

4-1-1993

What Would Be Wrong with a User-Friendly Code: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code

Lary Lawrence

Recommended Citation

Lary Lawrence, *What Would Be Wrong with a User-Friendly Code: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 Loy. L.A. L. Rev. 659 (1993).

Available at: <https://digitalcommons.lmu.edu/llr/vol26/iss3/11>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

WHAT WOULD BE WRONG WITH A USER-FRIENDLY CODE?: THE DRAFTING OF REVISED ARTICLES 3 AND 4 OF THE UNIFORM COMMERCIAL CODE

*Lary Lawrence**

I. INTRODUCTION

The law of negotiable instruments would not seem to be a particularly difficult area of law. A negotiable instrument, as an unconditional promise or order to pay a fixed amount of money, is a very simple creature. The potential problems arising from a transaction involving a negotiable instrument are far fewer than arise from, for example, the sale of goods. Similarly, bank collection does not appear to be a particularly difficult area of law. How many issues can arise concerning a bank's collection and payment of an item?

Despite the seeming simplicity of their subject matter, both the original Articles 3 and 4, as well as their 1990 versions are probably the most inaccessible articles of the entire Uniform Commercial Code. Apparently, accessibility was not a major concern of the drafters. This Essay explores the drafting problems that make these articles inaccessible to most of their users and analyzes the reasons for these problems. Hopefully, such exploration and analysis will enable the drafters of future commercial codes to focus on ways to make their codes more user-friendly.

II. PROBLEMS WITH FORMER ARTICLE 3

The modern law of negotiable instruments began in England in the mid-eighteenth century with a series of decisions by Lord Mansfield. *Miller v. Race*¹ was the first decision, and the law has changed little dur-

* Harriet L. Bradley Chair in Contract Law and Professor of Law, Loyola Law School, Los Angeles; B.A., 1970, University of California, Los Angeles; J.D., 1973, Boalt Hall School of Law, University of California, Berkeley. Coauthor of the following books: 4 WILLIAM D. HAWKLAND & LARY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES (Article 3) (1984 & Supp. 1992); 5 WILLIAM D. HAWKLAND & LARY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES (Article 4) (forthcoming Sept. 1993); THOMAS D. CRANDALL, HERBERT & LAWRENCE, UNIFORM COMMERCIAL CODE (forthcoming Apr. 1993).

1. 97 Eng. Rep. 398 (K.B. 1758).

ing the last 200 years. Negotiable instruments law was first codified in the United States in 1896 in the Negotiable Instruments Law (NIL).²

The NIL worked reasonably well and was generally accepted among both lawyers and bankers.³ On the whole, the statutory language adopted by the states was uniform, even though there were variations in some versions.⁴ This uniformity in statutory language, however, did not result in a corresponding uniformity in judicial interpretation. There was a split of authority as to the interpretation of roughly 75 of the 198 sections of the NIL.⁵

Believing that the NIL was basically a sound statutory scheme, the drafters decided not to make any substantial structural revisions when drafting the original version of Article 3.⁶ Instead they pursued three rather limited objectives. First, they wanted to ensure uniformity among the states.⁷ To accomplish this, they chose the better rule among the splits of authority that existed under the NIL, thereby attempting to avoid conflict.⁸ Second, they wanted to modernize some of the NIL's more outdated rules.⁹ Third, they intended to reorganize and simplify some of the NIL's more cumbersome provisions.¹⁰

The limited scope of the drafters' mission took its toll on the final product. Many problems existed.¹¹ Article 3's terminology was often internally inconsistent, as well as inconsistent with the terminology used in Article 4.¹² Important terms like "holder,"¹³ "paid"¹⁴ and "value"¹⁵ were used loosely and inconsistently in Article 3. Different uses of simi-

2. UNIF. NEGOTIABLE INSTRUMENTS LAW (1896) (superseded by U.C.C. art. 3).

3. See 2 STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION: STUDY OF THE UNIFORM COMMERCIAL CODE 776 (1955) [hereinafter REPORT OF THE LAW REVISION COMMISSION]; Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 368 (1957).

4. See 2 REPORT OF THE LAW REVISION COMMISSION, *supra* note 3, at 775.

5. *Id.* at 776; see William A. Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A. J. 179, 181 (1950).

6. See Llewellyn, *supra* note 3, at 380.

7. Fairfax Leary, Jr., *Commercial Paper: Article III*, 16 ARK. L. REV. & BAR ASS'N J. 33, 34-35 (1961); Llewellyn, *supra* note 3, at 380; Schnader, *supra* note 5, at 179.

8. See Leary, *supra* note 7, at 34-35; Llewellyn, *supra* note 3, at 380; Schnader, *supra* note 5, at 182.

9. See Leary, *supra* note 7, at 35; Schnader, *supra* note 5, at 182.

10. See Richard Cosway, *Negotiable Instruments in the Uniform Commercial Code*, 1 BUS. L. REV. 222, 224 (1954).

11. See Lary Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115 (1983).

12. *Id.* at 125-36.

13. *Id.* at 126-31.

14. *Id.* at 131-34.

15. *Id.* at 134-36.

lar terms in Articles 3 and 4 gave the illusion of what were really non-existent conflicts. For example, use of the phrase "payment is final" in section 3-418 and use of the phrase "finally paid" in section 4-213 led some courts to improperly conclude that these two sections were in conflict.¹⁶ In reality, the sections referred to completely different issues. Many sections of Article 3 were not comprehensive, therefore reference to rules outside the Code was necessary to supplement the rules found in its provisions.¹⁷ For example, issues regarding conversion,¹⁸ accommodation parties' defenses¹⁹ and the finality of payment and acceptance²⁰ were left to the common law. Unfortunately, it was seldom clear from the language of the provision whether such a reference was required.

The failure of the drafters to provide for changes in technology and business practices caused other problems. Many sections, although seemingly applicable, reached unacceptable results when applied to unanticipated situations.²¹ For example, because cashier's checks were not widely used prior to the drafting of former Article 3, these cash-like equivalents were not given any special treatment by the Code. Courts, however, created problems when they attempted to apply the provisions of Articles 3 and 4 to cashier's checks, when the provisions were drafted with ordinary checks in mind.²² Specifically, courts were split between applying former section 3-306, which allowed the issuing bank to raise defenses against a person who did not have the rights of a holder in due course, and protecting the public's view of cashier's checks as cash equivalents, which required denying the bank the right to refuse payment on such checks.²³ Although the latter decisions appeared more logical, they were without any support in the Code.²⁴

III. REVISED ARTICLES 3 AND 4

Fortunately, when Articles 3 and 4 were revised, the drafters recognized and satisfactorily resolved many problems. For example, the terminology employed throughout revised Article 3 is internally consistent

16. Compare *Natural Sav. & Trust Co. v. Park Corp.*, 722 F.2d 1303, 1306 (6th Cir. 1983) (deciding that drafters' did not intend § 4-213 to supersede § 3-418), *cert. denied*, 466 U.S. 939 (1984) with *Town & Country State Bank v. First State Bank*, 358 N.W.2d 387, 395 (Minn. 1984) (holding that § 4-213 must prevail over § 3-418).

17. See Lawrence, *supra* note 11, at 136-43.

18. *Id.* at 137-39.

19. *Id.* at 139-42.

20. *Id.* at 142-43.

21. *Id.* at 143-49.

22. *Id.* at 144-47.

23. *Id.*

24. *Id.*

and is consistent with the terms used in Article 4. The drafters defined and cross-referenced all the relevant terms.²⁵ In addition, the drafters attempted to indicate in the official comments when a Code provision was not meant to be exclusive.²⁶ On many occasions, the drafters even indicated the federal or state law to be applied.²⁷

Despite these improvements, Articles 3 and 4 are still largely inaccessible. There are several reasons for this inaccessibility. First, one must understand the entire statutory scheme in order to find answers to basic questions. Although the drafters did a wonderful job of providing an analytically tight system, a researcher must either know where to look or search through the entire article to find the answer to a basic question. Even if one is familiar with the approach adopted by former Articles 3 and 4, the researcher may have trouble finding the answer in the revised articles.

A. *Restructuring of Analysis*

As to several basic commercial law issues, the drafters made the questionable decision to restructure the analysis found in former Articles 3 and 4. In some situations, the new approach is completely different from that contained in former Articles 3 and 4. As a result, lawyers, businesspersons and judges must re-learn the law. Requiring re-education of the Code, and the availing potential for judicial misinterpretation, was unnecessary.

One of the areas where this new approach causes problems is the law governing discharge upon payment.²⁸ For example, suppose Paul makes a note payable to Steve who indorses the note to Mary. Under former Article 3, Steve would be discharged upon Paul's payment to Mary. The analysis by which this result was reached is simple. Paul is discharged under former section 3-603(1) by his payment to Mary. Steve is discharged under former section 3-606(1)(a), because Steve had a right of recourse against Paul. Upon Paul's payment to Mary, Paul may not recover from Steve.

Under revised Article 3, however, it is unclear whether Steve is discharged in this situation. Revised Article 3 eliminated the omnibus provision found in former section 3-606(1)(a) which provides that discharge of a party also discharges any party that has a right of recourse against the party discharged. Therefore, under revised Article 3, Paul's payment

25. U.C.C. §§ 3-103, 4-104 to -105 (1990).

26. See, e.g., *id.* §§ 3-417 to -418.

27. See, e.g., *id.* §§ 3-417, 4-207.

28. See *id.* § 3-605.

does not seem to result in Steve's discharge. Paul still cannot recover from Steve because Steve's obligation as an indorser runs only to a subsequent indorser who pays the instrument or to a person who is entitled to enforce the instrument.²⁹ Paul is neither. However, if Mary indorses the note to Paul, who then negotiates the note to Bill, Bill, as a person entitled to enforce the note, could recover from Steve. Can Bill recover from Steve if Bill does not have the rights of a holder in due course? Under former Article 3, the answer was "no." Steve's discharge was effective under former section 3-602 against any person other than a holder in due course without notice of the discharge. But, under revised Article 3, Steve would not appear to have a discharge that he could assert against Bill. Steve's only recourse would appear to be to recover from Paul after paying Bill. It is unlikely that the drafters intended this result. However, revised Article 3 gives no indication as to their intent. If the drafters intended that Steve not be discharged, such a substantial change from former Article 3 should have been made clear in the comments. If Steve was intended to be discharged, the drafters should have provided in revised section 3-602 that discharge of the payor also discharges any party having a right of recourse against the payor.

A similar problem exists with understanding the bank collection process set forth in Article 4. For example, four concepts integral to understanding the bank collection process are: final settlement, final payment, the payor bank's right to recover a provisional settlement, and the payor bank's accountability. The relationship of these concepts is carefully set forth in sections 4-213, 4-215, 4-301 and 4-302. However, understanding their relationship to one another is similar to solving a jigsaw puzzle. Not only is it time-consuming, but it is easy to reach incorrect inferences. To further complicate matters, much of the collection and payment process has been preempted by Federal Regulations CC and J.³⁰ Although there are frequent cross-references to these regulations in Article 4, their precise impact on Article 4 is not always clear. Further, because Regulations CC and J are subject to amendment by the Federal Reserve Board, a practitioner can easily overlook a relevant change.

B. Adoption or Rejection of Prior Law

The second problem with revised Articles 3 and 4 is that, at times, the official comments to the provisions of revised Article 3 refer to former Article 3 without any indication as to whether the revised provisions

29. *See id.* § 3-415(a).

30. Regulation J, 12 C.F.R. pt. 210 (1992); Regulation CC, 12 C.F.R. pt. 229 (1992).

were intended to adopt or reject the prior law. For example, the official comment to revised section 3-504 states: "Section 3-504 is largely a restatement of former Section 3-511. Subsection (4) of former Section 3-511 is replaced by Section 3-502(f)."³¹ However, the full page of comments accompanying former section 3-511 is not included in the official comment to section 3-504. Does this mean that these former comments no longer represent the applicable rule? Or does it mean that these former comments are good authority? If it is the latter, why were they not included in the revised official comment? If it is the former, should not the official comment indicate the change? The official comments to sections 3-114, 3-119 and 3-604 pose similar problems.

C. Interpretation of Terms

Third, it is sometimes difficult to know whether to interpret a term or section narrowly or broadly. At times, the drafters intended that a term be vague in order to allow a court to decide on a case-by-case basis what the result should be, while at other times, terms are used precisely. However, whether the drafters intended one or the other is not always clear. For example, an instrument to be governed by revised Article 3 must be payable in a fixed amount.³² In determining whether an instrument is payable in a fixed amount, section 3-104(a) provides that the instrument may be payable "with or without interest or other charges described in the promise or order."³³ To what do "other charges" refer?³⁴ The official comments to section 3-104 do not indicate an answer to this question. Do "other charges" include attorney's fees and costs of collection? They must. But former section 3-106(1)(e), which stated that an instrument may be payable "with costs of collection or an attorney's fee or both upon default," was omitted.³⁵ Are stated discounts, penalties or rebates "other charges?" Must the amount of the discount, penalty or rebate be determinable from the instrument itself? Official comment 1 to section 3-112 states: "Under Section 3-104(a) the requirement of a 'fixed amount' applies only to principal."³⁶ Section 3-112, however, pertains only to the payment of interest.³⁷ Does this comment refer only to "interest" or does it also apply to other charges? For example, is an instrument negotiable if it provides for a penalty to be determined by the

31. U.C.C. § 3-504 cmt.

32. *Id.* § 3-112 cmt. 1.

33. *Id.* § 3-104(a).

34. *Id.*

35. *Id.* § 3-106(1)(e) (1987) (superseded by U.C.C. § 3-104(a) (1990)).

36. *Id.* § 3-112 cmt. 1 (1990).

37. *Id.* § 3-112.

parties if payment is late? At other times, it is clear that the drafters intended phrases to be interpreted literally. Under section 3-411(b), if a bank wrongfully refuses to pay a cashier's check, the person asserting the right to enforce the check is entitled to compensation for expenses, loss of interest and, possibly, consequential damages³⁸ resulting from the non-payment. But neither expenses nor consequential damages are recoverable if the refusal to pay is a result of the bank asserting a claim or defense "that it has reasonable grounds to believe is available against the person entitled to enforce the instrument."³⁹

Under section 3-305(c), the issuing bank may assert a third party's claim as a defense to its obligation to pay a cashier's check.⁴⁰ If the third-party claim turns out to be invalid, is the bank liable for expenses or consequential damages if it reasonably believes the claim is valid and can be asserted against the holder? The comments to section 3-411 indicate that the bank is not insulated from damages if the third-party claim is not upheld.⁴¹ The issuing bank is relieved from such liability only if payment is enjoined under section 3-602(b)(1).⁴² These comments are only clear if one already knows that the words "a claim or defense of the bank" mean a claim or defense of the bank itself and not one that the bank can assert under section 3-305(c). The precision of the words "a claim or defense of the bank," compared to the imprecision of the words "other charges" in section 3-104(a), make it difficult to know whether to interpret a section narrowly or broadly.

Similarly, it is not always clear whether a provision was intended to be exclusive. Section 4-302(b) establishes two defenses a bank may raise to liability under section 4-302(a). First, the payor bank may defend itself by proving that the plaintiff breached a presenter's warranties under section 4-208.⁴³ Second, the payor bank may assert a defense by proving that the person seeking to enforce the payor bank's accountability presented or transferred the item to defraud the payor bank.⁴⁴ Under former Article 4, some courts believed a payor bank should not be able to defend against its liability under former section 4-302 by proving a right

38. *Id.* § 3-411(b).

39. *Id.* § 3-411(c).

40. *Id.* § 3-305(c).

41. *Id.* § 3-411 cmt. 3.

42. *Id.*

43. *Id.* § 4-302(b).

44. *Id.* § 4-302 cmt. 3; see *American Nat'l Bank v. Foodbasket*, 497 P.2d 546, 547 (Wyo. 1972).

to recover the mistaken payment under former section 3-418.⁴⁵ Other courts disagreed.⁴⁶

By listing two defenses to the payor bank's accountability in section 4-302(b), did the drafters intend that no other defenses be available? Neither the text nor the comments answer this question. The issue is muddled by section 3-418(d) which, although specifically giving a payor bank the right to recover a mistaken payment notwithstanding final payment under section 4-215,⁴⁷ does not mention whether the bank also has a defense to its accountability for an item.⁴⁸ There would appear to be no reason to distinguish between the bank's accountability for an item under section 4-302 and its final payment of the item under section 4-215. A bank is accountable for an item for which it has not made final payment only if the bank has failed to settle for the item on the day of receipt.⁴⁹ The bank's failure to settle for an item should not deprive it of the right to defend against its accountability if it could have recovered the payment had it so settled.

Comparably, section 4-407 governs when a payor bank has a right of subrogation upon improper payment of an item.⁵⁰ The section specifically lists two situations in which the payor bank has subrogation rights.⁵¹ It then provides that the payor bank has subrogation rights "otherwise under circumstances giving a basis for objection by the drawer or maker."⁵² What are these other circumstances? Neither the text nor the comments to section 4-407 provide any indication.

As a result of this statutory vagueness, courts are without guidance as to when to allow a payor bank subrogation rights. A few situations clearly allow subrogation rights. For example, a bank that makes early payment of a post-dated check, in violation of proper notice of post-dating issued by the drawer under section 4-401(c), should have a right of

45. *See, e.g., State & Sav. Bank v. Meeker*, 469 N.E.2d 55 (Ind. Ct. App. 1984); *Kirby v. First & Merchants Nat'l Bank*, 168 S.E.2d 273 (Va. 1969); *Northwestern Nat'l Ins. Co. v. Midland Nat'l Bank*, 292 N.W.2d 591 (Wis. 1980).

46. *See, e.g., Farmers & Merchants State Bank v. Western Bank*, 841 F.2d 1433 (9th Cir. 1987); *Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n*, 804 F.2d 1487 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *National Sav. & Trust Co. v. Park Corp.*, 722 F.2d 1303 (6th Cir. 1983), *cert. denied*, 466 U.S. 939 (1984); *Demos v. Lyons*, 376 A.2d 1352 (N.J. 1977). *But see North Carolina Nat'l Bank v. South Carolina Nat'l Bank*, 449 F. Supp. 616 (D.S.C. 1976), *aff'd*, 573 F.2d 1305 (4th Cir.), *cert. denied*, 439 U.S. 985 (1978).

47. U.C.C. § 3-418 cmt. 4.

48. *Id.* § 3-418(d).

49. *Id.* § 4-302.

50. *Id.* § 4-407.

51. *Id.*

52. *Id.*

subrogation. Similarly, a bank with knowledge of its customer's death that pays a check more than ten days after the death and therefore cannot debit its customer's account, would also seem to have a right of subrogation.⁵³ But how does a court know whether the drafters intended a bank to suffer loss in these situations? The drafters should have listed the situations in which section 4-407 was meant to apply.

D. Resolution of Issues Under Non-Code Law

Fourth, a few sections of Article 3 expressly leave resolution of important issues to non-Code law, although guidance by the drafters would have been easy and helpful. For example, section 3-420 specifically provides: "The law applicable to conversion of personal property applies to instruments."⁵⁴ The drafters omitted former sections 3-419(1)(a) and (b), which provided for a drawee's or payor's liability for conversion when it refused upon demand to pay, accept or return an instrument.⁵⁵ Official comment 1 to revised section 3-420 states:

Paragraphs (a) and (b) of former Section 3-419(1) are deleted as inappropriate in cases of noncash items that may be delivered for acceptance or payment in collection letters that contain varying instructions as to what to do in the event of nonpayment on the day of delivery. It is better to allow such cases to be governed by the general law of conversion that would address the issue of when, under the circumstances prevailing, the presenter's right to possession has been denied.⁵⁶

The problem is deciding what circumstances a court should consider in making these decisions. May the court refer to decisions under former section 3-419? No guidance is given by the drafters to answer this question. The drafters are more familiar than the courts with the factors that should be considered in determining whether an action for conversion should lie. There is no reason for the drafters to leave the judicial system without guidance on this issue.

Correspondingly, section 3-418(a) lists two situations in which a drawee may recover a mistaken payment or revoke a mistaken acceptance: if the drawer's signature is unauthorized, and if payment was made in violation of a stop-payment order.⁵⁷ Section 3-418(b) then provides that whether a mistaken payment can be recovered or a mistaken accept-

53. *See id.* § 4-405(a).

54. *Id.* § 3-420(a).

55. *Id.* § 3-420 cmt. 1.

56. *Id.*

57. *Id.* § 3-418(a).

ance revoked in other situations depends upon the law governing mistake and restitution.⁵⁸ Official comment 3 to section 3-418 specifically provides that if the payor-drawee has misread the balance of the drawer's account or if the drawer has no account with the drawee, whether the drawee may recover the payment depends upon the law of restitution. The comment goes so far as to analyze these cases under the *Restatement of Restitution*.⁵⁹

It is unreasonable to refer courts and lawyers to the common law of restitution as to both the types of "mistakes" for which restitution may be available and the conditions under which restitution may be available. Based on a century of case law, the drafters had knowledge of the potential mistakes. The drafters should have decided whether restitution would be available in these situations. It makes little sense to have courts rethink these issues time and time again. For example, the drafters should have indicated in the comments that the drawee may not recover a payment if its claimed mistake is that the drawer had a defense of which the drawee was unaware.

Similarly, if the drawee pays a draft over a valid stop-payment order or over the unauthorized signature of the drawer, section 3-418(a) specifically states that the drawee's rights are not affected by its failure to exercise ordinary care in paying or accepting the draft.⁶⁰ The effect of the negligence of a payor or acceptor in other situations, however, is mysteriously left to the law of restitution and mistake.⁶¹

E. Absence of Basic Rules

Fifth, the Code does not expressly state some basic rules, and there is no apparent reason for their absence. For example, section 3-501(b) provides that presentment may be made at the place of payment of the instrument, and *must* be made at the place of payment if the instrument is payable at a bank in the United States.⁶² Although the Code affirmatively states "where presentment *may* be made,"⁶³ the Code does not mention any other places where presentment may be made. Official comment 1 to former section 3-504 clearly stated: "This section is intended to simplify the rules as to how presentment is made and to make it clear

58. *Id.* § 3-418(b).

59. *Id.* cmt. 3; see GEORGE E. PALMER, 3 THE LAW OF RESTITUTION § 14.9, at 181-86 (1978).

60. U.C.C. § 3-418(a).

61. *Id.* § 3-418(b).

62. *Id.*

63. *Id.* § 3-501(b) (emphasis added).

that any demand upon the party to pay is a presentment no matter where or how."⁶⁴ In contrast, the official comment to revised section 3-501 states: "Subsection (b)(1) states the place and manner of presentment."⁶⁵ Does this mean that presentment may only be made at the place of payment? Although a negative answer to this question may be obvious to the drafters, it may not be obvious to a holder of an instrument or his or her lawyer. Why did the drafters omit official comment 1 to former section 3-504? Better yet, why was this basic rule not included in the text of revised section 3-501?

Revised section 4-206 poses a similar problem. It simplifies the process of transfer between banks by providing that any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.⁶⁶ The transfer is accomplished without an indorsement by the transferor bank.⁶⁷ Any symbol that identifies the transferor bank is sufficient.⁶⁸ Does the transferee bank become a holder by compliance with the requirements of section 4-206 when the transferor bank fails to indorse the item? An affirmative answer to this question would appear to be appropriate. But if so, why does section 4-206 speak of transfer⁶⁹ rather than negotiation?

IV. WHAT IS WRONG WITH A USER-FRIENDLY CODE?

The question continues to haunt me: "What is wrong with a user-friendly Code?" In seeking an answer to this question, two types of problems appear. First, there are problems regarding the composition of the members of the drafting committee. Second, there are problems regarding the manner of drafting.

A. Composition of the Drafting Committee

There is nothing so inherently difficult about the principles governing the law of negotiable instruments and bank collection to justify making Articles 3 and 4 inaccessible. Ironically, it seems that the primary cause of inaccessibility is that the persons involved in the drafting process had no idea that the law of negotiable instruments and bank collection was and continues to be inaccessible. Looking at the list of advisors and persons who attended the drafting meetings, it is apparent

64. *Id.* § 2-504 cmt. 1 (1987) (superseded by U.C.C. § 3-504 (1990)).

65. *Id.* § 3-501 cmt (1990).

66. *Id.* § 4-206.

67. *Id.* § 4-206 cmt.

68. *Id.*

69. *Id.*

virtually all participants are either employed by banks, clearing houses or the Federal Reserve Bank.⁷⁰

Because all the persons intimately involved in the project were so familiar with the terms, concepts and operations of the law of negotiable instruments and bank collection, the level of discussion was far more concerned with the proposed substantive rules than with the manner of their expression. In addition, because the terminology was second nature to virtually all of the participants, it was difficult for them to look through the eyes of a lawyer or judge who is not as well versed in these areas. Like an artist who understands his or her genre too well, drafters of codes in technological areas also need outside collaborators. For example, consider a film written and directed by the same person. Although that person knows better than anyone what he or she intends to communicate, the writer-director may not have the perspective to ascertain whether the style and manner of expression of the ideas reaches filmgoers. The writer-director is too close to the subject matter. Every nuance has a meaning. These nuances are often not visible to any but the most dedicated of fans.

The active participants in drafting revised Articles 3 and 4 were all too knowledgeable about the former law.⁷¹ Because they were so familiar with former Articles 3 and 4, they knew what it meant when a comment stated "restates section 3-605." Similarly, they knew what changes were intended; they knew what remained the same. They knew under what circumstances an instrument should be found to be converted or when a drawee should be entitled to recover a mistaken payment.

The drafting process must include persons who are outside the specific area. Unfortunately, any such person would have no incentive to become involved in the process. It is essential that the American Law Institute and the National Conference of Commissioners on Uniform State Laws, as promulgators of the Uniform Commercial Code, choose a co-reporter who does not have intimate knowledge of the specific field of law covered by the particular article of the Code under revision. If such a co-reporter is not selected, it is necessary that outsiders have an important voice in drafting the article.

B. The Manner of Drafting a Commercial Code

In writing Articles 3 and 4, the drafters balanced the need for flexibility to enable the Code to accommodate changes in technology and

70. U.C.C. art. 3 prefatory note.

71. *See id.*

banking practices with the need to provide sufficient guidance and certainty to allow safe planning of banking practice and commercial transactions. Adopting rigid and precise rules would stifle innovations in business practices and limit technological improvements. Rigid rules also would deprive courts of the ability to reach reasonable and fair decisions in the myriad of cases that could arise. Further, attempting to draft a Code that comprehensively covered every unusual and difficult problem would make it difficult to use and understand.

On the other hand, commerce must be able to plan its transactions. Especially in the area of negotiable instruments, parties must be able to know whether the instrument they are drafting is negotiable. Potential purchasers must be able to determine their rights in order to know whether to purchase the instrument. Banks must know their obligations in order to set up their routines. Insurance companies must know how the Code allocates losses in the event of forgery or alteration so they can set their rates.

The need for flexibility in Articles 3 and 4 does not require complex and confusing rules. The rules should be as comprehensive and clear as possible. A commercial code must be intelligible to lawyers who are not well-versed in commercial practices or in the history of commercial law. Courts should be provided the drafters' wisdom, rather than being required to fend for themselves. Judicial opinions in this area often reflect a judge's lack of understanding of Articles 3 and 4. The drafters should assist the courts in interpreting the Code by clearly and comprehensively stating all the applicable rules. Extensive official comments would be invaluable in understanding the Code and avoiding questionable judicial opinions.

On the whole, the drafters did a very good job. However, it would have taken very little effort to make revised Articles 3 and 4 more accessible. If accessibility becomes a goal in drafting, we may finally have a user-friendly Code.

