

Secured Transactions

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Secured Transactions

A Context and Practice Casebook

SECOND EDITION

Edith R. Warkentine

PROFESSOR EMERITA, WESTERN STATE COLLEGE OF LAW

Jerome A. Grossman

FENNEMORE LLP



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*To my husband, Erich, and our two wonderful children, Evan and Ellen.
Your love and support make it all worthwhile! —E.R.W.*

I would not be in a position to have participated in this project at all had my wife (at the time of the first edition) of 41 (now 50) years, Mary O'Brien Grossman, when I first approached her back in 1977 with the proposal that I go to law school, put the kibosh on the idea. Instead, she allowed me to quit my job, sell our house, and move the family to Berkeley. Since then, in all ways, she has encouraged me to do the work that I enjoy. I cannot thank Mary enough. —J.A.G.

Contents

Table of Principal Cases	xvii
Series Editor's Preface	xix
Preface	xxi
Book Organization and Coverage	xxi
Appendices	xxii
How to Use This Book	xxiii
Acknowledgments	xxv
Chapter 1 · The Uniform Commercial Code (“UCC”)	3
1. Uniform Commercial Code Overview	3
Exercise 1-1: Tabbing the Code	6
2. Article 1	6
Exercise 1-2: Course of Performance, Course of Dealing, Usage of Trade	7
3. The Official Comments	7
Exercise 1-3: The Official Comments	8
4. UCC Amendments	8
5. Relationship of UCC to Other Laws	9
Chapter 2 · Statutory Analysis	11
1. The Anatomy of a Modern Statute	11
Exercise 2-1: Identifying the Parts of a Statute	13
2. Types of Statutes: Rules v. Standards	13
3. Types of Statutory Disputes	14
4. Statutory Analysis, General	15
5. Statutory Analysis Under the UCC	16
5.1 Types of Disputes	16
5.2 UCC Statutory Analysis	17
5.3 Conclusion: Statutory Analysis and the UCC	22
Exercise 2-2: Think-Aloud Statutory Analysis	22
Additional Resources	24
Chapter 3 · Introduction to Personal Property Secured Transactions	25
Chapter Problem	25
1. The Context of Personal Property Secured Transactions	26
Asset-Based Lending: An Introduction to Personal Property Secured Financing	26

Short-Term Loans	27
Lines of Credit	27
Secured Loans	27
Equipment and Fixture Financing	27
Accounts Receivable Loans	27
Inventory Loans	28
Securitization	29
Agricultural Financing	29
Consumer Loans	30
2. The Lawyer’s Role in Personal Property Secured Transactions	30
3. Article 9 Overview	31
Exercise 3-1: Article 9 Overview	34
Additional Resources	35
Chapter 4 · The Scope of Article 9	37
Chapter Problem	38
Code Sections	39
1. The Importance of Analyzing Scope	39
2. The Basic Scope Rule	39
2.1 Included Transactions	41
Exercise 4-1: Applying Section 9-109(a)	42
Exercise 4-2: Consignments	44
Exercise 4-3: <i>In the Matter of Marhoefer Packing Company, Inc.</i> <i>In the Matter of Marhoefer Packing Company, Inc., Bankrupt,</i> <i>Appeal of Robert Reiser & Company, Inc., Creditor</i>	44
Exercise 4-4: <i>In Re Kentuckiana Medical Center LLC</i> <i>In Re Kentuckiana Medical Center LLC</i>	51
2.2 Excluded Transactions	58
2.3 Transactions to Which Article 9 Applies to a Limited Extent Only	59
3. Other Bodies of Law Applicable to Secured Transactions	59
Additional Resources	60
Chapter 5 · Creation of Security Interest	63
Chapter Problem	64
Code Sections	64
1. Introduction	64
2. Value	66
Exercise 5-1: “Value”	66
3. Rights in the Collateral	66
Exercise 5-2: Rights in the Collateral	67
4. A Signed Security Agreement That Provides a Description of the Collateral	67
4.1 Description and Classification of Collateral	68
Exercise 5-3: Questions to Consider	71

Exercise 5-4: Classifying Collateral	71
4.2 Identification of the Parties	73
Exercise 5-5: Attachment and Enforceability of Security Interest	73
5. Proceeds and Supporting Obligations	75
Exercise 5-6: Proceeds	75
6. “New Debtors” under Article 9	76
Exercise 5-7: New Debtors	76
7. Rights of Third Parties	77
Additional Resources	78
Chapter 6 · Default and Secured Party Remedies	79
Chapter Problem	80
Code Sections	81
1. Default	81
Exercise 6-1: Security Agreement Default Provisions	82
Exercise 6-2: Default	82
2. Judicial Enforcement	82
3. Collection and Enforcement by Secured Party	83
4. Secured Party’s Right to Take Possession of Collateral after Default	84
Exercise 6-3: <i>Giles v. First Virginia Credit Services, Inc.</i>	84
<i>Giles v. First Virginia Credit Services, Inc.</i>	86
Exercise 6-4: Self-Help Repossession	94
5. Disposition of Collateral and Notification of Disposition	95
6. Application of Proceeds of Disposition; Deficiency Rights; Surplus Obligations	95
Exercise 6-5: <i>Hicklin v. Onyx Acceptance Corp.</i>	96
<i>Hicklin v. Onyx Acceptance Corp.</i>	97
Exercise 6-6: Commercially Reasonable Disposition of Collateral	104
Exercise 6-7: Notification of Disposition	104
7. Rights of Transferee of Collateral	105
Exercise 6-8: Rights of Transferee of Collateral	105
8. Acceptance of Collateral in Full or Partial Satisfaction of Obligation	106
9. Waivers	106
Exercise 6-9: Waivers under Part 6 of Article 9	106
10. Noncompliance with Article 9	107
Exercise 6-10: <i>In re Schwalb</i>	107
<i>In re Schwalb</i>	107
Exercise 6-11: <i>Schwalb</i> Approach Analysis	126
Exercise 6-12: Question from a Practicing Lawyer	127
Additional Resources	127
Chapter 7 · Perfection of Security Interest (Filing)	129
Chapter Problem	130
Code Sections	133
1. Introduction	133

2. Governing Law	133
Exercise 7-1: Governing Law	134
3. Perfection by Filing	136
4. Financing Statements	139
4.1 The Debtor's Name	141
Exercise 7-2: Debtor's Name Issues	143
<i>In re Rancher's Legacy Meat Co.</i>	144
4.2 Indication of the Collateral	157
Exercise 7-3: Description of Collateral	157
<i>In re Financial Oversight and Management Board for Puerto Rico</i>	158
5. Place of Filing	163
Exercise 7-4: Debtor's Location	164
Exercise 7-5: Perfection Problems	164
6. Special Requirements for Certain Types of Collateral and Fixture Filings	165
7. Perfection of Security Interest in Proceeds	166
8. Change of Location, Change of Name, and "New Debtors"	166
8.1 Change of Location	166
8.2 Change of Name	167
8.3 Change of Legal Structure	167
9. Effectiveness of Filed Financing Statement	168
Exercise 7-6: Post-Filing Events	168
Additional Resources	169
Chapter 8 • Perfection of Security Interest (Other Methods)	171
Chapter Problem	172
Code Sections	173
1. Introduction	173
2. Purchase-Money Security Interests	173
Exercise 8-1: Purchase-Money Security Interests	174
3. Perfection by Attachment; Automatic Perfection	175
Exercise 8-2: Automatic Perfection	176
Exercise 8-3: Perfection Problems	176
3. Perfection by Possession	178
Exercise 8-4: Perfection by Possession	179
4. Perfection by Control	181
Exercise 8-5: Perfection by Control	181
Exercise 8-6: Control Problems	182
5. Perfection of Security Interest in Property Subject to Certain Statutes, Regulations, and Treaties	183
Exercise 8-7: Certificate of Title Perfection Issues	184
Exercise 8-8: Perfection of Security Interest in Proceeds	184
Additional Resources	185

Chapter 9 · Priority Disputes (Secured Creditors)	187
Chapter Problem	188
Code Sections	190
1. Introduction to Priority Disputes	190
2. Secured Creditors v. Unsecured Creditors	191
3. Secured Creditors v. Secured Creditors	191
3.1 Perfected Secured Creditors v. Unperfected Secured Creditors	191
Exercise 9-1: Analyzing a Two-Party Priority Dispute	193
3.2 Perfected Secured Creditors v. Perfected Secured Creditors	193
Exercise 9-2: Another Priority Dispute	194
Exercise 9-3: Priority Dispute in Deposit Accounts	194
3.3 Priority Disputes Involving Purchase-Money Security Interests	195
Exercise 9-4: <i>In re Sports Pub., Inc.</i>	195
<i>In re Sports Pub., Inc.</i>	196
Exercise 9-5: More Priority Disputes	203
Additional Resources	204
Chapter 10 · Priority Disputes (Secured Creditors and Others)	205
Chapter Problem	206
Code Sections	208
1. Secured Creditors v. Lien Creditors	209
Exercise 10-1: Section 9-333	210
Exercise 10-2: Secured Creditor v. Possessory Lien Creditor	210
Exercise 10-3: Secured Creditor v. Lien Creditor	210
2. Priority Disputes with Buyers	211
Exercise 10-4: Secured Creditor v. Buyer	211
Exercise 10-5: Floor Planner v. Buyer	212
3. Priority Disputes over Fixtures	212
Exercise 10-6: Article 9 Creditor v. Mortgagee	213
Exercise 10-7: Fixtures Dispute	213
4. Priority Disputes Involving Dual Debtors and Transferred Collateral	214
Exercise 10-8: New Debtor Priority Dispute	215
5. Priority Disputes Involving Goods Covered by a Certificate of Title	215
Exercise 10-9: Transferred Collateral Scenarios	216
Exercise 10-10: Priority Dispute in Goods Covered by a Certificate of Title	216
6. Federal Tax Liens	217
Additional Resources	218
Chapter 11 · Bankruptcy	219
Chapter Problem	220
Bankruptcy Code Sections	221
1. Overview of Bankruptcy and the Secured Creditor	221
2. Introduction to Bankruptcy	222
3. The Trustee's Avoiding Powers	223

3.1 Trustee Standing in the Shoes of the Debtor	223
3.2 Trustee Taking the Place of an Actual Unsecured Creditor	223
3.3 Trustee as Hypothetical Ideal Judicial Lien Creditor	224
Exercise 11-1: Section 544(a): The Strong-Arm Clause	224
Exercise 11-2: Section 544(a)	225
3.4 Trustee's Power to Avoid Fraudulent Transfers	225
Exercise 11-3: Section 548 (Fraudulent Conveyances)	226
3.5 Trustee's Power to Avoid Preferential Transfers	227
3.5.1 "Transfer of an interest of the debtor in property."	227
3.5.2 "To or for the benefit of a creditor."	227
3.5.3 "For or on account of an antecedent debt."	227
3.5.4 "Made on or within 90 days before the date of filing the petition or between 90 days and one year if the creditor was an insider."	229
3.5.5 "Made while the debtor was insolvent."	229
3.5.6 "That enables the creditor to receive more than it otherwise would in a Chapter 7."	229
Exercise 11-4: Preferential Transfer (Section 547)	230
3.5.7 Exceptions to Preference Rules	230
Exercise 11-5: <i>In re McConnell</i>	231
<i>In re McConnell</i>	231
Exercise 11-6: Preferences	234
Exercise 11-7: Section 547 (Improvement of Position)	234
4. Other Bankruptcy Impacts on Secured Creditors	235
4.1 The Automatic Stay	235
4.2 Other Restrictions in Reorganizations	235
Chapter 12 · Secured Transactions Problems	237
Problem 12-1	237
Problem 12-2	237
Problem 12-3	238
Problem 12-4	240
Problem 12-5	241
Problem 12-6	241
Problem 12-7	242
Problem 12-8	243
Problem 12-9	244
Problem 12-10	244
Problem 12-11	245
Problem 12-12	245
Problem 12-13	246
Appendix A · Secured Promissory Note	247
Appendix B · Security Agreement	253
Appendix C · Continuing Personal Guaranty	263

Appendix D · Lock Box Agreement	275
Appendix E · Glossary of Terms	279
Appendix F · Intercreditor and Subordination Agreement	281
Appendix G · LLC Security Agreement	287
Appendix H · An Abbreviated Road Map to Article Nine	297
Index	301

Table of Principal Cases

<i>In the Matter of Marhoefer Packing Company, Inc., Bankrupt, Appeal of Robert Reiser & Company, Inc., Creditor</i>	45
<i>In re Kentuckiana Medical Center LLC</i>	51
<i>Giles v. First Virginia Credit Services, Inc.</i>	86
<i>Hicklin v. Onyx Acceptance Corp.</i>	97
<i>In re Schwalb</i>	107
<i>In re Rancher's Legacy Meat Co.</i>	144
<i>In re Financial Oversight and Management Board for Puerto Rico</i>	158
<i>In re Sports Pub., Inc.</i>	196
<i>In re McConnell</i>	231

Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

More recently, the NextGen Bar Exam reflects a genuine effort to dramatically increase the focus on assessing more than mere knowledge, and on assessing law practice skills. "Set to debut in July 2026, the NextGen bar exam will test a broad range of foundational lawyering skills, utilizing a focused set of clearly identified fundamental legal concepts and principles needed in today's practice of law." *About the NextGen Bar Exam*, NextGen: The Bar Exam of the Future, <https://nextgenbarexam.ncbex.org>.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* or prepare students for the NextGen Bar Exam using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design, authored by teaching and learning experts who believe in practice-focused legal education, and written with *Educating Lawyers* and *Best Practices* (and now the NextGen Bar Exam) in mind, Context and Practice casebooks make it easy for law professors to modernize their law school classrooms.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the authors of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professors care enough about your learning to have adopted this book, I bet they would welcome your input, too!

Michael Hunter Schwartz
Series Designer and Editor
Consultant, Institute for Law Teaching and Learning

Preface

This student-centered book draws on a wide variety of teaching materials that Professor Warkentine developed over a twenty-plus-year teaching career plus “real world” problems drawn from Mr. Grossman’s forty years of experience as an expert secured transactions practitioner. Professor Warkentine is indebted to generations of law students who challenged her to find effective ways to introduce difficult and often obtuse material. Our three primary objectives are:

- To help law students further develop analytical skills, with a particular emphasis on statutory interpretation;
- To provide students with an opportunity to master the substantive law of Article 9 of the Uniform Commercial Code; and
- To expose students to how the doctrine learned in this class translates into an exciting and intellectually challenging legal career.

Book Organization and Coverage

This book begins with a quick overview of the entire UCC. Because statutory analysis is at the core of the course, the book then discusses how to read and apply a statute. Following is an overview of UCC Article 9 and the law of secured transactions in general, including the role of attorneys in secured transactions. Doctrine is then introduced in the order that students should follow when analyzing a secured transactions problem. After all of the doctrinal material has been covered, the final book chapter presents a series of problems that will help students to review and “put it all together.”

After the three introductory chapters, each chapter follows the same organizational approach. Beginning in Chapter 4, each chapter begins with an Article 9 Graphic Organizer, depicting the overall coverage of Article 9. The organizer is highlighted to identify the subject studied in that chapter, and to help you remember where that subject fits in the “big picture.” Following the Graphic Organizer is a Chapter Problem, which helps put the chapter material into context. Next is a list of

the code sections to be studied in that chapter. Each chapter includes descriptive text, one or two cases or excerpts from cases, and several smaller exercises that draw on the material studied in that chapter and require students to select and apply the applicable code sections to solve the problems. At the end of the chapter is a list of additional resources, including ALR annotations, law review articles, and cases. None of these additional resources are required reading. These are sources for those students who always come up after class and request some additional reading. If you are not one of those students, you can easily be successful in this course without ever consulting any of the cited material.

Professor Douglas Whaley, a renowned professor and himself the author of seven textbooks on contracts and commercial law, suggested that when writing a textbook, the author follow this basic guideline: “Give the students enough understanding that they know the basics and can avoid malpractice by looking up the subtleties when they arise later in life. If you teach too many details, the students end up overloaded and top heavy so that the basics elude them.”¹ We have followed that guideline in this book; as a result, not every section of Article 9 is discussed, nor is there an exercise or problem illustrating every legal issue raised in Article 9. However, the book teaches you all of the tools you will need successfully to attack an Article 9 problem. This second edition takes the same approach to the recent adoption of Article 12, addressing “controllable electronic records”: Article 12 is introduced, together with accompanying amendments to the remainder of the UCC; its broad outlines are described; and a limited number of exercises and problems now address its effect on secured transactions, but comprehensive coverage would be beyond the scope of this text.

Appendices

Because one of our goals is to introduce students to the practical aspects of a secured transactions practice, we have included in the Appendices a variety of forms that might be used in a typical secured transaction. These forms are not intended to be used as models, and are certainly not “forms” to be followed; rather, they are presented for their educational value; they provide a starting point for discussion and illustrate specific problems confronting the practicing lawyer.

1. Douglas J. Whaley, *Commentary: Teaching Law: Thoughts on Retirement*, 68 OHIO ST. L. J. 1387, 1400 (2007)

How to Use This Book

This book is deceptively short. The “star” of the book is the text of the Uniform Commercial Code and its Official Comments. You must purchase and use a complete version of the text of the Code and the Comments. You will need to spend a significant amount of time reading the statute and the Official Comments. For emphasis, we have included excerpts of text and comments in the book.

This book does include cases, but only a limited number of them, and the cases that we include have not been heavily edited, other than to exclude analysis of issues extraneous to the point being illustrated. We have, however, omitted many footnotes. When footnotes are included we have placed them in brackets [] within the text. The purpose of including cases in this format is to prepare you to read cases as lawyers read cases—unedited—and to prepare you to use the cases as lawyers use cases—to solve problems.

To get the most out of this book, read the Chapter Problem as you begin each new chapter. You will not be prepared to analyze the problem fully until you have completed the entire chapter, but reviewing the Chapter Problem initially will help to provide context for the material you will be studying. Next, read each of the code sections indicated for that chapter, along with the Official Comments. Read difficult code sections aloud. Deconstruct each section. Do not skip this step! Students who are successful in Code courses all emphasize that they spent a lot of time reading the statute and the Official Comments. In addition, be sure that you have your Code open and that you refer to it frequently as you read the text that explains each code section.

After you have completed the assigned reading, including the Code, you are ready to read and prepare your answers to the chapter exercises. We purposely do not indicate what code sections you will have to consult to work through the exercises—learning how to find the appropriate code section is an essential part of what this course is about. In class, be prepared to discuss how you selected the applicable code sections and how you applied them to reach a conclusion. Work on the shorter exercises first. When you think you have mastered the material in the chapter, return to the Chapter Problem and try to write out a complete analysis.

This book uses visual aids extensively to help students picture how the individual code sections fit together to reach a conclusion. Students who do not customarily use visual aids such as those contained in this book find them to be extremely helpful. Many students who customarily prepare their own flowcharts continue to prepare their own material, but they tell us that they nevertheless use the figures in the book to help them refine their own work. **All students should always keep in mind that the original sources, the statute and the Official Comments, are the primary**

authority on which they should rely for analysis. Everything else can be used, if helpful, but never to the exclusion of the statute itself.

Edith R. Warkentine

Jerome A. Grossman

July, 2014

Supplemented by Jerome A. Grossman

October, 2023

Acknowledgments

This student-centered book is my second in the Carolina Academic Press Context and Practice series. Students who took my Secured Transactions class after taking my Sales class (where I used my CAP Sales book) urged me to write my own book. I was reluctant to do so, because Article 9 and Secured Transactions practice have changed significantly since I was last in practice. However, Jerry Grossman, a distinguished practitioner whom I met in the context of work for the California State Bar, was kind enough to agree to be my co-author for this book. I think it is particularly appropriate for a practitioner to co-author a text for the Context and Practice series. As a result of our collaboration, we have created a text that is truly unique among other available texts. The perspective of most of the questions is that of a transactional lawyer preparing for client meetings, interviews and negotiations. So I must first thank Jerry for agreeing to do this with me and for his terrific contributions.

Next, I thank the “early readers” of the text: my husband, Erich, and my colleague, Professor Elizabeth N. Jones, the director of our school’s Criminal Law Practice Center and herself an expert in criminal law and procedure. When I wrote the Sales book I learned that willing readers without a legal background or without a legal background in the substantive area in which I write, can make important contributions to the readability of the text. If they can understand the text, it will be accessible to our students as well. I think law professors sometimes assume that law students have background that we would not assume a lay person has. Accordingly, by having a lay person and a non-expert read the book, we were forced to explain context in a user-friendly way. My husband, who has served as my “reasonable man” since I went to law school, has always scrutinized my work to be sure it was accessible to students, and his contribution this time was invaluable. Professor Jones, who has more than enough on her plate, and could easily have refused to help due to time constraints, nevertheless was generous with her time; she read critically and gave excellent input on a timely basis. I can’t thank her enough!

As I learned in the past, it “takes a village” for me to write a book! I want to thank my secured transactions students, Western State College of Law Class of 2013, who urged me to write this book, and particularly the five students who served as my research assistants in the early stages: Kyle Adamson, Joseph Chaparo, Steven Giamichele, Amanda Huff, Alex Nguyen, and Michael Valentine. I also want to thank all of the students in my Spring 2014 Secured Transactions class, who were the “beta site” for this book.

I am again indebted to Professor Sidney DeLong, Seattle University School of Law, who graciously shared with me the materials he created and uses in his own classes. I have always thought his discussion of how to analyze a statute is one of the best I've seen, and he has been kind enough to permit me to adapt and use that discussion in Chapter 2 of this book.

Finally, words cannot express my appreciation of Jacqueline Alvarino, who went above and beyond, doing meticulous work in typing and editing the manuscript. Her thoughtfulness and attention to detail while maintaining a wonderful attitude were remarkable. This book simply would not have happened without her.

Edith R. Warkentine, July, 2014

My major professional thanks, of course, must go to Professor Edith Warkentine, who invited me to participate in this project, who wrote the initial draft of every chapter and cheerfully accepted my kibitzing, who taught the course and took that opportunity to vet the material, and who ensured that we timely produced a completed manuscript of the first edition. I also echo her thanks to everyone who assisted with the production of this text.

My additional thanks goes to Professor Warkentine for allowing me to build that first-edition foundation to produce this second edition.

I acknowledge, too, the many mentors who shaped my career, making it possible for me to enter the field of secured transactions, for which I have been temperamentally well-suited: Professor Peter Winship, the visiting professor from Southern Methodist University who first introduced me to the UCC; Paul J. Mundie, my initial partner assignment and mentor at Heller Ehrman, who encouraged me to remain in the Corporate Department and fostered my interest in commercial finance; David A. Rosinus, with whom I worked closely for almost the entire 14 years that I was with Heller Ehrman, who actively supported my desire to focus my practice on commercial finance and whose rigorous approach to legal analysis demanded that I “show my work” — to map out the analytical steps that I took to move from statement of an issue to resolution (one of the pedagogical tools espoused by this text); Steven O. Weise (a name familiar to everyone whose practice involves secured transactions), with whom I had the good fortune to cross paths, not only as a colleague at Heller Ehrman, but also as a participant in various bar projects, and who has allowed me to importune him whenever I've had a question I wanted to bounce off someone who has seen it all; Michael T. Andrew, former partner and counsel at Luce Forward Hamilton & Scripps, another proponent of rigorous analysis and willing consultant; Harry C. Sigman, now deceased, during his life a permanent member of the State Bar Business Law Section's Commercial Transactions (nee “UCC”) Committee (among many other things), who periodically reached out to keep me involved in matters affecting the UCC, as enacted in California.

Jerome A. Grossman

July, 2014 / October, 2023