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The View from Experience

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by
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One of the hardest things about being Executive Director is to be temperate. Thus, I really don't think I'm going to say what I might say otherwise. In contrast to Dick [Speidel], I am going to take the title of this program literally. I want to talk about the process. I also want to talk about what NCCUSL[1] is. There are a lot of familiar faces out there. Many of you are familiar with the process. Many of you are not, however. If we are going to assess the revision process, I think we have to understand what that entire process is about, and we also have to understand whether or not Articles 2 and 2A represent a clear picture of that process, or whether in some ways they are an aberration, which is what I believe.

What I want to do is first talk a little bit about NCCUSL, its history, what it's about. Then I want to talk about the process so everyone understands what goes on when we try to revise or create a uniform law.

First, NCCUSL. This is an organization that was created back in 1892 (so it's not a young organization) at the prompting of the American Bar Association, which perceived the need for uniformity among state laws.

It is a state governmental organization. That is to say, it is made up of Commissioners from the various States in the Union. It is also an organization of the legal profession, because its function is to reform the law in terms of statutes, and you have to be a lawyer to be a Commissioner. It's composed of representatives from each of the fifty states, plus three other jurisdictions: the District of Columbia, the U.S. Virgin Islands, and Puerto Rico.

Its function is to prepare uniform and, at times, model laws for state enactment. But, it also has a broader vision. It has a committee, chaired by Professor Curtis Reitz at the University of Pennsylvania,

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1. NCCUSL stands for National Conference of Commissioners on Uniform State Laws.

which looks after state interests in the international sphere, which are increasingly of importance. We also have another committee that looks toward interests with respect to the various Indian Tribes, which, as most of you may know, are sovereign nations, at least as far as the States go. It does not, even though it has many times been asked to do so, prepare legislation for Congress, even though, in some cases, like the Uniform Electronic Transactions Act, Congress lifts large amounts of provisions from the state product to enact in the federal statute.

The function of the organization is to facilitate uniformity of law among the States, thereby producing benefits to the public through consistent legal rules as well as improvements in the law. It is also its function to avoid significant disadvantages that may arise from diversity of state law.

The Conference works in many areas. Commercial law is the one that is most familiar to many of us. But it has a number of products in family (domestic relations) law. It has done considerable work in estates and trusts. It has done some work (with less success) in the real estate area. We can draw our own conclusions from that. It does a great deal of work to implement the Full Faith and Credit Clause, to deal with interstate enforcement, and to deal more recently with alternative dispute resolution.

Primarily, the Conference works in the area of private law, and it has eschewed public law and regulatory law. But there are exceptions; there are no absolute hard and fast rules. In fact, in several cases the Conference has dealt with regulatory laws such as the Uniform Money Services Act, which implements federal regulation on the state level of businesses that may be engaged in money laundering.

The membership of the Conference is not large. Currently, it has 315 lawyers, who roughly fall into four categories. The largest category is private practitioners—there are 193. The next category is government lawyers—forty-four. There are twenty-eight judges, and there are fifty academics (or educators). Out of that, we have thirty-two legislators in NCCUSL, who either are educators or private practitioners.

The Commissioners all serve without compensation. They donate their time, thousands and thousands of hours per year. They represent their States in three basic ways. One, they serve on a variety of Conference committees. We have standing committees, such as the Executive Committee. We have Drafting Committees. We have Study Committees. We have special committees, and so on. Secondly, they represent their States at the annual meeting of the Conference, which occurs for nine days at the end of July and in early August, where all of the products of the Drafting Committees created

during the year are debated by the entire membership of the Conference. Finally, and quite importantly, as Dick alluded to, the Commissioners are charged with the duty of taking the product, once approved, back home and getting it enacted.

Where do Commissioners come from? They are appointed state officers. The State makes its own determination as to the number, and while there are normally statutes that govern the appointment process, interestingly enough there is no uniform state law on appointment! And so, we have approximately 64% appointed by the Governors, approximately 14% appointed by the legislative bodies, and the other 22% are hybrid appointments, such as in Minnesota, where there is a triumvirate body.

Where does the Conference get its funding? It gets its funding from state contributions, which are appropriated by the Legislatures. It has a very modest budget. This year, the budget is just short of two million dollars. The Conference has a small staff in Chicago, and the rest of it is volunteer labor. The American Bar Association makes a small contribution every year, and the remainder of any funding comes from grants from foundations or federal grants, or in the case of the Uniform Commercial Code, from licensing the Code to various commercial publishers. NCCUSL does not take money for drafting uniform or model acts from private sources, for the obvious reasons.

In addition to NCCUSL, there are a number of joint editorial boards. When there are several acts in a given area, the Conference often creates a joint editorial board with other interested organizations. Let's take the Permanent Editorial Board (PEB) for the UCC, which is perhaps the most familiar to you. It is a joint body composed of six representatives from the National Conference and six representatives from the American Law Institute. It's function, which we will talk more about in a few minutes, is, in essence, to monitor and see to the health of the Code. The PEB is funded separately. Some of the money comes from the original Faulk Foundation grant, which was made at the beginning of the Code, way back in the '40's, and other money comes from the license income from the Uniform Commercial Code, which I might mention has been quite significant in recent years. So if nothing else has come out of this process, we have the money!

With that background, let me turn to the process itself. I think it's very important to understand the process. In the first instance, the Conference has the Committee on Scope and Program. Scope and Program is the agenda committee of the Conference. Anybody can make a suggestion for a uniform act. In fact, after the recent election, we have no less than five proposals to do *something* with respect to the electoral process. I'm not sure whether we'll do it, as it is hardly a private law subject. Very often, the proposals come from

Commissioners, and they often come from the American Bar Association, but they can come from newspaper articles, or many other sources.

If Scope and Program believes that the proposal meets Conference criteria (which I will discuss in a minute), then it will recommend to NCCUSL's Executive Committee that a Study Committee be created. The Study Committee usually works for about a year to assess whether or not the act does meet the criteria and whether it is worth doing. If there is a positive recommendation to the Executive Committee at the end of the study, then a Drafting Committee will normally be appointed.

In some instances, the study may occur under the auspices of somebody else. For example, in the case of the Uniform Commercial Code, as Dick indicated, he was the Chair of the Article 2 Study Committee, which existed under the auspices of the Permanent Editorial Board. That study then made a recommendation for the revision of Article 2 and Article 2A. There also was an Article 9 Study Committee under the auspices of the Permanent Editorial Board. In other cases the study may be conducted under the American Bar Association. The revision of Article 5 arose from an exhaustive study by the American Bar Association UCC Committee of the Business Law Section.

What are the criteria for a uniform, or a model, act? Essentially, it comes in two parts. One is there must be an obvious reason for an act on the subject, and, coupled with that, there should be a reasonable probability the act can be enacted in a substantial number of jurisdictions, or that it will promote uniformity indirectly, such as by serving as a model for States that are interested in legislation in the area. Second, there also must be a prospect of significant benefit. In other words, the problem should have some significance. It is also important that the proposed act make a contribution that is substantial in relation to other competing projects. And finally, the subject should not be one that is entirely novel, or one on which some experience is lacking, or where it is a local problem; these are not good conditions for uniformity.

If a proposal passes these criteria, then a project to begin drafting will be instituted. A Drafting Committee is appointed by the President of the Conference from the body of Uniform Law Commissioners. The President tries to achieve a balanced point of view for the Committee where that is a feasible thing to do. In other words, if there are two sides to the issue or several sides to the issue, an attempt is made to find a Commissioner who may have a viewpoint along one or the other of those lines.

A Reporter is appointed for most Drafting Committees. The Reporter can be a Commissioner, though very often is not, but is

someone outside who is a recognized expert in the field, most often an academic, as opposed to a practicing lawyer.

A Drafting Committee usually meets two to three times a year. When the Committee has concluded its work for the year, it goes before the annual meeting of the Conference and defends its work there. The Committee then goes back to work for another year. Usually a two-year period occurs before an act is ready for promulgation, although in some instances it may be longer or shorter.

Where the Uniform Commercial Code is involved, the Conference has a long-standing relationship with the American Law Institute. The Drafting Committee is appointed by the President of NCCUSL in consultation with the American Law Institute, and normally several representatives from the American Law Institute will be members of the Drafting Committee. My function as Executive Director is to appoint the Reporter, and I do that in consultation with the Institute as well.

We have an arrangement of a somewhat similar nature with the American Bar Association on a project where we are doing a Uniform Mediation Act, and there a couple of American Bar Association representatives on the Committee itself.

Drafting Committees meet to work on weekends. Linda talked about medium-priced hotels. I think she was quite charitable; some of them are less than that. We fly in on Thursday. We meet all day Friday, all day Saturday, Sunday morning, get on a plane and fly back to resume our regular jobs Monday morning.

The first meeting of a Drafting Committee often involves a memo from the Reporter discussing the study that has been completed, setting forth the issues and the various options for resolving those issues, and defining the appropriate scope of the act. Subsequent meetings generally are conducted with a draft prepared by the Reporter, where the Drafting Committee looks at the words, looks at the policy decisions, and makes decisions in terms of what the next draft ought to look like.

Over a long period the Conference has had an arrangement with the American Bar Association. For each project, the American Bar Association is requested to appoint an advisor. The advisor from the ABA sits with the Drafting Committee. That person is not a member, but has full participatory ability in terms of discussion, and the advisor's function is to represent the views of the interested parties in the American Bar Association to the Drafting Committee, and seek those views of the American Bar Association to convey them to the Drafting Committee.

Another initial function of any Drafting Committee is to try to ascertain all constituencies which may be interested in the subject-matter of the draft. Specific invitations are issued to all of those

interests to ask them to participate in the work of the Drafting Committee. NCCUSL does not have funds to pay for such participation, but every effort is made to facilitate the participation of people or interests that may not have adequate resources. One way to do that is to try to site drafting committee meetings at places where representatives of those interests can attend. Notices of meetings and drafts are sent to anyone who wants to be on the mailing list, and those who do not desire to participate at the drafting committee level for expense reasons or other reasons can send in comments. Indeed, the Conference has recently created a website that allows electronic commentary.

Let me give you an example about one Act, UCITA. There were a total of 219 individuals on the mailing list for that Act. And customarily, the drafting committee meetings had an attendance on the average of fifty to one hundred individuals. The kinds of interests that were represented were the publishing industry, the entertainment industry, the computer hardware, broadcasting, and software industries, manufacturers, libraries, consumers, the financial industry, security exchanges, the Society for Information Management representing licensees, corporate users, and others.

The Chairman of each Drafting Committee is charged with running the committee meeting. Committee decisions are made by vote of the committee members after hearing discussion and debate and considering submitted comments. Advisors and observers are requested to participate by discussing their views of the product as well as by submitting written comments.

At the end of the process, at an annual meeting of the Conference, for a period of time the act is discussed in front of the Commissioners from all of the states. In the case of the UCC, it also has to pass the American Law Institute Council and the membership of the American Law Institute at an annual meeting. Only acts which are approved are submitted for a vote by the States in NCCUSL. That is an important point, because the National Conference, and in the case of the Uniform Commercial Code, the Institute, do not have the power themselves to create law. All they do is serve, in a sense, as a drafting arm for the Legislatures. As a result, when you have finished an act, you have to take it back and try to get the State Legislature to enact it. In most states there is some organization that takes a look at the act again, whether it be a Law Revision Commission, a committee of the state bar association, or some other process. The examination is to make sure the act is suitable for enactment in that state or whether there are any particular problems. It also gives interests in that particular state that may or may not have had a voice on the national level an opportunity for input.

The Conference has been quite successful in enactments in recent years. The Commercial Code is enacted in one form or another in all fifty-three jurisdictions. The Uniform Probate Code, which is a massive effort in the probate area, while enacted in a substantial number of states, has also been broken down into parts, and some of those parts have been enacted in forty-eight or fifty states. The Uniform Partnership Act and the Uniform Limited Partnership Act are the law in fifty-one jurisdictions. The Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act are enacted in fifty-two jurisdictions each. The Uniform Controlled Substances Act is the law in forty-six jurisdictions. And so on. There also have been some less successful acts. Nonetheless, those acts are sometimes successful in another way. For example, they may serve as a model for the States. Or they may prompt reform in other ways. Or they may simply serve another function which I believe uniform laws serve, and that is to clarify the law by synthesizing case decisions, and by making the resulting law easier to find.

Let me draw some conclusions from what I've covered. You can apply these conclusions to the Article 2/2A process as it has been described, and draw your own judgment.

Broad participation is a good thing. It makes the statute substantially better. It often also leads to a consensus, because the parties around the drafting table hear the concerns of others and become familiar with those concerns, and therefore are better able to reach a compromise. However, I emphasize that attendance at drafting committee meetings is not absolutely necessary. It is useful, but it's not absolutely necessary. There are modern communication methods, which facilitate comments that will be considered. It is Conference procedure to reproduce the comments that are received and distribute them for the Drafting Committee and the observers. There is input through the widely-based American Bar Association. Finally there is input at the enactment level in many, many states.

Second, uniformity obviously is a major goal. And enactability therefore plays a part in many policy decisions. I personally do not believe this is a bad thing. In the first place, seldom is one policy choice "the right choice." That is to say, usually a choice is being made between competing policy considerations, and several of them may make equally good sense. Therefore, it's seldom that one policy choice by a given person, no matter how strongly held, ought to override other competing policy choices that may be equally acceptable. Frankly, I find, particularly since we are getting input from the people who are going to be governed by the act, that their choices of policy are seldom unacceptable.

The process differs, in that sense, from the Restatement process. In the Restatement process, you're looking at synthesizing case law. There often is a right and a wrong interpretation. That's not necessarily true in the political process. Secondly, most NCCUSL statutes are not mandatory. They, in effect, are default rules. They can be varied by agreement, so even if there are several policy possibilities, you can often vary the one selected by agreement to reach a different conclusion. That validly may be done for a variety of reasons. The default rule may have been chosen so that it reflects what is going on in the market. That way, people don't have to draft as much into the contract. Or, alternatively, the rule may be drafted exactly the opposite way to give a party who is perceived to be the weaker side a bargaining chip.

Finally, most products involve degrees of uniformity. In the old days NCCUSL used to emphasize absolute uniformity. I think that's unrealistic today. True, our slogan is "Uniformity of Law from Diversity of Thought," but in most cases some continued diversity and what may be termed "core" uniformity is adequate. It certainly leads toward a greater facility in applying the law, and clearly uniformity is not needed, even though desirable, in all instances. There are many examples of that, for example Section 2-318 of Article 2, which gives you three alternatives.

A third observation is that acts that have a broad scope and many provisions are much more difficult to produce than acts with narrow scope and a limited number of issues of practical significance. That's the way NCCUSL used to operate, the acts were quite narrow and quite focused. It was only in the '40's with the UCC that NCCUSL began to get into very broad-gauged products. With the exception of the Uniform Commercial Code, most of those broad-gauged products have not been successful from a uniform enactment perspective. For example, the Uniform Probate Code, which is probably the largest other broad scale project besides the UCC in terms of its entire scope, is only an enactment in less than half the states.

Finally, I believe you often are faced with a necessity to go to general provisions. Part of the reason is political; if you have a bright-line provision you do divide the electorate. However, a general provision often is of some other value. There has been criticism of that because that can be only the appearance of uniformity. But it is clear that some uniformity, even with general provisions, is probably more desirable than non-action. Secondly, one of the functions of the Joint Editorial Boards is to interpret commentary court decisions. You are familiar with the PEB commentaries that do that, so there is a process to resolve conflicting interpretations of a general provision. Also, general provisions have a longer shelf life, and therefore

promote uniformity as NCCUSL does not have to go back and deal with fifty independent minded state legislatures as often. Thus, core uniformity is not without its own value.

Turning to the future, I have given a lot of thought about the problems raised by Dick, and that will be mentioned by others.

I believe NCCUSL participatory process, while seldom completely inclusive, in more instances than not permits consideration of viewpoints that might not be heard or considered in its absence, and tends to produce a better, and often more enactable, statute than might some other process. This process, however, is not risk free. If the parties to it take a one or two issue stance instead of a view of overall balance, or if they compare the inevitable compromise provisions of a product against a wish list rather than viewing it as an improvement in the law, given modern communications that immediately make known what occurred in early enacting states and thus what happens during enactment in one state can influence enactment in others, the process more than ever can produce failure. Failure may either leave the law in the area increasingly less relevant and less uniform as the various jurisdictions go their own ways, or, if NCCUSL attempt reflected demand for legislation on the subject, a possible loss to the federal level, which may please one interest or another, but never all. Two examples in point are the Uniform Consumer Credit Code and the Uniform Electronic Transactions Act.

An alternative is to make the process less participatory. This could be reflected in a return to something like the federal process, where testimony is taken and the drafting body then formulates the statute in private; in short, a return to the process used by the PEB for the UCC before the New Payments Code experience, the failure of which, in that very broad project, in turn led to the present participatory process. I doubt NCCUSL will return to this approach. It is far more likely that projects will be reduced to ones of narrower focus on a limited number of consensus issues for statutory enactment, with more work being done in the Joint Editorial Boards by way of Commentary and related techniques. Another change already implemented by NCCUSL is the exercise of more control over the work of Drafting Committees by the President and Executive Committee by way of a more specific initial charge to guide the work, and by monitoring the work through reporting requirements. This looks toward the ALI Council approach and may provide more objectivity and a broader vision beneficial to the Conference as a whole than a Drafting Committee, too close to its product, can provide.

In conclusion, the uniform laws process is a people process. Much depends on the Chair of the Drafting Committee establishing the groundwork for consensus and making sure decisions are made

openly; on the Reporter being viewed as trustworthy and objective; on the drafting committee members becoming experts and working for compromise among the views they represent; and on observers arising above pure self-interest and recognizing the need for balance. If everyone focuses on the goal of improving the law and realizes this entails objective evaluation and compromise, the process as presently constituted can succeed. If the participants adhere only to their own agendas and eschew compromise and overall balance, the process often will fail or will evolve to a less democratic form. In short, we can either work together, or become irrelevant together.