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Memo

Date: May 7, 2009"

To: Article 9 Joint Review Committee and Observers

From: Mark Clark

Regarding: Comments on May 6, 2009, Conference Call

As indicated in an earlier memo, I listened to, but did not speak up during, the May 6 telephone conference. I, however, have two comments.

My first comment pertains to recording (and searching) systems. Several people mentioned the important role played by the various recording and searching systems adopted by the states. The states have recently adopted a variety of machine-based recording and search systems that are fast, precise and relatively inexpensive. They are also rigid, unimaginative and ill-suited to the state of Anglo-American name law and practice. The answer to Mr. Sigman's question is not 50 years of pent up frustration: the answer is that recording officers have recently succeeded in throwing all the burden, risk and expense of diligence, imagination and duplication on private industry. And private industry has noticed.

My second comment pertains to complexity, and provides background for my first comment. As I have observed elsewhere, Anglo-American name law is informal and flexible. A complex name practice has grown up under it. (For centuries, the legal profession has coped with that by using a string of "a/k/a's" but modern filing systems preclude that solution.) The situation is like a balloon: press the complexity down somewhere and it pops up somewhere else. The statute can be simple, leaving the complexity outside the statute. (We have only a foretaste of the complexity that will prevail when Bankruptcy Judges create a separate and inconsistent name caselaw under Article 9.)

We could tackle the fundamental issue. I have some familiarity with other name systems. I have a daughter and grandchildren who live in a country that is not a Common Law country and does have a system of national identity cards. I won't expand this memo to recount some of the issues that arise there. Suffice to say, if you think the organized filers are a formidable lobby, wait 'til the ACLU and the women's movement become interested in our subject. As I have observed elsewhere, the War on Terror (or whatever it is called now)

may result in a fundamental change in American name law and practice, but I doubt that Article 9 will.

I believe, however, there is a solution for Article 9. Face the fact that the search for absolute certainty and simplicity is a vain exercise in frustration unless the fundamental name law and practice are changed. Instead, set a goal of achieving simplicity and certainty in 99% of the practical cases, and crowding all the complexity and uncertainty into the remaining 1%. I believe such a realistic goal could be pursued under either a "safe harbor" or a "priority" approach.