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Peter A. Alces

William & Mary Law School, paalce@wm.edu

Robert M. Lloyd

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AN AGENDA FOR REFORM OF THE ARTICLE 9 FILING SYSTEM

PETER A. ALCES*
ROBERT M. LLOYD**

Introduction

The Uniform Commercial Code article 9 filing system has largely been taken for granted. While the system is the very foundation of the personal property security law in the United States,¹ students of the commercial law assume its efficacy and practitioners' attention in complex transactions is often distracted by matters of ostensibly greater concern. It is frequently only in bankruptcy, when the debtor's financial fortunes have deteriorated to the point of virtual no return, that the parties turn to the more mechanical financing statement filing issues and discover, often for the first time, that some deficiency in the system may provide the trustee and the unsecured creditors she represents a windfall at the expense of a secured creditor that had, it thought, crossed every "t" and dotted every "i."

If the object of the commercial law is to provide certainty and predictability, and to accommodate the continued expansion of commercial practices,² the article 9 filing system, so fundamental to commercial transactors' expectations, should not be the source of unpleasant surprises for conscientious counsel; it should reflect the integrity and sophistication of the commercial community it serves and should assure that form does not prevail over substance. But the filing system is dependent on form. The

* Professor of Law, Marshall-Wythe School of Law, College of William and Mary. Professor Alces is the Chair of the American Bar Association Uniform Commercial Code Committee Article 9 Filing System Task Force (the Task Force). The observations offered in this article are those of the authors as developed from materials collected by the Task Force and from correspondence among members of the Task Force. Any positions urged in this article are those of the authors and do not necessarily reflect conclusions or positions of the Task Force or of the organizations that have sponsored the work of the Task Force.

Substantial portions of this article appeared in a different form in the *Preliminary Report of the Uniform Commercial Code Committee Article 9 Filing System Task Force to the Permanent Editorial Boards Article 9 Study Committee*, submitted Feb. 1, 1991 (the Report).

** Professor of Law, University of Tennessee College of Law. Professor Lloyd is Vice Chair of the Task Force and the coauthor, with Professor Alces, of the Report.

1. The word "filing" appears in twenty provisions of the U.C.C., including seventeen sections of article 9. See U.C.C. §§ 2-326, 3-304, 4-208, 9-103, -113, -301, -302, -304, -305, -306, -308, -309, -312, -401, -402, -403, -404, -405, -406, -407 (1990). The phrase "financing statement" appears in fourteen provisions of article 9. See *id.* §§ 9-302, -306, -307, -312, -315, -401, -402, -403, -404, -405, -406, -407, -504, -505. Hawkland & Maggs, *UCC Concordance*, 1974 U. ILL. L.F. 11, 40, 100.

2. See U.C.C. § 1-102(2) (1990); see also Hawkland, *Uniform Commercial Code Methodology*, 1962 U. ILL. L.F. 291.

challenge, then, is to reconcile formal considerations with the demands of commerce.

The American Bar Association's Business Law Section Uniform Commercial Code Committee recognized that article 9 of the U.C.C. could be undermined by deficiencies in the filing system and empaneled a task force to review filing practices in each of the jurisdictions that has adopted article 9 of the Code. This article describes the scope and method of that study and offers preliminary observations to both inform and cause consideration of filing issues. The authors have drawn on materials submitted by several members of the Task Force³ and on a preliminary review of materials collected to date in the course of the survey of filing practices currently being conducted by the Task Force.

The observations that follow are divided into five sections: part I treats the method of the Task Force's Study (the Study) and outlines the procedures followed by the Task Force in assembling the body of material concerning the state of the filing system in this country. Part II describes in more detail the scope of the Study and reviews the range of sources the Task Force has accumulated. That description explains the role that the constituent interest groups have played in both developing the contours of the Study and in distilling a sense of the status quo from the materials received to date. The part also treats the various perspectives brought to bear and the consequences of that diversity for both the Study and for any comprehensive reform initiative.

Parts III and IV are interrelated: first, part III offers a cursory (and, at this juncture, tentative) appraisal of the deficiencies plaguing the current filing systems. For those purposes, the focus is on broad categories of problems rather than on particular glitches from one state to the next. It may be that the landscape of ultimate reform will not be susceptible to coverage with such a broad brush. Part IV draws on the observations and conclusions offered in part III to begin the development of an agenda for reform. It suggests some of the substantial as well as political challenges that confront reform of the filing system. There are vested interests and ostensibly intractable prejudices to deal with.

The conclusion synthesizes the direction of the Task Force Study and represents an invitation to those concerned with secured transactions generally, and the filing system particularly, to consider the work to be done over the coming months as an opportunity to improve the commercial law by incorporating what we have learned to realize maximum benefit from the technology and commercial expertise that has been developed since the promulgation of the Uniform Commercial Code. While the issues introduced in those parts are necessarily interrelated, the division of topics reflects the emphasis of each of the parts.

3. Memoranda concerning the filing system were prepared by Michael J. Brandt, Esq., of Birmingham, Ala.; Barbara Clark, Esq., of Kansas City, Mo.; and Professor Ann Lousin, of Chicago, Ill.

I. Method of the Study

The Study began in earnest in the spring of 1989, with the development of a questionnaire⁴ designed to depict comprehensively the state of the current system as well as any pending reform initiatives. Consequently, the questionnaire is lengthy, containing nineteen separate items, many of which include several sub-questions. The form is broken into substantially two main sections, one concerning filing, the other concerning search issues. The tenor of the questions ranges from the very specific⁵ to the general.⁶ The design of even the most specific question, however, is not merely to determine, for instance, the fee for accepting a telefaxed submission, but to inform as to the interstices of the filing system at the time the questionnaire was completed by each of the respondents in their respective states.

While the first inclination was to survey attorneys representing commercial lenders in order to appreciate counsels' perception of the system,⁷ after receiving substantial input from those expert in matters regarding the filing system, the Task Force members determined that it would be more worthwhile to enlist the assistance of filing professionals to better capture the state of the system. Apparently many, if not most, attorneys delegate filing tasks to subordinates and search services. To reach a group of experts vitally concerned with the integrity of the filing system, a representative of the Task Force approached Marvin Gillock, Deputy Secretary of State for the U.C.C. Division for the State of Missouri and President of the International Association of Corporation Administrators (IACA). Gillock undertook to distribute the questionnaire to representatives of the IACA in each of the article 9 jurisdictions; he then had the completed questionnaires returned to him and forwarded to the Task Force for collation. To date, all but four jurisdictions are represented in the completed questionnaires.⁸ Further, many state administrators responding included additional detailed

4. Harry Sigman, Esq., of the California Bar, contributed substantially to the development of the questionnaire and must be credited with formulating the ambitious scope of the undertaking. It was Sigman's perception that a survey such as that contemplated by the Task Force could not be repeated successfully in the course of an article 9 revision process. Therefore, it would be better to include as many items on the questionnaire as possible in order to capture as complete a snapshot of the filing system as the patience of respondents would allow. A copy of the final form of the questionnaire is reproduced as appendix I.

5. See, e.g., *infra* app. I, No. 3(C): "[W]hat is the amount by which the expedited service fee exceeds the standard service fee?"

6. See, e.g., *id.* No. 18: "Are there currently pending or contemplated in your state any regulations or legislation that would have any impact on the filing or search systems?"

7. Indeed, the questionnaire was first distributed to a group of attorneys representing commercial finance interests throughout the United States. That "shakedown" distribution did reveal several deficiencies in an early form of the questionnaire, but, more importantly, it revealed that counsel for secured lenders were not sufficiently familiar with the mechanics of the filing system to be able to complete many items on the form.

8. The states not yet completed are Alaska, Hawaii, Tennessee, and Vermont. The Task Force is continuing its efforts to secure completed questionnaires from those jurisdictions.

materials describing their filing practices and procedures. With Gillock's assistance, the Task Force collected a complete file of the materials depicting article 9 filing officer practices in this country.

It also became clear, however, that a survey of corporate administrators, while invaluable, would not provide the complete body of data indispensable to study and reconsideration of filing practices. Certainly one of the significant concerns of any commercial regime is that expectations (in this case, those of the filing officers) in fact be realized by those dependent on the regime — the consumers of filing and search services. While ultimately the consumer of those services is the secured lender (and, to an extent, the entire commercial community), it was apparent early in the course of the Study that professional Uniform Commercial Code search services were a group most intensely concerned with even the most technical and mechanical aspects of the article 9 financing statement filing system.

Bruce Jacobi, Chief Executive Officer of Intercounty Clearance Corporation and past President of the National Public Records Research Association (NPRRA), the trade group representing the interests of U.C.C. search services, coordinated a separate survey of filing practices in article 9 jurisdictions from the perspective of the service companies.⁹ That survey was conducted largely by interviews with service professionals familiar with filing practices in the several states. A model script or questionnaire was developed from the form prepared by the Task Force for the filing officer survey.¹⁰ The results of that survey were submitted to the Task Force in notebook form in the middle of December 1990.

Finally, the Task Force collected, though in a less comprehensive manner, the responses of practicing attorneys in a number of jurisdictions (of varying sizes and levels of commercial activity) to the form questionnaire used in the IACA survey. These attorney responses will be valuable primarily in illustrating the depth of the practicing bar's familiarity with filing practices. Perhaps most telling are the short notes received from some commercial lawyers roughly to the effect that they "had turned the form over to a paralegal in the office because I didn't even know where to start."

Members of the Task Force reviewed the results of all three elements of the survey. The NPRRA and IACA results were combined into a single text and were distributed at the 1991 Spring Meeting of the American Bar Association Business Law Section in Williamsburg, Virginia. An initial and somewhat cursory review of the responses collected by both the filing officers and the service companies indicates some dissonance between the perceptions of the two groups regarding extant filing practices.

9. The members of Jacobi's Committee are: Mel Boylhart, Infosearch, Inc.; Clare Oliva, Intercounty Clearance Corp.; Seth Schlusberg, National Code Corp.; Frances Debray, The Search Is On; Todd Drake, NCSearch, Inc.; Paulette Gareau, Intercounty Clearance Corp.; Richard Maxwell, Quest Research; Alice Penny, Paralegal Services of North Carolina; Michele Reidinger, Capitol Paralegal Services; Bill Robathan, Probus Research; and Pat Walker, Parasec Inc.

10. A copy of the service company script/questionnaire is included as appendix II.

II. *Scope of the Study and Sources Consulted by the Task Force*

As review of the form questionnaires reveals, the design of the study is to identify, *inter alia*, the state of the filing system as of the last quarter of 1990. While it would be naive not to anticipate perhaps even dramatic adjustments in the status quo, it would be equally naive to assume that imminent improvements will redress the inadequacies of the current system. So long as the period covered by the survey was not atypical, and there is no indication that it was, the survey may be expected to disclose the systemic problems that would attend any filing system drawn along the lines of the current model. So while the survey provided a means to make important filing information more accessible (e.g., certain fees), its primary object, and its enduring contribution, will be in its identification of the strategic strong and weak points of the current regime.

Many of the items in the questionnaire investigate the efficiency of the filing system. Particularly addressed is the question of to what extent do delays in the system undermine the efficient execution of secured transactions? If there are lengthy delays between the time a financing statement is submitted to the filing officer and the time when a search of the records would reveal the filing, will such a delay impact the funding of a loan against collateral identified in the filing? The survey will disclose whether the search services discern such delays and whether filing officers acknowledge them. It will not predict the response of commercial counsel and their clients to the realities of such a delay.

Similarly, if a filing officer will reject a filing because of certain inadequacies, it is important to the commercial community that the secured party be apprised of both the rejection and the reason for the rejection. Yet that is neither the practice in many jurisdictions, nor is it a matter subject to article 9 provision. In many states a filing may be rejected because the correct fee was not submitted with the financing statement.¹¹ However, some states have developed methods to avoid rejection in inaccurate fee situations,¹² while other states have neglected to adjust their practices in a manner designed to limit the unfavorable commercial consequences of a filing being rejected for incorrect fee reasons.¹³

11. From the responses to item number 1.D. on the IACA form questionnaire, this would appear to be the case in several states. *E.g.*, Arizona, Arkansas, California, Colorado, Delaware, Florida. *See infra* app. II, No. 1(D).

12. For example, Alabama, Indiana, and Kansas provide for the filing offices maintenance of accounts for customer-secured parties (on search services), or, alternatively, simply contemplate that an employee in the filing office will contact the secured party and notify it of the inaccurate fee payment, providing the secured party an opportunity to cure the defect.

13. We can only infer that this is the case in jurisdictions responding that a filing may be rejected when an inaccurate fee is tendered without suggesting what steps, if any, the filing office will take to remedy the problem short of flatly rejecting the filing. Note, in particular, New Hampshire, New Mexico, and New York. It is anticipated that the Task Force will contact filing officers in these and similarly responding states to seek clarification where necessary.

It has become clear in the course of the survey that many states are currently considering the computerization of their search and filing systems. While some states are moving from a manual system to a computer system,¹⁴ others are moving from one computerized system to a more sophisticated computerized system.¹⁵ In the course of those transitions it is quite likely that, at least initially, delays in the current regime, where they exist, will be exacerbated.

Although technological advances may initially confound the system in some substantial ways, the goal of all interested parties is to make adjustments to the status quo that will ultimately enhance its efficacy. That objective will only be fully realized if there is cooperation among the various constituent interest groups, as well as coordination of efforts in the several states. The Study thus far has revealed no concerted effort to coordinate practices among the states or even to identify a unifying strategy for reform of the filing system. Items on the questionnaire asked respondents to identify the particular software and hardware systems as well as search logic used in their states.¹⁶ The answers were revealing both in what they disclose about the relative sophistication of the current systems and in what they disclose about respondents' familiarity with the systems. This data should provide a means to depict the electronic sophistication (and diversity) of the current state systems, which is a necessary predicate of coherent and comprehensive uniform reform. It is unlikely that real systemic improvement will result from well meaning but disparate efforts that lack coordination either in method or object. Emerging technologies make this an exciting time for reform of the filing system, but it is, as well, a challenging time. Insofar as the survey has sought to identify the technological state of the art, such as it is, the survey may provide the initial, albeit tentative, steps toward comprehensive reform.

In addition to the surveys of search service and filing officer expectations and practices, the Task Force is also considering the article 9 case law that reveals the incongruities of the current filing system. This is not an area in which the case law is either voluminous or particularly helpful. The few cases that do exist, however, focus on the dearth of statutory guidance afforded secured parties and filing officers.¹⁷ They also, to an extent, reveal the posture of the courts toward filing problems and thereby suggest the judicial reception that revision of the current regime would receive. A member of the Task Force¹⁸ prepared a report on the apposite case law that was presented at the American Bar Association's Business Law Section 1991 Spring Meeting.

Finally, from the outset of the study, the Task Force has encouraged attorneys and others concerned with the filing system to share their "hor-

14. In particular, Oregon, West Virginia, and Wisconsin.

15. Mississippi, Montana, New Jersey, and North Carolina (all remarking, "possibly").

16. See *infra* app. II, Nos. 4-5 (the IACA questionnaire).

17. See text accompanying *infra* notes 26, 28-29 & 31.

18. Michael J. Brandt, Esq., of Birmingham, Ala.

ror" stories: how the system has failed and how completely. While the limited utility of such anecdotal evidence is manifest, it is also apparent that such tales reliably predict transactors' anxieties with the filing system. Any reform initiative must increase, to the extent possible, commercial actors' comfort with the system. The growing file of horror stories may provide a means to anticipate potential anxieties and preempt their development by considerate education of the practicing bar, including both its most and least commercially sophisticated members.

The following two parts of this article outline, in summary terms, the authors' initial perceptions of the nature and scope of filing system problems and offer as well the contours of an agenda for reform of the filing system. The design here is not to depict exhaustively the challenges facing any form of filing system, but instead to sketch the nature of those challenges and to offer initial observations regarding the thrust of any comprehensive reform. Those two inquiries are necessarily intertwined.

III. Nature of Filing System Deficiencies

The Study has disclosed myriad problems with the filing systems presently in use. We have grouped these under three major headings: speed, accuracy and cost. A major item in the cost category is the attorney time spent attempting to achieve the necessary degree of certainty concerning the client's perfection and priority.

A. Speed

Because of U.C.C. section 9-312's first-to-file-or-perfect rule,¹⁹ a secured party is assured priority only if it searches through the date of its filing. This means that before disbursing funds the secured party must file its financing statement, wait for the financing statement to be indexed and searchable, and then obtain a search showing its financing statement filed with no competing financing statement ahead of it. In most jurisdictions this is not a problem. The delay between the time the financing statement and search request are first filed and the time the search showing priority is received is only a few days — fast enough for all but the most urgent transactions. In some states, however, the volume of filings that the central filing office must handle results in delays of several weeks from the time the secured party files its financing statement to the time it receives a search showing the priority of that financing statement.²⁰ It has been

19. U.C.C. § 9-312(5) (1990) provides the following general priority rule: "Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time security interest is first perfected, whichever is earlier"

20. Searchers in Connecticut report that there is generally a twenty *business* day lapse between the time a financing statement is stamped and accepted and the time a search will disclose the financing statement. In California, the Secretary of State's office has run six to eight weeks behind around the Christmas holidays, although in recent years the staff has worked overtime and reduced this considerably.

asserted that this delay causes a great number of secured lenders to close transactions without assurance of their priority.²¹

A simple solution to this problem may be for the filing offices to hire more people.²² This is not realistic, however, given the fact that state governments throughout the country are facing severe budget problems. Even if the money were available, it might be better spent on technology than on additional salaries. Moreover, because the volume of searches and filings ebbs and flows, having a staff large enough to keep current during the peak periods might mean having people idle during the slack ones.

Another solution would be better education for secured lenders and their attorneys. An informal survey suggests that, in spite of the time lag in the filing offices, experienced commercial lawyers seldom close important transactions without a search through the date of filing. Most of the cases in which funds are disbursed without obtaining a search through the date of filing are situations in which the lender and its counsel either failed to realize soon enough the need to file early or simply did not care enough to do so.²³

B. Accuracy

Accuracy is another concern of secured lenders. Properly filed financing statements can be misindexed or searchers can overlook properly indexed statements. The results can be large losses for secured lenders.²⁴ In some jurisdictions, the lender who has suffered a loss may have no recourse.²⁵ In most jurisdictions, however, the lender can recover for losses caused by the filing officer's failure to perform properly a ministerial duty,²⁶ but this will often entail further expensive litigation. Moreover, because filing officers in many jurisdictions do not issue certificates, lenders may encounter difficulty in proving that they in fact received an inaccurate search.²⁷

21. *U.C.C. Filing System in Crisis*, SECURED LENDING ALERT, May 1986, at 1; B. CLARK, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 2.18 (2d ed. 1988).

22. The service company survey (see *supra* text accompanying note 9) indicated that the delay in Connecticut is reduced to two to three business days when the office is fully staffed.

23. For an example of a case in which a lender lost priority by failing to search through the date of its filing, see *Wegner v. Grunewaldt*, 821 F.2d 1317 (8th Cir. 1987). In late February, the bank prepared its loan documents and conducted a search which showed no other secured party claiming an interest in the collateral. Another creditor filed its financing statement on March 3, and the bank filed its financing statement on March 8. The court correctly gave priority to the creditor who filed on March 3. *Id.* at 1324.

24. See, e.g., *Borg Warner Acceptance Corp. v. Secretary of State*, 240 Kan. 598, 731 P.2d 301 (1987); *Borg Warner Acceptance Corp. v. ITT Diversified Credit Corp.*, 344 N.W.2d 841 (Minn. 1984).

25. See KAN. STAT. ANN. § 84-9-407(3) (Supp. 1986) (state and filing officers immune except for willful misconduct).

26. See, e.g., *Mobile Enters., Inc. v. Conrad*, 177 Ind. App. 475, 380 N.E.2d 100 (Ct. App. 1978) (inaccurate response to telephone inquiry); *Hudleasco, Inc. v. State*, 90 Misc. 2d 1057, 396 N.Y.S.2d 1002 (Ct. Cl. 1977), *aff'd*, 63 A.D.2d 1042, 405 N.Y.S.2d 784 (1978) (inaccurate certification); see also IND. CODE ANN. § 26-1-9-401(6) (Burns Supp. 1990) (establishing fund to pay judgments recovered against filing officers).

27. A leading commentator notes: "[C]oncern for litigation has caused many filing officers

Another important source of potential errors is the policy of some filing officers of backdating improperly rejected documents. When a secured party is able to convince a filing officer that its financing statement was improperly rejected, filing officers in some states will backdate the filing date to the date the document was originally submitted. This is a potential trap for later secured parties who may get a clean search in the gap between the original submission date and the date the financing statement is finally accepted.

It should be noted, however, that in spite of the huge potential for losses caused by inaccurate filings and searches, actual losses appear to be extremely rare. An informal survey of lawyers in a state where searches are notoriously inaccurate revealed no one who had suffered a loss or personally knew anyone who had.

C. Cost

Although the charges made for searching and filing are minimal, the inefficiencies of the present system impose enormous hidden costs on both borrowers and lenders. Perhaps the most obvious of these is the cost of search firms. In many jurisdictions, the response time on a search request submitted to the central filing office is so long that lenders are forced to employ private search firms to make their searches. For large transactions, this cost is insignificant, but for small transactions it can become important. The result in some cases is that searches that should be made are, in fact, not. For example, some major commercial lenders when taking purchase money security interests fail to search after filing to make sure their financing statement is properly on file.

Another example is trade name filings. Because of cases such as *In re Glasco, Inc.*²⁸ and *In re McBee*,²⁹ there is uncertainty in some jurisdictions whether filings under trade names are valid.³⁰ As a result, lenders must

to be extra stingy with their information. . . . Certificates of UCC searches are available in only a small number of states, even though § 9-407(2) seems to mandate such certificates." B. CLARK, *supra* note 21, ¶ 2.18.

28. 642 F.2d 793 (5th Cir. Unit B Apr. 1981) (filing under trade name "Elite Boats" validly perfected security interest where debtor's name was "Glasco, Inc.").

29. 714 F.2d 1316 (5th Cir. 1983) (filing under trade name perfected security interest in assets of individual debtor).

30. Professors White and Summers take the position that trade name filings are valid under certain conditions:

We believe that the *text* of subsection 9-402(7) (despite Comment 7) permits individuals and partnerships to file properly solely under a trade name, at least where a reasonably diligent searcher could, because of the notoriety of the trade name, be likely to discover the filing. Although the courts are not in agreement here, a number adopt our position.

J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 22-18 (3d ed. 1988) (emphasis in original) (footnote omitted). *Contra* W. HILLMAN, *COMMERCIAL LOAN DOCUMENTATION* 161 (3d ed. 1990) (1972 amendments to article 9 "attempt to make clear that trade names lack the proper element of notice to creditors").

take time to discover trade names and search against them.³¹ Because this is attorney time, it is expensive.

Another uncertainty, one that is reduced to manageable proportions only at significant cost, is similar names. Many computerized systems do not pick up any name other than the exact name under which the search is entered.³² For example, in some systems, a search under the name "Allstate Enterprises" would not reveal a document filed under "All State Enterprises" or "All-State Enterprises." Similarly, a search under "Bijou Theater" would not reveal documents filed under "Bijou Theatre."³³ Some computer systems will pick up some similar names,³⁴ but none available will find them all. This means, first of all, that an attorney must take extra pains to be sure she has the exact name of the debtor. In addition, she would be well advised to search under any likely "near misses" that a court might decide were "minor errors which are not seriously misleading" under U.C.C. section 9-402(8).³⁵

Finally, local filing and dual filing also present problems. Lawyers have to take time to determine whether local filing is necessary and, if so, in what county or counties the filings must be made.

IV. *Developing an Agenda for Reform*

Initially, it is appropriate to determine how radical of a change should be contemplated in the filing system. The academic lawyers, practitioners, and filing officers who have so far participated in the Study suggested a variety of changes. At one extreme are those who propose a totally-electronic, national filing system replacing all of the now-existing state systems. At the other extreme, some suggest only minor improvements that would not change the basic way things are done.

Because modern technology offers tremendous improvements in speed, accuracy, and cost, it would be unfortunate to ignore its potential. That conclusion may militate in favor of suggesting comprehensive changes in the current system. What is less clear is whether the commercial community should devote its energies to a radical overhaul of the system and ignore the possibility of making small, but nevertheless beneficial, changes to the status quo.

31. See also *Peoples Nat'l Bank v. Uhlenhake*, 712 P.2d 75 (Okla. Ct. App. 1985) (secured party who knew debtor's trade name, but failed to search under that name, estopped to assert priority over secured party who had previously filed under trade name only).

32. B. CLARK, *supra* note 21, ¶ 2-18.

33. See *Huntington Nat'l Bank v. Tri-State Molded Plastics, Inc. (In re Tyler)*, 23 Bankr. 806 (Bankr. S.D. Fla. 1982) (search under the name "Tri-State Molded Plastics, Inc." did not reveal financing statement filed under the name "Tri-State Moulded Plastics, Inc.>").

34. See STATE OF TEX., SECRETARY OF STATE, UNIFORM COMMERCIAL CODE COMPUTER TERMINAL INSTRUCTIONS AND SEARCH METHODOLOGY 42-63 (1990) [hereinafter TEXAS MANUAL].

35. U.C.C. § 9-402(3) (1990) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

Arguably, the best course is to chart a state-of-the-art filing system and focus on its adoption in as many jurisdictions as possible. The present system could remain in place in non-adopting jurisdictions, and its unremedied inadequacies would serve as an incentive for more jurisdictions to adopt the new system. At least two arguments against that strategy may be anticipated. First, given the cost of electronic systems and the budget constraints facing the states, it will be many years before most of the states have sufficiently sophisticated electronic systems in place. In the meantime, many secured lenders will be suffering with defects that could easily be remedied. Second, and more important, it is impossible to be sure of what kind of electronic filing and retrieval system will be best in the years to come. If adjustments were structured around a particular system, new technology could render the system obsolete soon after the changes were implemented.

As a result, it appears that a better approach may be to respond to deficiencies in the existing system, and at the same time make changes that will at least accommodate (and perhaps stimulate) technological change. It might be worthwhile to develop long range plans to include profound adjustments to the status quo, such as a national filing system. However, such a dramatic proposal could divert attention from more immediate proposed changes.

The range of possible revision initiatives is quite extensive. For example, consideration could be given to eliminating local filing and dual filing. To the extent that alternatives two and three to U.C.C. section 9-401(1) resulted from a desire to avoid opposition from local filing officers, that concern may be much less crucial now. When the Code was originally drafted, there was considerable concern about whether it would be widely adopted or suffer from the same neglect that so many of the uniform laws that have been promulgated since suffer. Because of this concern, the drafters felt compelled to offer something for everybody. The second and third alternatives to section 9-401 resulted, in large part, from that compulsion.

Now that the commercial landscape has evolved, if the Permanent Editorial Board's study proposed the elimination of local and dual filing and such a proposal were to upset local filing officers, the worst that could happen is that the new revisions would not be adopted in some jurisdictions. The resulting non-uniformity would probably not be a significant problem. Moreover, there is a good possibility that jurisdictions that do not adopt the new filing provisions would nevertheless adopt the remainder of the article 9 revisions.

A. Technological Responses

The most beneficial changes in the filing system are going to be technological changes rather than statutory changes. The filing system conceived by the drafters of article 9 was for the most part coherent. It was based on the all-paper, manual information technology then employed by even the most advanced private businesses. Most of the problems we have today result from the fact that the system has simply become overloaded, and

state governments have not been able to find the resources necessary to keep up. In addition, commercial financing has become national in character and business information systems facilitate instant communications and instant access to privately-generated data. As a result, we have become less tolerant of the delays and irritations inherent in hardcopy transmission and manual filing.

1. Technology Currently in Use

More than half of the states have some form of automated search process in their central filing systems. In many states unofficial searches can be conducted via commercial on-line services. Texas has recently introduced an on-line system that accommodates a wide variety of search strategies.³⁶ Perhaps the most advanced filing system now in operation is the personal property registry in the province of British Columbia. The British Columbia system allows secured parties to file financing statements electronically at remote terminals in their offices. The original document is maintained by the secured party, and the computer at the central registry generates an additional hard copy which is mailed to the secured party as verification that its financing statement is properly on file. The filing fee is deducted from a deposit made by the secured party as a condition of being authorized to file in this manner. The system has been in effect since October 1990 and is reported to be working smoothly except for some minor problems that are being resolved through software enhancements.

2. Future Technology

Based upon the recent past, it seems clear that advances in computers and telecommunications will make possible systems with speed, accuracy, and convenience surpassing those of even the best of today's systems. It also seems likely that in spite of the continuing decline in the cost of computing power, the systems that will be needed to handle the volume of U.C.C. filings will continue to be very expensive. As a result, we can expect that while there will be technological improvement, it will be slow, and some states will lag far behind.

3. What Can Be Done to Encourage Technological Development

A revision of article 9 could accelerate utilization of emerging technology by assuring that the statute is sufficiently flexible to accommodate developments. The drafters could consult those familiar with automated filing systems and with modern office technology generally. Such a group could review carefully article 9's filing provisions and redraft them as necessary to accommodate the needs of the present and projected automated filing systems.

A second and far more powerful step toward a technological solution would be the formation of a national committee to coordinate groups that would lobby for technological improvements in the individual states. In

36. See TEXAS MANUAL, *supra* note 34, at 42-63.

many states, the governmental authorities are not going to be receptive to the idea of upgrading their systems. There are many other demands on state funds and on the Secretary of State's time. Implementing a new filing system can be a very expensive and difficult task. As a result, the system will be improved only if concerted energy is exerted.

B. Statutory Solutions

Most of the problems with the filing system result from causes other than article 9 itself. For the most part, they result from the failure of many state governments to take appropriate measures to deal with the growth in lending activity. Thus any statutory changes, other than those that direct state governments' expenditures, will have relatively insignificant effect. Nevertheless, some changes would be worthwhile because they can reduce the number of filings, reduce the overload on the system, and save lenders some costs. Moreover, if the revision of article 9 takes an aggressive position, it may be possible to get at least some states to adopt legislation that will direct funds toward improving and maintaining the filing system.

1. Reduce Local Filing

The original justification for local filing (other than for real estate collateral) was that it allowed local lenders to walk over to the filing office and search the filing records themselves. Ideally that justification should be obsolete. Lending is now conducted much more on a national basis, and modern communications should make it easier to deal with a central filing office that has a computerized system than with a local filing office where the expense of computerization is much less likely to be justified. Unfortunately, the reality in many jurisdictions is quite different from that picture. Searches conducted by central filing offices are so slow and so inaccurate that many attorneys and loan officers prefer to deal with local filing offices because they can conduct the searches themselves or have someone who works for them do it.

In spite of this, an effort could be made to move as many states as possible toward a central filing system for all collateral except real estate-related collateral such as fixtures, timber, and mineral rights. Local filing causes a number of problems. First, it contributes to the overload of the filing system. When there is a question of whether central or local filing is required, careful lawyers will file in both places. Non-lawyers and some nonspecialist lawyers will take this one step further and file in both places even when the law is clear concerning which is the correct filing office. Similarly, filings will often be done in a number of counties because of uncertainty as to the correct county in which to file. By providing that all filings except those for real estate-related collateral are made in the central office, both of these types of uncertainty will be eliminated, and the number of unnecessary duplicate filings will be reduced. This will not only reduce costs for lenders but will reduce the volume of filings the system has to deal with.

2. Clarify the Debtor's Name Requirement

Section 9-402 could be amended to provide that the financing statement must include the correct legal name of the debtor and that trade names and the like are not sufficient to validate a filing.³⁷ In order to gain the full benefit of this provision, *i.e.*, the creditor's not having to ascertain all of the debtor's trade names, there could also be added to article 9 a provision that a creditor with a properly perfected security interest shall lose no rights because of the debtor's failure to comply with any statute or other rule of law concerning the use of trade names.³⁸ Some research would be required to determine the typical concerns so that the provision can be drafted broadly to satisfy the greatest number of jurisdictions.

In addition, there could be added to the comments a clarification of the meaning of the phrase "not seriously misleading" as it applies to the debtor's name. The case law seems to conclude that an error is seriously misleading if it would cause a searcher searching under the correct name in the relevant index to fail to find the financing statement.³⁹ Nevertheless, specifying this in the comment would add a degree of certainty.

3. Consider Filings by Taxpayer Identification Number

Filings by taxpayer identification number would offer some advantages. There would be no questions concerning trade names, substantially similar names, and the like. More importantly, filing by taxpayer identification number would make much easier the search logic of electronic systems. Unfortunately, there are also serious drawbacks. Small typographical errors could easily go undetected with disastrous results. For example, the transposition of two letters in a corporate name will normally be quite apparent to even a casual reader, whereas the transposition of two digits in a taxpayer identification number might slip by all but the most diligent proofreader. To avoid the risk of losing perfection, secured creditors could be faced with the need to institute numerous costly cross-checks in order to assure accuracy. On the other hand, it might be that some sort of an automatic cross-check could be built into the filing system. Changing to taxpayer identification numbers is also likely to cause major transition problems, and some segments of the bar and the secured lending community might oppose so drastic a change.

37. Barkley Clark suggests that the Permanent Editorial Board "should consider putting the words of Official Comment 7 into the text itself." B. CLARK, *supra* note 21, ¶ 2.09[1][b]. Cf. also *Willson v. Habersham Bank*, 111 Bankr. 368, 369 (N.D. Ga. 1990) (expressly refusing to follow comment 7).

38. See, e.g., CAL. BUS. & PROF. CODE § 17918 (West 1987) (no action may be maintained until fictitious business name statement filed); N.Y. GEN. BUS. LAW § 130 (McKinney 1988) (no action may be maintained on a contract made in a fictitious business name until certificate is filed); see also P. WEIL, ASSET-BASED LENDING § 1.2.6.6 (1989) (persons claiming through borrower subject to borrower's infirmity).

39. See, e.g., *In re McGovern Automotive Specialty, Inc.*, 51 Bankr. 511, 513-14 (Bankr. E.D. Pa. 1985).

Further study would be needed to determine the practicality of filing by taxpayer identification number. At best, filing by taxpayer identification number could be offered as an optional provision in the amendments, to be adopted by the various jurisdictions when they are ready to do so. It seems most unlikely that many jurisdictions will go to this system in the near future.

4. Impose Time Limits on Filing Officer Processing

An aggressive solution to the problems of long delays in processing search requests and long delays before financing statements become searchable could be to provide in the Code a maximum time for such processing. While some filing officers might oppose this, others might see it as a source of potential leverage in obtaining the funds necessary to properly staff and equip their offices.

V. Conclusion and Future Work of the Task Force

To the knowledge of the authors, the Task Force's study of the article 9 filing system is unique. Heretofore there has not been a comprehensive review of the system (or for that matter of any analogous system). Filing under article 9, as presently constituted, relies upon the cooperation of disparate actors of varying levels of legal sophistication, and is subject to varying pressures. The system that works best for Montana may not address the needs of secured transactors in California, though article 9 does not offer the filing officers in either of those states very precise guidance. Given the potentially severe sanction for even the slightest error in filing a financing statement — the surrender of priority⁴⁰ — the commercial community cannot continue to rely on a system that each day frays more and more at the edges, and which, increasingly, reveals more and more flaws in its essential fabric.

The Task Force Study represents the type of careful inquiry that those revising the commercial law should find indispensable to deliberations regarding the direction of amendatory initiatives. When the results of the Study are finally formulated, the finished product will describe commercial practices within the current legislative framework and provide the means to identify the deficiencies and strengths of the extant filing system. It may be that relatively conservative adjustment of the status quo would yield the most commercially, and politically, desirable results.

While the original charge to the Task Force from the Secured Transactions Subcommittee of the American Bar Association's Business Law Section was to survey current filing practices and to provide the results of that survey in a form accessible to members of the Section, it is clear that the Permanent Editorial Board's Study of article 9 intimates another, perhaps even more substantial, forum for consideration of the Task Force's

40. See U.C.C. § 9-312 (1990).

findings. There may be no issues more crucial to any revision of article 9 than the filing system issues.

Appendix IUCC FINANCING STATEMENT SEARCH
AND FILING SURVEY QUESTIONNAIRE

STATE OF _____

Date Completed _____

1. A. Do you accept any filings by fax? ____ Mail? ____ Over the Counter? ____ Telephone? ____.
Do you accept any search requests by fax? ____
Mail? ____ Over the counter? ____ Telephone? ____ .
- B. Does your system in any way give priority to, or otherwise treat differently, financing statement filings hand delivered as opposed to mail-in filings? ____ .
If so, please explain. _____

- C. Can a filing accepted over the counter later be rejected? ____.
If so, how much later? ____ .
On what bases? _____ .
_____ .
Is this different for mailed filings? ____ .
What are the standards governing rejection of submitted filings?
_____ .
Are these standards published? _____ .
How frequently are filings rejected? _____ .
Does your state filing office call the party who submitted the filing if it is rejected? ____ . Is the rejected filing mailed back to the party who submitted it? ____ . If not, what is done with it? ____ .
- D. Must the exact fee accompany a filing request? ____ . Will your state filing office bill the party submitting the filing? ____ . Are there other payment arrangements available? ____ . If so, please explain.

- E. Does your system in any way give priority to, or otherwise treat differently, search requests hand delivered as opposed to mail-in requests? ____ .

2. A. How much time elapses between the time a financing statement is hand delivered to the filing office and the time a stamped copy is returned to the secured party or the secured party's agent? _____ . Can this process be expedited under special circumstances? _____ . If so, under what circumstances? _____ . Is there an additional fee for expedited service? _____ . If so, what is the amount by which the expedited service fee exceeds the standard service fee? \$ _____ .
- B. How much time elapses between the time a mailed financing statement is received by the filing office and the time a stamped copy is returned to the secured party or the secured party's agent? _____ . Can this process be expedited under special circumstances? _____ . If so, under that circumstances? _____ . Is there an additional fee for expedited service? _____ . If so, what is the amount by which the expedited service fee exceeds the standard service fee? \$ _____ .
3. A. Is there a difference between "certificate only" and "certificate with copies [of financing statements on file]" search reports so far as time for response is concerned? _____ . If so, please explain. _____ .
- B. How much time elapses between the time a search request is hand delivered to the filing office and the time a search report is sent to the secured party or the secured party's agent? _____ . How is the search report sent? _____ . Can this process be expedited under special circumstances? _____ . Is there an additional fee for expedited service? _____ . If so, what is the amount by which the expedited service fee exceeds the standard service fee? \$ _____ .
- C. How much time elapses between the time your state filing office receives a mailed-in search request and the time it mails the report? _____ . Can this process be expedited under special circumstances? _____ . Is there an additional fee for expedited service? _____ . If so, what is the amount by which the expedited service fee exceeds the standard service fee? \$ _____ .

4. A. Is the filing system *manual* or *computerized* or a *combination* of the two? (please circle as appropriate).
- B. If computerized, what hardware do you use? _____

What software do you use? _____
Who supplied the hardware and software and how recently?

_____.
- C. If your state is currently operating a manual filing system, does it plan to implement a computerized system? _____. If so, how soon? _____. What hardware and what software would be used? _____

_____.
- D. If your state currently uses a computerized filing system, is it considering implementation of another system in the near future? _____. If so, how soon? _____. Describe the new system: _____.
- Are there any changes contemplated in your system? _____.
If so, when will they be made and what will they be? _____
_____.

5. A. Is the search system *manual* or *computerized* or a *combination* of the two? (please circle as appropriate).
- B. If computerized, what hardware do you use? _____.
_____. What software do you use? _____.
Who supplied the hardware and software, and how recently?
_____.
_____.
- C. If your state is currently operating a manual search system, does it plan to implement a computerized system? _____. If so, how soon? _____. What hardware and what software would be used? _____.
- D. If your state currently uses a computerized search system, is it considering implementation of another system in the near future? _____. If so, how soon? _____. Describe the new system: _____. Are there any changes contemplated in your system? _____. If so, when will they be made and what will they be? _____.
6. A. If your state currently uses a computer filing and search system, how is data put into the system? _____.
Does the person inputting the information include everything from the financing statement exactly as it is submitted? _____. If not, please explain. _____.
- B. Do you retain original filings? _____. If so, for how long? _____. Is there a "purge program" in your system? _____.
- C. Do you retain a backup file in the event (1) the computer goes down? _____; (2) computer records are lost or destroyed? _____; (3) computer data is otherwise lost or destroyed? _____.

7. A. If your searches are conducted on a computerized basis, what is your search logic? _____

For example, if the debtor's name is Kenneth Brown, will your search system pick up any variations in a debtor's name (e.g., K. Brown, Ken Brown, Kenneth Brown, K.B. Brown)? _____ ; any misspellings or typographical errors, variations in punctuation, or extra spaces (e.g., are all of the following picked up in a search under any of them: IBM, I-B-M, I.B.M., I B M; if not which are treated alike)? (Please explain) _____

_____ ;
How does your system deal with items like Incorporated, Corporation, Company, Inc., Co., Corp.)? _____

B. Is your system's search logic expressed anywhere in verbal form? _____ If so, can we study it? _____ .

C. What is your experience with search accuracy? Please explain. _____

8. How much time elapses between the time a financing statement is received by your office for filing and the time a search would disclose that financing statement of record? _____ .

9. A. How is the date through which the search reveals filings of record (the "effective date") determined? _____

_____ .
B. What is the normal lag time between the effective date and the date of a particular search? _____ ; between the effective date and the mailing or other transmittal of the search report? _____ .

C. May the effective date or the gap between the effective date and the mailing date of the search report differ depending on the form or method of submission (phone, fax, mail, over the counter) of the search request? _____ .
If so, please explain. _____

10. What was, during 1989, the maximum period of time between the date of the filing officer's receipt of a search request and mailing of the search report? (even during holiday periods) _____. What is the current length of the gap period? _____. For example, if your state filing office received a request on 4/2/90, when would a response *with* copies of filings be mailed out and what would be its effective date? _____. When would the same response *without* copies of filings be mailed out and what would be its effective date? _____.
11. What filings other than financing statements are included in a UCC search response? _____.
12. Under what circumstances can an interested party obtain a search response on a same-day or other expedited basis? _____. Is there an additional fee for expedited service? _____. If so, what is the additional? _____.
13. How quickly can copies of filed financing statements be made available to a party requesting such copies?

_____.
14. A. Are oversized or other nonstandard forms filed in a separate system or otherwise treated differently from standard forms?
_____.
B. Is that separate system searched in response to an ordinary request or must it be separately requested? _____.
C. Does a search for filings on non-standard forms take longer? _____. Cost extra? _____. If so, how much longer? _____
How much extra? \$ _____.
D. How long does it take to have copies of non-standard filings forwarded to the party making a search request?
_____.
_____.
15. Do you respond to a search request identifying only the debtor's name (e.g., seeking all filings against John Doe, not limited by address or social security number)?
_____. If not, why not? _____.
16. Do you cross-index by taxpayer I.D. number? _____
trade name? _____ address? _____.
17. Does your state issue a "certified" search? _____.
If so, what is the significance of that label? _____
_____.
18. Are there currently pending or contemplated in your state any regulations or legislation that would have any impact on the filing or search systems? _____. If so, please describe briefly. _____
_____.

19. Please provide the name, address, and phone number of someone in your office or organization whom we could contact with regard to the subject matter of this questionnaire.

Appendix II**Uniform Commercial Code Article 9 Revision Survey**

State of _____

Completed By: _____ Date _____

UCC Filing Process

1. Are filings accepted by:
a) Fax c) Over the Counter
b) Mail
2. Are non-standard forms accepted? What is the "extra" fee for filing a non-standard form?
3. Are hand delivered filings treated differently or given priority over filings received by mail? By Courier?
4. Are rejections handled differently based on how the filing was presented?
5. Can a filing accepted over the counter later be rejected? If so, how much time can elapse between acceptance and rejection?
6. Do written standards governing rejection of filings exist?
7. Are standards governing rejection of filings administered consistently and fairly?
8. When reviewing a UCC-3 for filing does your state filing office insist the debtor and secured party name and address be exactly the same as the original UCC-1? Are phrases like "AKA" and "formerly known as" causes for rejection? Are certain words required (i.e. "joint debtors")?
9. Can you approximate what percentage of your filings are rejected?
10. What are the three most common reasons for rejection?
11. How and when are you advised that a filing has been rejected?
12. If a document has been incorrectly rejected will your state agency "back-date" the filing to the date of original submission?
13. Must the EXACT fee accompany each individual filing? How does your state handle filings submitted with an incorrect fee?
14. Does your state filing office bill the party submitting the filing or provide any other payment methods?
15. Are there any fees in addition to the filing fee associated with filing a UCC financing statement (i.e. recordation taxes)?
16. How much time elapses between the time a UCC-1 financing statement is hand delivered and the time a stamped acknowledgement receipt is made available? UCC-3?
17. Can this process be expedited under special circumstances? Are there additional fees for expedited service? How much?
18. Can a single UCC-3 form be used to make more than one change (i.e. an amendment and a continuation)?

19. Are UCC-3 financing statements given separate file numbers in all cases?
20. Are name changes cross referenced so that a search on either the "old" or "new" name will reveal all filings?
21. Are there any noteworthy requirements regarding signatures on UCC forms?

UCC Search Process

1. Is your search system manual or automated?
2. Are searches accepted by:
 - a) Fax
 - b) Mail
 - c) Over the Counter
 - d) Telephone
3. Are hand delivered searches treated differently or given priority over searches received by mail? By Courier?
4. Does your state filing office allow for direct access for searching purposes? Can you gain access through a third party (i.e. Compu-serve)?
5. Does your state filing office sell UCC data in bulk form?
6. Is there any difference between "information only and information with copies" search requests in terms of response time?
7. Is it possible to request copies without schedules, schedules only, or any other variable copy types?
8. What information must be provided to conduct a search (name, address, ID number)?
9. Does your state filing office bill the party submitting the search or provide any other payment methods (i.e. credit card, depository account, etc.)?
10. How much time elapses between the time a search is hand delivered and it is completed?
11. Can searches be expedited under special circumstances? Are there additional fees for expedited service? Cost?
12. Do written standards governing search logic and what filings to include on a particular search request exist?
13. Can searches be conducted "from" a certain date "through" a certain date?
14. How are punctuation, abbreviations, and minor variations handled when searching (e.g., I.B.M. vs. International Business Machine, and K. Brown, vs. Ken Brown, vs. Kenneth Brown)?
15. Are standards governing search logic administered consistently and fairly?
16. What has your experience been with search accuracy?
17. Describe your state filing office's system for handling "rechecks" including fees and turn-around time. For handling "error/corrections?" what provision does your state have for re-indexing lost/misplaced filings?

18. Describe any concerns or problems you have experienced with the way searches are conducted.
19. How much time elapses between the time a financing statement is stamped as accepted by your state filing office and the time a search would disclose that financing statement?
20. What is the normal lag time between the effective date of a search and the completion date?
21. During 1989, what was the maximum period of time between the effective date and the completion date of a search? Is this different for searches with copies and those without?
22. What filings other than financing statements are included in a UCC search request?
23. Are oversized or other non-standard forms filed in a separate system or otherwise treated differently from standard forms?
24. Are you aware of any changes being planned for the handling of UCC filing or searches in your state?
25. Have you been given an opportunity to provide input to the people in charge of your state's filing office?
26. If you could wave a magic wand, what changes would you make in the UCC search and filing system?