCCUSL's position is that those who did not participate in that process would better serve the public interest if they "contribute their energy to improving and promoting it [the final draft], rather than to questioning reasonable results arrived at through a participatory and open process."³² As a consequence, this procedure puts considerable pressure on critics of a final draft to refrain from attempting to change it. Instead the critics are asked to acquiesce in and support the enactment of that draft in the interest of uniformity and to wait a few years after enactment before urging amendments.

That concept, however, is acceptable only if the substantive content of the final draft satisfactorily takes into account the public interest. This brings us back to the question not discussed by Professor Rubin³³ and the primary focus of this article—*Who Is Looking Out for the Public Interest?* in the uniform laws process?

C. The Interest Groups

The "public interest," of course, means different things to different people. As previously discussed, statutory rules must be clear, concise, and efficient. In order to be "efficient," the rule must also be "fair" and encourage "fair dealing."³⁴ Not everyone agrees with the latter point. Indeed, there is some reluctance to accept this view in the drafting committees.

The attitude of many institutional or creditor groups that act as observers in the drafting committees—banks, secured creditors, and securities intermediaries—is that efficiency should be measured in terms of lower transaction costs. Those lowered costs will inure to the benefit³⁵ of customers, borrowers, and investors. In the institutional and creditor groups' view, interjecting considerations of "fairness" and "fair dealing" can interfere with the attainment of efficiency because those principles add uncertainty to transactions, leading to the involvement of courts and judicial decisions that then exacerbate this uncertainty. These views are certainly not limited to the interest groups. They are also manifested by many respected academics,³⁶

32. Miller, *supra* note 28, at 714.

33. See *supra* text accompanying notes 17-22.

34. For additional discussions of "fair dealing" see *supra* text accompanying note 23, and *infra* text accompanying notes 69-75.

35. A cynic might say "trickle down."

36. See, e.g., Schwarcz, *supra* note 23 (discussing fairness).

some of whom serve as reporters or as members or advisers to the drafting committees. As one leading scholar recently wrote to me:

The law of voluntary obligations at its best is binary. Formation rules are clear. Liability is strict. Duties, terms, and conditions are explicit. Unlike the continuum of tort law, contracts in general and commercial specialties in particular do not need a third party (court or jury) to determine their existence and scope.³⁷

I reject that view for several reasons. First, efforts to write statutes that purport to limit the ability to obtain judicial relief from aberrant behavior are doomed to fail because aggrieved parties will do so anyway if the stakes are high enough. Second, the inherent power of the courts is such that ways will be found to afford relief and require fair dealing if warranted by the circumstances, including “disemboweling”³⁸ a statute that tries to preclude such relief. Third, and perhaps most importantly, rules that encourage rather than discourage (and sometimes spawn) arrogant or capricious behavior by banks, secured parties, or securities intermediaries are counterproductive and costly. In the long run such rules lead to conflict and disruption of business operations. None of this is new—it is all well established by history.³⁹

37. Letter from John F. Dolan to Donald J. Rapson (Jan. 28, 1994) (on file with the *Loyola of Los Angeles Law Review*). Although Professor Dolan has contributed to the revision process, generally there has been a lack of input from the academic world—a very troubling aspect of the revision process. All too often those who teach one of the topics under revision sit silently, instead of participating and possibly improving the focus on public interest concerns. Only after enactment do they end their silence—frequently in an article that is critical.

38. Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 458-61 (1979) (discussing judicial eviscerations of holder in due course rule).

39. There are many examples but one is particularly illustrative. In the infamous case of *K.M.C., Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), the issue was whether the bank-lender was under an obligation of “good faith” to provide the borrower with sufficient notice, before cutting off a line of credit and demanding repayment, to allow a reasonable opportunity to seek alternative financing. The bank contended that the broad discretionary authority and “demand” language in the loan agreement made notice unnecessary, arguing that it could only be held liable if it acted in “bad faith” which it defined as “dishonesty” based on the narrow subjective definition of “good faith” under UCC § 1-201(19). The Sixth Circuit rejected that contention and affirmed a \$7,500,000 damage award against the bank. *Id.* at 766.

The decision in *K.M.C.* sparked a plethora of lender liability litigation that continues today. The general result is the imposition of liability where the institution acts in an aberrant or capricious manner. Conversely, where the institution comports with the broader standard of “good faith” that requires compliance with “reasonable commercial standards of fair dealing,” the institution generally prevails, and, most importantly, this usually leads to the prevention or early and less costly resolution of litigation.

Consumer advocates are equally aggressive in advancing their countervailing view that prevention of harsh and abusive practices warrants statutory rules that result in large damage awards and penalties without regard to the added transaction costs and whether or not there has been any harm or prejudice.⁴⁰ Under that approach, efficiency, including fairness, is almost irrelevant. The public interest is no better served by a policy of retribution than it is by one that fails to discourage misbehavior. Accordingly, even though it is essential that consumer representatives be involved in the drafting process, such representation and participation does not necessarily mean that the final product will be efficient, fair, and serve the public interest.

D. The Role of the UCC Drafting Committees

Drafting committees must be able to listen to, but then disassociate themselves from, the urgings of the interest groups. The question, however, is whether the "environment" of the drafting committee process inhibits drafting fair and efficient statutory rules that advance the public interest. In theory, the reporters and the drafting committee should be able to listen, objectively evaluate, step away from, and then rise above the interest groups. Without, however, in any way, questioning the integrity of the drafting committees, I fear that the process makes that very difficult to do. To the extent it is not done by the drafting committees, Professor Patchel would be correct in charging that "the current uniform laws process, rather than providing a means for drafting laws that represent neutral, best solutions to commercial law issues, tends instead to produce only solutions that are the most amenable to the business special interests that largely dominate it."⁴¹

NCCUSL's procedures require that drafting committee meetings be open and participatory to all. As a consequence, representatives from interest groups are encouraged to and indeed unhesitatingly do make known their views and positions. From time to time, the chairperson of the drafting committee even asks for nonbinding votes of the entire assemblage in order to see if there is a reaction to or a consensus on a particular issue. That vote obviously reflects the

40. Consider the costs and complexities imposed by the Truth in Lending Act, 15 U.S.C. §§ 1601-1693 (1988) resulting from the combination of disclosure requirements and the provisions for civil liability—including double finance charge penalties and class actions. See 15 U.S.C. § 1640 (1988). It is difficult for me to believe that these statutes and the implementing regulations really afford consumers "equivalent value" in terms of either meaningful information or lower transaction costs.

41. Patchel, *supra* note 22, at 162.

number of attendees from the respective interest groups—usually the banking groups have the highest number of attendees.

Recognizing that reality, the chairperson will then ask the drafting committee to vote—alone but publicly—a vote that often determines how the draft will come out on a particular question. Although the individual members of the drafting committee are supposed to speak freely on the various issues and to vote their own consciences independently of their personal affiliations, the fact remains that their statements and votes are publicly made in the glare of the interest groups. To some, that may be somewhat daunting and intimidating. Drafting committee members whose practice, employment, or academic consulting is for or on behalf of an interest group may be hard pressed to take a position contrary to that group.

My own experience is indicative of the pressures. As a member of the Articles 3, 4, and 4A Drafting Committees, I took several positions that were contrary to the views of some of the bank attorney observers. At one session, one attorney—perhaps jokingly—said, “Don’t forget who you work for,” an obvious reference to the fact that my employer, The CIT Group, Inc. (CIT), was a wholly owned subsidiary of a bank holding company group. As a member of a drafting committee, I do not represent CIT; nor does CIT expect me to do so.⁴² In my case that remark had no effect other than to anger me—but those kinds of pressures obviously can have an intimidating effect.

More recently, I had a similar experience involving the Article 9 Drafting Committee. There, I have been urging that in all deficiency actions, regardless of the amount of a successful bid at a *procedurally* correct foreclosure sale, there should be a credit for an amount equal to what would have been realized from a “commercially reasonable” sale, that is “fair value.”⁴³ This requirement would have its principal impact when there is little or no competitive bidding or when the foreclosing secured party is the successful bidder and becomes the owner of the collateral.⁴⁴ Based on comments expressed at the drafting com-

42. Fortunately, CIT has a long tradition of encouraging its in-house counsel to participate actively in projects involving the improvement of commercial law. CIT has also gone out of its way to allow its attorneys freedom, without any corporate interference, in the formation and presentation of their views. That policy has worked admirably. Among my predecessors at CIT are Homer Kripke and Carl Felsenfeld, whose contributions have brought credit to themselves, the legal profession, and CIT.

43. Rapson, *supra* note 27, at 686-88.

44. Recently in *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994) (5-4 decision), Justice Souter made essentially the same point in observing that such bids (as “a peppercorn paid at a noncollusive and procedurally regular foreclosure sale,” *id.* at 1767 (Souter,

mittee meetings, it is apparent that most representatives of secured parties do not support that proposal.⁴⁵ At a trade association meeting attended by some members of that interest group (including CIT), an unfavorable comment was made concerning my proposal and my association with CIT. I do not know whether this was an attempt to get the CIT representative to persuade me otherwise, but he told me about the comment. Consistent with CIT history and practice, however, he did not try to influence my position.

E. The Drafting Committees for Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections), and 4A (Funds Transfers)

Contrary to the comments of Professors Rubin⁴⁶ and Patchel⁴⁷—who did not attend the meetings—the Articles 3, 4, and 4A Drafting Committees were not dominated by the banking interests. This balance can be attributed to the strength and independence of the chairpersons, Carlyle C. Ring, Jr. and Robert Haydock, as well as the reporters, Professors Robert Jordan and William Warren. The containment of the banking interests can also be attributed to the presence and active participation of attorneys⁴⁸ from the Federal Reserve who frequently took certain positions contrary to those of the banks which they considered to be unreasonable or unfair. Clearly, those Federal Reserve representatives acted in the finest traditions of the public interest and true professionalism.⁴⁹ Moreover, the fact that the

J., dissenting) do not constitute “reasonably equivalent value” for purposes of Bankruptcy Code § 548, 11 U.S.C. § 548 (1988):

When the prospect of such avoidance is absent, indeed, the economic interests of a foreclosing mortgagee often stand in stark opposition to those of the debtor himself and of his other creditors. At a typical foreclosure sale, a mortgagee has no incentive to bid any more than the amount of the indebtedness, since any “surplus” would be turned over to the debtor (or junior lienholder), and, in some states, it *can even be advantageous for the creditor to bid less and seek a deficiency judgment.*

BFP, 114 S. Ct. at 1775 (Souter, J., dissenting) (emphasis added).

45. Thus far, the majority of the drafting committee does not favor my proposal for commercial transactions. There are, however, a number of supporters, and I would not be surprised if some form of the proposal was adopted for consumer transactions.

46. Rubin, *supra* note 5, at 787-88.

47. Patchel, *supra* note 22, at 110.

48. Oliver I. Ireland, Associate General Counsel, Board of Governors of the Federal Reserve System, Washington, D.C.; Ernest T. Patrikis, General Counsel, Federal Reserve Bank of New York; Thomas C. Baxter, Jr., Deputy General Counsel, Federal Reserve Bank of New York; John R.H. Kimball, Associate General Counsel, Federal Reserve Bank of Boston.

49. Professor Patchel makes an unfortunate error in lumping the Federal Reserve attorneys with “banks and bank interest groups.” See Patchel, *supra* note 22, at 122.

Federal Reserve opted to become actively involved in the uniform laws process rather than urging federal legislation or regulatory action is indicative of the merits of that process and certainly suggests caution in urging "federalization" of commercial law.

As one example, the Federal Reserve representatives were insistent upon a "final payment" rule for wire transfers which prevents a bank that has paid the funds to the beneficiary from later recovering those funds if the bank does not receive settlement from the originating or intermediate banks. This rule was contrary to the then prevalent practices and policies of banks in the CHIPS⁵⁰ wire transfer system, which resisted making such a change. As a result, section 4A-405(c) implements a general principle of finality, subject to very limited exceptions, by making unenforceable any agreement purporting to give the bank a right of recovery.

In the Articles 3 and 4 revision, the presence of the Federal Reserve facilitated adoption of the view that banks have a duty to exercise ordinary care with respect to the opening of accounts.⁵¹ That presence also fostered the view that the definition of "good faith" should be expanded to include "reasonable commercial standards of fair dealing."⁵² Several members of the drafting committee also held these views and vigorously insisted upon statutory rules that fairly balanced the interests of banks and users of the payment systems.

IV. THE NEED FOR IMPROVING THE PROCESS

NCCUSL's procedures should be revised to permit the drafting committees to function in a quieter and more deliberative professional environment. Open meetings are certainly beneficial insofar as they afford representatives of interest groups the opportunity to express their positions. *Openness*, however, also limits the ability of the members of the drafting committee to independently evaluate the validity of these positions. The "fishbowl" of external pressures and parochial considerations emanating from the interest groups hinders the ability of the members to engage in thoughtful and deliberative discussions, to use and apply their own expertise to the greatest extent possible, and to objectively and privately make decisions on the various issues. The inability of the drafting committee to function separately and in-

50. The Clearing House Interbank Payments System (CHIPS) is an automated communication and settlement system that is owned and operated by the New York Clearing House processing both international and domestic funds transfers.

51. See *supra* text accompanying note 13.

52. See *supra* text accompanying notes 11-12.

dependently from the interest groups lessens its ability to produce the best results. It makes little sense for the drafting committee to spend two-and-a-half days together three times a year without having any meaningful opportunity to work alone, to discuss the issues with one another, and to concentrate in-depth on the responsibilities at hand.

In essence, private drafting committee meetings are analogous to the practice of legislative committees going into "executive session." Although arguably contrary to the principle of openness and NCCUSL's focus on "building a consensus," the need for a more deliberative process is essential and critical.⁵³ There is, of course, a legitimate concern about decisions made in private, but one good way of alleviating these concerns is to follow Professor Patchel's suggestion that "the drafters' detailed explanation of the major policy choices that have been made—and the alternative choices that have been rejected—during the drafting process, [be] set forth in plain language and human terms."⁵⁴

A. *The Revision of Article 5 (Letters of Credit)*

I have a particular concern that subjecting drafting committee members to the glare of open meetings while arriving at their decisions may have had some negative effects upon the proposed final draft of Revised Article 5. The concern is not at all about the integrity or ability of the drafting committee members; it is about aspects of the process that may have impeded independent and objective decision making in the face of interest group pressures.

Of course, the issuance of letters of credit is primarily a banking function. Accordingly, it is fully understandable and appropriate that bankers, bank attorneys, and bank interest groups have been very actively involved with the Article 5 Drafting Committee. Moreover, because letters of credit are used in an infinite variety of commercial transactions, it is hard to identify a particular interest group or groups that can be said to generally represent commercial "users." The Treasury Management Association, whose members include treasury executives of a number of major corporations, has been one of the few participants in the drafting process acting on behalf of business users of letters of credit. Consumer groups, as might be expected, have not been involved. The net result is that banking interests have had a major presence at drafting committee meetings and in the drafting pro-

53. I have expressed this concern, which is not mine alone, to NCCUSL and the chairperson and reporters of the Article 9 Drafting Committee.

54. Patchel, *supra* note 22, at 158.

cess. For example, eleven of the nineteen listed advisers to the drafting committee appear to be associated with or represent banks or bank interest groups. I have no direct knowledge, however, of the actual discussions at the drafting committee meetings. I am not a member and only attended one meeting for a few hours on January 14, 1994, in order to urge some of the points being made in this article.

One of the most active of the bank groups is the U.S. Council on International Banking, Inc. (USCIB), an industry association composed of domestic and international banks. USCIB has consistently expressed concern that U.S. banks will be placed at a competitive disadvantage with foreign banks by being subjected to a revised Article 5 that would "isolate the U.S. from the international community, and will invite controversy, confusion and litigation."⁵⁵ USCIB has acted in a completely professional manner in vigorously asserting its position.

1. Proposed section 5-116(c) and preemption by the UCP

In June 1993, by which time the Article 5 Drafting Committee had issued its seventh draft (March 31, 1993), USCIB made clear that it could not support the revision as it was because of the purported "Diminished Status of UCP."⁵⁶ "UCP" is the Uniform Customs and Practice for Documentary Credits, which is a set of rules periodically issued by the International Chamber of Commerce.⁵⁷ USCIB was dissatisfied because in the draft presented section 5-103(c)⁵⁸ treated "the UCP as mere incorporated contract language that cannot displace any UCC obligation of good faith, diligence, reasonableness, or care."⁵⁹ USCIB stated that:

55. Letter from USCIB to Carlyle C. Ring, Jr., Chairperson of the Article 5 Drafting Committee (June 29, 1993), attaching *USCIB Study of Fundamental Problems with the Seventh Draft (March 31, 1993) Revision of UCC Article 5* [hereinafter *USCIB Study*] (on file with the *Loyola of Los Angeles Law Review*). The *USCIB Study* was publicly distributed in New York City at the 1993 Annual Meeting of the Committee on Uniform Commercial Code, American Bar Association Section on Business Law.

56. *USCIB Study*, *supra* note 55, at 2.

57. The latest revision is known as UCP No. 500, effective January 1, 1994.

58. That provision read as follows:

Except as otherwise provided in Sections 1-102(3), 5-108(a), 5-110(b), 5-111(f), and 5-114(a), the parties may vary their rights and obligations under this [Article] (i) by expressly incorporating rules of practice, such as the Uniform Customs and Practices of the International Chamber of Commerce, (ii) by a term in a letter of credit, confirmation, or advice, or (iii) otherwise by agreement.

U.C.C. § 5-103 (Discussion Draft, Mar. 31, 1993).

59. *USCIB Study*, *supra* note 55, at 2.

U.S. banks are becoming increasingly concerned about the effect of current § 5-109(2) and § 1-102(3) on the typical limitations of liability to gross negligence and bad faith and other such boiler plate provisions. Revised UCC Article 5 should eliminate these concerns, not extend them. Revised UCC Article 5 should unequivocally favor freedom of contract and should limit application of § 1-102(3), so that the only mandatory provisions in Revised UCC Article 5 would be those establishing its scope (i.e., what type of undertakings will and will not qualify as UCC Article 5 letters of credit), and those establishing the scope of the obligation of good faith (which should be narrowly defined in light of the overall policy of encouraging prompt payment of facially conforming documents). The seventh (and preceding drafts) have not fulfilled the two goals of the UCC Article 5 revision announced in draft § 5-101—setting a substantive framework and preserving procedure flexibility.⁶⁰

USCIB's lack of support for that draft was taken very seriously by the drafting committee. The proposed final draft issued on May 25, 1994,⁶¹ contains the following changes, *inter alia*, from the March 31, 1993, Draft:

§ 5-116. CHOICE OF LAW.

- (c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article

60. *Id.* at 4 (footnote omitted).

61. This proposed final draft came before the annual membership meeting of NCCUSL in August 1994 for final approval. At that time, it was essentially approved without substantive change. See *infra* text accompanying note 82. The only major change was the addition of a new § 5-110 providing for warranties by the beneficiary on presentment. Present § 5-111 makes provision for a similar warranty and I support the reinstatement of this previously deleted provision. The addition of this new section resulted in the renumbering of the subsequent sections. Accordingly, the section citations to the provisions of the Revised Article 5 in the May 25, 1994, Draft are to those sections as renumbered in the final draft approved by NCCUSL in August 1994, namely §§ 5-111(a) and 5-116(c), which were formerly §§ 5-110(a) and 5-115(c), respectively.

and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

; and

§ 5-102. DEFINITIONS.

(a) In this article:

(7) "Good faith" means honesty in fact in the conduct or transaction concerned.

I assume that section 5-116(c) is an accommodation by the drafting committee to meet the USCIB concerns, and has its support. The retention in section 5-102(a)(7) of the subjective definition of "good faith" presently in section 1-201(19) is clearly in accord with the wishes of most bank interest groups.⁶² But are these provisions in the public interest? I doubt it.

Under proposed section 5-116(c), if a letter of credit is "expressly made subject" to the UCP, the rules of Article 5 governing the liability of an issuer of the letter of credit are, in effect, preempted by the UCP rules. There is an exception for certain nonvariable UCC provisions specified in proposed section 5-103, but one would be hard pressed to find any significant exceptions in those provisions. Section 1-102(3) is one of the exceptions and provides that "the obligations of good faith, diligence, reasonableness and care prescribed by the Act may not be disclaimed by agreement."⁶³ However, there do not appear to be any special obligations of this kind imposed upon issuers in Revised Article 5. Indeed, there is no obligation of "reasonable care"; instead, proposed section 5-108(e) provides that issuers "shall observe standard practice of financial institutions that regularly issue letters of credit."⁶⁴ It is true that section 1-203 superimposes an obligation of "good faith" in the performance or enforcement of every contract or duty under Article 5. As defined, however, in proposed section 5-102(a)(7), this obligation is limited to subjective "honesty in fact" and

62. Prior to the USCIB Study, draft § 5-102(b) of the March 31, 1993, Draft incorporated § 3-103(a)(4) which provides that "'Good faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing." The Subcommittee on Letters of Credit of the Banking Law Committee of the New York State Bar Association opposed the inclusion of "reasonable commercial standards of fair dealing" on the ground that it is "vague and uncertain . . . and does not provide a workable standard in the LOC context." Letter from Michael Evan Avidon, Chairperson of the Subcommittee on Letters of Credit, to Carlyle C. Ring, Jr., Chairperson of the Drafting Committee and Professor James J. White, Reporter (Aug. 13, 1993) (on file with the *Loyola of Los Angeles Law Review*).

63. U.C.C. § 1-102(3) (1990).

64. U.C.C. § 5-108(e) (Revised Article 5 as approved by NCCUSL Aug. 1994) (on file with the *Loyola of Los Angeles Law Review*).

does not include "reasonable commercial standards of fair dealing." Banks generally do not act "dishonestly," but they have been known to act arbitrarily and capriciously.

Proposed section 5-116(c) can be traced to nonuniform section 5-102(4) enacted in New York in 1962 on the recommendation of the New York Clearing House Association, which was thereafter also enacted in Alabama, Arizona, and Missouri. Under that provision, Article 5 is wholly inapplicable if by the terms of the letter of credit or by agreement, the letter of credit is made subject to the UCP. Most letters of credit issued in New York and throughout the United States say that they are subject to the UCP.

It is significant to note that nonuniform section 5-102(4) was expressly rejected in 1964 by NCCUSL, ALI, and PEB as "both unacceptable and unsound."⁶⁵ Among other things, the sponsoring organizations questioned "the general wisdom of any state legislature's enacting comprehensive and serious legislation, all of which can be rendered completely nugatory by the election of individual persons."⁶⁶ The pending proposal seems equally objectionable. It is, in essence, a state statute ceding to an international group—here, the International Chamber of Commerce—the right and ability to make rules governing issuer liability over which state law would have no control. This is true even if the transaction is entirely within the United States or just one state. Although it is certainly appropriate, and consistent with present law, for Article 5 to incorporate UCP rules of custom and practice as aids in determining whether there is liability *under* Article 5, proposed section 5-116(c) appears to go further and allow the UCP to adopt rules of custom and practice that would "govern the liability of an issuer" in *preemption* of Article 5.

The proponents of proposed section 5-116(c) may contend that there is no present conflict between proposed Revised Article 5 and the UCP. That, however, overlooks the fact that proposed section 5-116(c) is open-ended so that questions of issuer liability would be subject to future changes in the UCP. For example, if the UCP were amended to mandate arbitration of claims against issuers, that would be binding. A UCP amendment requiring a beneficiary to mitigate damages before recovering from an issuer for wrongful dishonor would be contrary to proposed section 5-111(a), but might be binding. More drastically, the UCP might be amended at a future time to pro-

65. PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 2 at 95-100 (Oct. 31, 1964).

66. *Id.* at 99.

hibit an applicant from seeking injunctive relief against payment of a letter of credit, even if based on fraud or forgery.⁶⁷ Such a rule might also be binding.

If it is true that there are no inconsistencies between proposed Article 5 and the UCP on matters of issuer liability, and if one can make the assumption that there will not be any amendments to the UCP limiting rights against issuers, why is section 5-116(c) being proposed? USCIB's reasons are clear—it is quite candid in stating that it is more comfortable with and prefers to be governed by the UCP. The USCIB stated that:

While the UCP is partly standard contract language, it is also recognized by the market and the courts throughout the world as the de facto law which defines and regulates the interlocking relationships among applicant, issuer, adviser, confirmer, nominated bank, beneficiary, transferring bank, and transferee beneficiary. The UCP is so recognized because it reflects the understandings and practices of internationally active bank L/C departments on a worldwide basis, and they regularly occupy all of the roles governed by the UCP, including the roles of applicant and beneficiary.⁶⁸

In all of this discussion, however, to what extent have the interests of applicants and beneficiaries which are not banks been sufficiently protected? What are the expectations of nonbank users of letters of credit with respect to their rights and remedies against an issuer, particularly in transactions that are solely domestic? If there is to be an Article 5 in the UCC covering letters of credit, should not the rights and remedies of such users be governed by that state law? Can there be any assurance that these users will be dealt with fairly under the UCP and that there will be proper safeguards against aberrant, capricious, or arbitrary behavior?

Supporters of proposed section 5-116(c) may also contend that the provision does nothing more than permit an "agreement" between the issuer, applicant, and beneficiary. This "agreement" allows the UCP to govern in the circumstance where the letter of credit is "expressly made subject" to the UCP and the beneficiary then fails to reject the letter of credit. Such an "agreement," however, is neither express nor affirmative; it arises out of silence. Is it commercially rea-

67. Cf. proposed § 5-109(b) (providing for court of competent jurisdiction to grant injunctive relief to applicant who "claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud").

68. USCIB Study, *supra* note 55, at 2.

sonable and realistic to say that nonbank users who obtain letters of credit in the ordinary course of their business operations have made such an "express" agreement? Banks uniformly insert such language in the boilerplate of a letter of credit; there is no real opportunity to bargain for its deletion. Letters of credit are routinely received and accepted by businesspeople without consulting attorneys and most businesspeople would not realize that they have given up their rights and remedies under state law and instead subjected themselves to international rules which ordinarily do not have the status of law. This is a troubling proposal.

2. Proposed section 5-102(a)(7) and the rejection of "reasonable commercial standards of fair dealing" as part of "good faith"

Proposed section 5-102(a)(7) represents an advertent refusal by the drafting committee to broaden the definition of "good faith" to include "reasonable commercial standards of fair dealing." In doing so, the Article 5 Drafting Committee is the first and only UCC drafting committee to make this decision⁶⁹ and to thereby create a clear inconsistency with Articles 2A, 3, 4, and 4A, as well as proposed Revised Article 8.⁷⁰

One anomalous consequence of this decision is that in a letter of credit transaction the bank is held to a lesser standard of good faith

69. Although Alternative B for a revised Article 6 uses the subjective definition of § 1-201(19), the Article 6 Drafting Committee was not called upon to address the question. See U.C.C. § 6-102(3) (1990) (incorporating the general definitions in Article 1).

Section 6-107(3)(a), however, uses a standard of "good faith and commercially reasonable" in insulating a buyer from liability to creditors where the buyer makes such an effort to comply with Article 6, or believes that Article 6 is not applicable to a particular sale. The "commercially reasonable" phrase was added to the draft as the result of an ALI membership vote to amend "good faith" to include "reasonable commercial standards of fair dealing." See Annual Meeting The American Law Institute, 66 A.L.I. PROC. 429-38 (1990). Alternative A, which opts for repeal of Article 6, has already been adopted in the majority of the states.

70. See U.C.C. §§ 2A-103, 3-103(a)(4), 4-104(c), and 4A-105(a)(6) (1990). In 1993 the Article One Task Force of the American Bar Association Section on Business Law, co-chaired by William B. Davenport of Chicago and Harry C. Sigman of Los Angeles, recommended to PEB that "good faith" in § 1-201(19) be amended to reflect the broader definition. PEB opted, however, to leave the decision to each drafting committee. Section 8-102(a)(9) of the final draft of Revised Article 8, approved in 1994 by NCCUSL and ALI, provides:

"Good faith," for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this Article (Section 1-203), means honesty in fact and the observance of reasonable commercial standards of fair dealing.

U.C.C. Revised Article 8, Investment Securities (Proposed Final Draft at 35, Apr. 5, 1994) (on file with the *Loyola of Los Angeles Law Review*).

than it is held to in the enforcement and collection of negotiable instruments, the payment of cashier's and other bank checks, or the execution and payment of wire transfers. Another anomalous consequence is that the applicant and beneficiary in a letter of credit transaction are held to a lesser standard of good faith than they are in the underlying transaction.⁷¹

It is, nevertheless, understandable that banks would be concerned if "fair dealing" were to be a factor in determining the propriety of a decision to honor or dishonor a presentation for payment under a letter of credit.⁷² Accordingly, taking cognizance of that concern, on January 15, 1994, I proposed to the Article 5 Drafting Committee that it adopt the following definition:

"Good faith" means honesty in fact and the observance of [reasonable commercial standards of] fair dealing in the letter of credit transaction. An issuer or confirmer acts in good faith if it honors or dishonors a draft or demand for payment solely upon its determination as to whether the draft or demand for payment is strictly in compliance with the terms of the relevant letter of credit (§ 5-108), even though honor or dishonor is made with knowledge of a claim of fraud by another person.⁷³

In making that recommendation, I stated:

71. If the underlying transaction is a sale or lease of goods by a merchant, "good faith" means that the parties must act in accordance with "reasonable commercial standards of fair dealing in the trade." See U.C.C. §§ 2-103(1)(b), 2A-103(3). Similarly, in most states, if the underlying transaction involves a non-UCC contractual obligation, "good faith" requires compliance with "reasonable commercial standards of fair dealing." RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

72. For example, the Subcommittee on Letters of Credit of the Banking Law Committee of the New York State Bar Association expressed its concerns in the following terms:

LOC banks deal in documents, not goods, in representations, not facts. A bank is entitled to reimbursement if it honors upon presentation of the stipulated documents, whether or not a judge would think it "fair" for the bank to honor even though the applicant swears it was short-shipped and begs the bank to count the widgets for itself. Notions of "fair dealing" will probably do violence to the independence principle and involve banks in disputes relating to the underlying transaction, rather than the presentation of conforming documents under a LOC.

Letter from Michael Evan Avidon, *supra* note 62, at 6. For the similar position of USCIB see James G. Barnes, *Defining Good Faith Letter of Credit Practices*, 28 LOY. L.A. L. REV. 101 (1994).

73. Letter from Donald J. Rapson to Carlyle C. Ring, Jr. (Jan. 15, 1994) (on file with the *Loyola of Los Angeles Law Review*). Proposed § 5-108(a) requires an issuer to honor a presentation that "appears on its face strictly to comply with the terms and conditions of the letter of credit." U.C.C. § 5-108(a) (Revised Article 5 as approved by NCCUSL Aug. 1994) (on file with the *Loyola of Los Angeles Law Review*).

The rationale for this approach is to deter commercially inappropriate behavior by applicants and beneficiaries alike by requiring them to adhere to the same standard of "fair dealing" that is usually applicable to their underlying transaction by reason of either Article 2 or 2A or the general law of contracts, while at the same time insulating banks that adhere to the strict compliance standard from bad faith claims. I believe that this proposal is an appropriate compromise of the various views expressed yesterday and urge its adoption by the Drafting Committee. If, however, the Drafting Committee rejects this suggestion and continues to recommend the "honesty in fact" standard alone, I would hope that the Drafting Committee would explain its position—and that the explanation would be something more than a knee-jerk aversion to "fair dealing" or a response that requiring applicants and beneficiaries to adhere to the standard of commercial "fair dealing" is somehow inimical to the unique world of letters of credit, even though issuing and confirming banks that adhere to the strict compliance standard would be protected.⁷⁴

The drafting committee, however, rejected that proposal at its meeting of March 12, 1994. As of this writing, I know of no rationale or justification for this rejection other than the general dislike by the bank interest groups of a requirement for compliance with "reasonable commercial standards of fair dealing."⁷⁵

3. Proposed section 5-111(a) and the exculpation from consequential damage liability for wrongful dishonor

In its present form⁷⁶ and under proposed section 5-111(a), Article 5 is also inconsistent with Articles 3 and 4A⁷⁷ with respect to the liability of an obligated bank for consequential damages arising out of a

74. Letter from Donald J. Rapson, *supra* note 73, at 1-2.

75. Memorandum from Carlyle C. Ring, Jr., Chair of the Drafting Committee, accompanying the Proposed Final Draft (May 25, 1994) (on file with the *Loyola of Los Angeles Law Review*) states:

"*Good Faith*" definition. This draft uses the Article 1 definition of "honesty in fact" (Subjective Standard). Issuers (particularly Banks) believe that adding "fair dealing" will undermine certainty of payment by inviting courts to look into the underlying transaction, thereby seriously eroding the "independence" principle and the "strict compliance" standard essential to the commercial effectiveness of Letters of Credit. The Drafting Committee supports this view.

76. U.C.C. § 5-115(1) (1990).

77. *Id.* §§ 3-411(b), 4A-404(a).

wrongful dishonor or refusal to pay. Present section 5-115(1) provides that upon wrongful dishonor by an issuer, the person entitled to payment "may recover from the issuer the face amount of the draft or demand together with incidental damages." No mention is made of consequential damages. This can be attributed to the fact that present Article 5 focuses only on the traditional commercial letter of credit, as distinguished from stand-by letters of credit, and treats the aggrieved person as a "seller." Thus, the measure of damages is based on Article 2.⁷⁸ The fact that a creditor might suffer consequential damages as a result of being deprived of the funds does not appear to have been considered. Proposed section 5-111(a) makes explicit what is implicit in present section 5-115(1) and expressly prevents either a beneficiary or an applicant from recovering "consequential damages."

Recent UCC revisions, however, have expressly dealt with this point in the analogous cases of wrongful dishonor or refusal to pay (1) bank checks on which a bank is primarily liable, that is cashier's, teller's, or certified checks and (2) wire transfers that have been accepted by the beneficiary's bank. Sections 3-411(b) and 4A-404(a), respectively, provide for recovery of consequential damages if the bank's refusal to pay is wrongful and the obligated bank is given notice of the particular circumstances giving rise to consequential damages. The purpose is to discourage banks from such refusals to pay and to implement the principle of certainty of payment.⁷⁹ The notice requirement assures that the bank is informed of the general type or nature, and magnitude of the consequential damages that will be suffered as a result of the refusal to pay before it can be held liable.⁸⁰

The Treasury Management Association expressly requested the drafting committee to include a provision in Article 5 similar to sections 3-411(b) and 4A-404(a). At the meeting of March 12, 1994, however, the drafting committee rejected that proposal.

Letters of credit are extremely important in commercial transactions because they serve either as (i) payment mechanisms or (ii) assurances of the payment or performance of obligations. In either circumstance, the hallmark of the letter of credit is the *certainty of payment* by the issuer-bank. Discouraging wrongful dishonor or repu-

78. See *id.* §§ 2-708(1), 2-710. Generally, consequential damages are not specifically recoverable because the contract price usually includes the seller's profit. *But cf.* § 2-708(2) (providing an alternative measure including profit if "subsection (1) is inadequate to put the seller in as good a position as performance would have done").

79. *Id.* §§ 3-411 cmt. 1, 4A-404 cmt. 3.

80. See *id.* § 4A-404 cmt. 2.

diation of the obligation to pay is, at the very least, equally important in the case of letters of credit as in the case of bank checks and wire transfers. Yet, the very mechanism for discouraging wrongful dishonor or repudiation—potential liability for consequential damages—has been explicitly and intentionally rejected in proposed section 5-111(a). There is no discernable reason or rationale for creating such an obvious inconsistency between the treatment of bank checks and wire transfers on the one hand, and letters of credit on the other—and none has been given. The provision for notice to the bank adequately protects the bank against unfair surprise and affords it an opportunity to avoid consequential damage liability by making payment.

4. The role of the interest groups

All three issues, (i) preemption of Article 5 by the UCP under section 5-116(c), (ii) broadening the definition of “good faith” in section 5-102(a)(7), and (iii) consequential damages liability for wrongful dishonor under section 5-111(a), have thus far found little or no support in the drafting committee. It is uncertain whether or to what extent the first issue has been examined. The Treasury Management Association was the only interest group supporting proposals that addressed the second and third issues. This lack of support is disturbing.

The chairperson of the Article 5 Drafting Committee, Carlyle C. Ring, Jr., who also chaired the Articles 3, 4 and 4A Drafting Committees, is an excellent lawyer and a very fair-minded individual. He has made certain that all points of view, including mine, were thoroughly aired. Professor James J. White, the eminent UCC authority, is the reporter. The members of the Article 5 Drafting Committee have outstanding expertise; indeed, half of them are also serving on the Article 9 Drafting Committee. This makes it difficult for me to question the decisions by the drafting committee, but I am compelled to do so. This should not be construed in any way as a criticism of the drafting committee members or their integrity. Rather, these questions are directed to the revision process which, because of its susceptibility to interest group pressures and the emphasis on legislative success, may impede the ability of the drafting committee to make independent and objective judgments on substantive and policy issues.

My concern is that the drafting committee may not have had the opportunity to step away from the pressures of the bank interest groups and objectively discuss and evaluate the three proposals in a private deliberative manner. Were the actions of the drafting committee based on its independent and objective belief that rejection of the

proposals was really in the public interest? Or was the drafting committee driven by the realization that rejection of the proposals, no matter how meritorious, was necessary for the support of the bank interest groups in the legislative process? Bearing in mind that the drafting process was in the final stages after four years and that NCCUSL emphasizes legislative enactment as the criterion for success, did the drafting committee have the flexibility to adopt the proposals even if it meant losing the support of the bank interest groups? It may well be that the drafting committee truly believed that its decisions were in the public interest and would have arrived at those decisions irrespective of interest group pressures. The point of these questions is to focus upon the revision process and whether it was conducive to independent and objective decision making.⁸¹

5. Challenging the drafting committee's decisions

I submitted memoranda raising these three issues to the annual membership meeting of NCCUSL in August 1994 and intend to raise these issues before the ALI meeting in May 1995. Although the normal tendency of these organizations is to approve drafts submitted to them at their annual meetings, they do not merely "rubber-stamp" those drafts and I was hopeful that the NCCUSL meeting would result in modifications to the Article 5 Draft with respect to these three issues. Regrettably, however, NCCUSL approved the drafting committee's resolution of the three issues without change.⁸²

Important changes to prior UCC drafts of other articles have emerged from these meetings. Most dramatic, perhaps, was the decision of the NCCUSL membership at its 1988 meeting to reject a re-

81. Mr. Ring responds in this Symposium to these questions and states that "the drafting committee, its advisers, and other participants honestly believe that the policy choices that Donald Rapson challenges are in the public interest" and that "the question is fundamentally whether an 'individualized' definition of 'public interest' or a 'collective wisdom' of what is in the public interest is to prevail." Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 *LOY. L.A. L. REV.* 289, 307 (1994). Mr. Ring, however, does not discuss the fact that two of those policy choices (that is, "good faith" and the relationship of UCP) are inconsistent with the drafting committee's earlier choices reflected in the March 31, 1993, Draft; that even though that draft excluded recovery of consequential damages, that choice was inconsistent with the choices recently made by NCCUSL and ALI in their recent approvals of Articles 3 and 4A; that USCIB objected generally to the March 31, 1993, Draft and specifically to the first two choices; and that the ensuing drafts then did a complete turnabout on those two issues so as to seemingly adopt the USCIB position.

82. Letter from Carlyle C. Ring, Jr. to Donald J. Rapson (Aug. 8, 1994) (on file with the *Loyola of Los Angeles Law Review*) (including "a copy of Revised Article 5 as approved by NCCUSL on a vote by states 51-0").

vised Article 6 submitted by the drafting committee and instead to recommend repeal of the bulk sales law. Repeal has, in fact, rapidly occurred in more than half of the states—much to the surprise of many on the drafting committee.⁸³

Another important change took place at the 1990 meeting, when the NCCUSL membership rejected a recommendation by the Articles 3 and 4 Drafting Committee, which was favored by the banks. The drafting committee had recommended that losses, created when employees (who have “responsibility” with respect to checks) forge their employers’ signatures as drawers of checks, be allocated to the employer rather than the bank. As a consequence of the rejection of that recommendation, section 3-405, which reflects the allocation principle, is only applicable to indorsements, and banks continue to have the burden of proving that the employer was negligent under section 3-406 in order to shift loss with respect to forged drawers’ signatures.

Although NCCUSL’s approval of proposed sections 5-116(c), 5-102(a)(7), and 5-111(a) is disappointing, I have no regrets about having raised the issues and am glad that they were considered and discussed by NCCUSL. I plan on pursuing these issues with the ALI. Important changes have resulted from prior ALI meetings. At its 1990 meeting, the suretyship rules of section 3-605 were changed in the interest of promoting settlements and workouts. As a consequence, section 3-605(c) provides that a secondary obligor is not discharged by an agreement, made without its consent, between the primary obligor and the creditor for an extension of the time to pay unless the secondary obligor “proves that the extension caused loss.” At the recent May 1994 meeting, which approved Revised Article 8 and accompanying amendments to Article 9, it was agreed that there would be new and expanded comments clarifying the relationship between the priority rules in new section 9-115 governing conflicting security interests in investment property and the revised adverse claim and “protected purchaser” rules. These comments will make clear what the final draft had left in doubt; section 9-115 does not preclude resort to non-UCC law through section 1-103 in order to provide relief

83. That experience exemplifies the need for separating the drafting process from the legislative process. Even with the majority of the Article 6 Drafting Committee favoring repeal, the drafting committee never made that recommendation until pressed by the NCCUSL membership. Some members believed that the unlikelihood of legislative success, combined with an institutional lack of flexibility, precluded the drafting committee from making that recommendation. See Steven L. Harris, *Article 6: The Process and the Product—An Introduction*, 41 ALA. L. REV. 549, 560-61, 567 (1990); Peter Winship, *Lawmaking and Article 6 of the Uniform Commercial Code*, 41 ALA. L. REV. 673, 683 n.34 (1990).

from misbehavior that gives rise to an adverse claim by a party who is subordinate under the priority rules. With that recent history in mind, I hope to persuade the ALI to take a different position than NCCUSL on these three issues raised by the Article 5 Final Draft.

As of the writing of this article, I do not know whether my misgivings about Revised Article 5 will cause me to withhold support for its approval and enactment if the positions on the three issues are not changed.⁸⁴ To gain support the drafting committee will have to make the case that Revised Article 5 on balance is an improvement over existing law. Given the heavy investment by NCCUSL of time, effort, and expense in arriving at a final draft, rejection by the sponsoring organizations, or approval but non-adoption in the states, would certainly be unfortunate. On the other hand, the sponsoring organizations *cannot afford* to allow the integrity of the process to be impaired by a perception that it was influenced by the pressures of an interest group. Professor Patchel's concluding observation that NCCUSL "runs the risk not only of tarnishing its reputation as a neutral body of experts, but also of becoming a marginal player in the future development of the commercial law"⁸⁵ cannot be ignored.

Indeed, if there were principled modifications with respect to the three issues, there could be a long-range therapeutic and beneficial effect. In the words of Homer Kripke, who has contributed so much to the greatness of the UCC, "extensive technical legislation like the U.C.C. has to be drafted by a select group [not dominated by any interest groups] *before* it is worked over by the legislature with particular focus [at that later time] on the political and other public aspects of the situation."⁸⁶ If this concept becomes a reality, considerable progress in improving the uniform laws process will have been made.

For this to happen, NCCUSL must change its mind-set that success is measured by the extent and rapidity of legislative enactment by the states.⁸⁷ I agree with Professor Patchel's suggestion that the sponsoring organizations must "place the importance of enactment in per-

84. Are my comments about Revised Article 5 different than Professor Rubin's criticisms of the revision of Articles 3 and 4 which I have said were not "wholly objective and fair"? See *supra* text accompanying note 12. I believe that they are different. Here, I have advanced specific proposals to the drafting committee. These proposals have been rejected without my thus far receiving a rationale for the rejection based on the *substantive merits* of the proposals. Cf. Ring, *supra* note 81.

85. Patchel, *supra* note 22, at 164.

86. Homer Kripke, *A Reflective Pause Between UCC Past and UCC Future*, 43 OHIO ST. L.J. 603, 604 (1982) (emphasis added).

87. See *supra* text accompanying notes 31-33.

spective," and that NCCUSL should "in an appropriate situation, draft the law that it considers to represent the better position, even though adopting that position may cause a politically influential group to oppose the law in the state legislatures."⁸⁸ Indeed, I believe that implementation of that suggestion is a key to the present and future success of the UCC and the roles of NCCUSL and ALI. If proposals for revisions to the UCC were viewed as an informed judgment on the merits rather than a filtered consensus of conflicting interest group views, the likelihood of enactment may well be enhanced. Fortunately, no matter what happens to Article 5, the opportunity for achieving that success is directly at hand with the ongoing revision of Article 9.⁸⁹

B. *The Revision of Article 9 (Secured Transactions)*

UCC revisions have been governed by NCCUSL's uniform laws procedures only since 1986.⁹⁰ The procedures for the UCC drafting committees have, in fact, been evolving and changing in recent years. NCCUSL has been sensitive and responsive to suggestions and criticisms made by persons in and outside of the revision process. Some examples are NCCUSL's recognition of the need for significant modifications of the 1987 version of Article 2A;⁹¹ and the acceptance of extensive clarificatory revisions to the comments explaining the new suretyship rules of new Article 3 and coordinating those rules with ALI's new *Restatement of Suretyship*.⁹² Other examples are the inclusion of consumer representatives to the drafting committees for Articles 2 and 9;⁹³ establishing PEB Study Committees to review and document the need for revisions to a UCC article prior to establishing a drafting committee;⁹⁴ and cooperation with the Members Consulta-

88. Patchel, *supra* note 22, at 159.

89. At the same time, the Article 2 (Sales) Drafting Committee is working on the very formidable task of revising, and probably expanding, Article 2. I am only peripherally involved with the work of that drafting committee. Accordingly, the following discussion is confined to the Article 9 Drafting Committee only because I am a member and thus actively involved in its work. I have no reason to believe, however, that anything I say with respect to the procedures, work, and opportunity for success of the Article 9 Drafting Committee is not equally applicable to the Article 2 Drafting Committee.

90. *See supra* text accompanying note 30.

91. *See* U.C.C. Article 2A (Leases) (1987) (amended 1990).

92. *PEB Commentary* No. 11, [PEB Commentaries] U.C.C. Rep. Serv. (Callaghan) (Suretyship Issues Under §§ 3-116, 3-305, 3-415, 3-419 and 3-605) (Feb. 10, 1994).

93. *See supra* text accompanying note 17.

94. The PEB, with the support of NCCUSL and ALI, established study committees to study and recommend whether Articles 2 and 9 and related provisions are in need of revision and, if so, to recommend the nature and substance of the revisions. The Article 9

tive Groups established by ALI to critique draft revisions during the drafting process.⁹⁵ Consequently, I would expect NCCUSL to be willing to adapt some of its procedures for the Article 9 Drafting Committee in accordance with suggestions made below and those by Professor Patchel.⁹⁶

It is important to recognize that there is no pressing need to revise Article 9.⁹⁷ It works very well and is generally acknowledged to be a brilliant statutory creation which has brought certainty and efficiency to secured transactions law and practice, replacing prior complexity and confusion. Accordingly, there is no reason for NCCUSL or anyone else to be obsessed with bringing about legislative amendments. Nor does any particular interest group appear to have concerns of such great magnitude as to mandate the need for immediate legislation.

That, however, is not to suggest that a revision of Article 9 is inappropriate. There is clearly room for improvement. First, existing statutory ambiguities and deficiencies need clarification. Second, Article 9 needs to better deal with special kinds of financing such as agricultural finance. Third, greater guidance is needed with respect to procedures, particularly in Part 5 dealing with enforcement on default. Fourth, Article 9 should rectify perceived abuses, for example, deficiency actions against consumers. Fifth, a modernization of the statute should take account of new forms of complex commercial financing arrangements such as asset securitization (also known as structured finance). Sixth, the UCC filing system must be improved so as to accommodate vastly increased volume and to utilize new and

Study Committee made its recommendations after a two-year study. PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (Dec. 1, 1992) [hereinafter STUDY GROUP REPORT]. The STUDY GROUP REPORT forms the basis for most of the proposals being considered by the Article 9 Drafting Committee. Additional issues are also being considered. For example, my proposal for a "fair value" credit in deficiency actions was only developed near the end of the study and was too late to be considered in the STUDY GROUP REPORT. See *supra* text accompanying note 43.

95. ALI has established Members Consultative Groups for each of the UCC articles under revision. These groups meet periodically with the respective reporters to review particular issues. Other interested persons are invited to attend and participate.

96. See Patchel, *supra* note 22, at 155-62.

97. Compare the prompt revision of Article 8, where the evolution of the indirect holding system for securities and the possibility of federal preemption due to concerns expressed by the Securities and Exchange Commission made the revision a compelling necessity. See A.L.I. & NCCUSL, U.C.C. Revised Article 8, Investment Securities, Proposed Final Draft at xi-xii, 1-32 (Apr. 5, 1994) (foreword by Geoffrey C. Hazard, Director A.L.I.).

developing technology. As cogently stated by the Article 9 Study Committee,

the Committee believes that Article 9 is fundamentally and conceptually sound; it does not contemplate that the Drafting Committee would change materially the concepts of attachment and perfection or would devise radically new priority rules or means of enforcement. Nevertheless, the Committee believes that the improvements that are likely to result from revising Article 9 along the lines suggested in this report are sufficiently great to justify the costs of re-education, unintended consequences, and temporary nonuniformity that would attend the revision.⁹⁸

It is, therefore, imperative that the Article 9 Drafting Committee be allowed to proceed in a careful, deliberative, and thoughtful manner to objectively consider and evaluate the various proposed revisions—and to do so free from the glare, pressures, and urgings of the many interest groups. This imperative creates an ideal setting for modifying the procedures of the drafting committee in accordance with the following suggestions:

1. The first day of the two-and-a-half day meeting should be for the drafting committee *alone*, at which time it would discuss and deliberate issues, proposals, and drafts presented by the reporters. Votes would be taken, language in draft statutes and comments would be reviewed and determinative decisions would be made. The drafting committee would also review the agenda for the next day's "open" meeting and examine the anticipated issues.

2. The second day of each meeting would be an open meeting conducted in accordance with NCCUSL's present procedures. The decisions taken on the first day by the drafting committee would be reported and the various observers and interest groups could comment on those decisions as they saw fit. In addition, the observers and the interest groups would be asked to comment on proposals and drafts on the agenda submitted in advance by the reporters. Reports on particular issues by special consultants, experts or committees would also be presented. The drafting committee would listen and ask questions, but not vote on any issues. At the chairperson's discretion, nonbinding votes of the observers could be taken.

3. On the last half-day, the previous day's agenda would be completed. The floor would be opened for anyone to present new

98. STUDY GROUP REPORT, *supra* note 94, at 6.

matters. The reporters would summarize their views concerning the results of the meeting, which would then be reduced to written synopses and publicly disseminated. Finally, the reporters would outline their program for the interim before the next meeting and present a suggested agenda for that meeting.

4. As the process proceeds, discussion drafts and eventually proposed final drafts would be prepared, circulated, and reviewed by the drafting committee, the advisers, and the observers—much like the current procedure. The comments to these drafts, in addition to containing the customary explanatory material, would also identify and summarize the various issues that had arisen, their proposed resolution, and when appropriate present alternative formulations. Written comments upon the drafts and comments would be encouraged and distributed to all interested persons with a view to stimulating discussion and comment by the drafting committee.

5. Upon completion of a final draft with proposed comments, it would be published and distributed as widely as possible for written comment by interested persons for a “cooling-off” period⁹⁹ of not less than six months. All comments must be reviewed by all members of the drafting committee; it is essential that those persons taking the time and effort to write comments know that they will receive careful attention. The drafting committee would meet alone, as necessary, to discuss and evaluate these comments and to make appropriate revisions to the final draft.

6. Following the conclusion of the “cooling-off” period and the preparation of a revised final draft, the final draft would then be submitted for approval to NCCUSL and ALI.

This changed process requires strong leadership from the chairperson and the reporters—establishing specific agendas, fixing target dates, adhering to schedules, and budgeting and rationing discussion times with a firm hand. The Article 9 Drafting Committee has that kind of leadership.¹⁰⁰ Undoubtedly, there may be some lessening of the “openness” of the meetings; not everyone will be able to speak as much or as often as he or she likes. Instead, participants should be encouraged to submit their comments by letters or memoranda to the drafting committee with the assurance that these comments will be

99. This proposal for a “cooling-off” period has been long urged by Harry Sigman. See Harry C. Sigman, *Improving the UCC Revision Process: Two Specific Proposals*, 28 *LOY. L.A. L. REV.* 327-28 (1994).

100. William M. Burke is the chairperson of the Article 9 Drafting Committee and Professors Steven L. Harris and Charles W. Mooney, Jr. are the reporters.

circulated and carefully considered. Submission of written comments and materials on particular subjects in lieu of unstructured oral discussions will much improve the quality of the deliberations. Throughout the process, the emphasis must be on advancing the public interest by developing rules that will be clear, concise, and efficient,¹⁰¹ with the prospect for legislative success not being a primary factor.

V. CONCLUSION

Professor Rubin has performed a service by drawing attention to the UCC revision process and demonstrating the need for consumer representation and participation in that process. Regrettably, the bitterness of his own experience and his lack of objectivity concerning the revision of Articles 3 and 4 may have detracted from the merits of his focus upon process. Professor Patchel, however, has advanced from that point and presented a thoughtful and insightful analysis of the uniform laws procedures that currently govern the UCC revision process. She has done so from the perspective of an "outsider" to that process and offered important constructive suggestions¹⁰² for improving and making the process more relevant to the future development of the commercial law.¹⁰³

In this article, I have attempted to objectively evaluate the analyses of Professors Rubin and Patchel from the perspective of an "insider" who has been a part of the process that they have criticized—and to objectively evaluate that process. It seems that we agree on a number of points, particularly the need for a more deliberative and thoughtful process that takes into account the concerns of all interest groups, but which then focuses upon and emphasizes the public interest in producing the final product. I have made a number of suggestions to accomplish that result which can and should be immediately implemented in the ongoing revision of Article 9. I am optimistic that this will happen—hopefully sooner and not later.

101. This means that the rules must be fair and encourage fair dealing. *See supra* text accompanying note 34.

102. Patchel, *supra* note 22, at 155-62.

103. *Id.* at 164.

