

## **Opinion No. 62-126**

October 9, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Mrs. Betty Fiorina, Secretary of State, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

May the Secretary of State accept for filing under the Uniform Commercial Code, an instrument that contains a photo-copy or carbon-copy of the signature of the debtor and/or the secured party?

#### CONCLUSION

Yes, but see Analysis.

### **OPINION**

#### ANALYSIS

Under Article 9 of the Uniform Commercial Code (50A-9-401, et seq, N.M.S.A., 1953 Compilation) it is provided that seven different types of instruments may be filed thereunder. These instruments, consisting of a financing statement (50A-9-402), amendment to financing statement (50A-9-402), security agreement (50A-9-402), continuation statement (50A - 9-402); termination statement (50A-9-404); assignment or statement of assignment (50A-9-404); and statement of release (50A-9-406) each relate either to the perfection, continuation, transfer, or release of a security interest in property which is subject to the Uniform Commercial Code.

Each of the instruments designated above are required under the provisions of the Code to be either signed by the secured party or by both the debtor and the secured party.

What constitutes in fact a valid signature sufficient to satisfy the requisites of a proper execution or authentication of such instruments under the Uniform Commercial Code, is set out under the provisions of Section 50A-1-201 (#39) N.M.S.A., 1953 Compilation. This Section provides in part:

"Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing."

As stated in the Official Code Comment to Section 1-201 (39) of the Uniform Commercial Code, the definition of the term "signed" is extremely comprehensive and liberal in nature. Such comment provides, as follows:

"The inclusion of authentication in the definition of 'signed' is to make clear that as the term is used in this act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentication can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing."

Sections 50A-9-401 through 50A-9-407, N.M.S.A., 1953 Compilation, specify the requisites necessary to constitute a valid instrument subject to filing under the provisions of the Uniform Commercial Code and which affects a security interest in property. Section 50A-9-403, N.M.S.A., 1953 Compilation, states that presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes a filing under the Uniform Commercial Code. Section 7-1-3, N.M.S.A., 1953 Compilation is a general statute applicable to the filing or recording of instruments and requires that an instrument, in order to be filed, must be duly acknowledged and certified, except the section was amended to exclude the necessity for acknowledgements to certain instruments filed under the Uniform Commercial Code. See Attorney General's Opinion No. 62-1, dated January 3, 1962.

It is generally recognized that a copy of an instrument may not be submitted or accepted for filing as a public record unless such instrument is either an original signed by the parties, a certified true copy of an original instrument, or a duplicate original signed by the parties executing such instrument. **Bates v. Bates**, 247 Ala. 337, 24 So.2d 440; **Banks v. Blight**, 6 T B Mon (Ry) 192, 17 Am. Dec. 136; **Stevens v. Brown**, 3 Vt. 420, 23 Am. Dec. 215; **Rehm v. Reilly**, 161 Wash 418, 297 P. 147, 74 A.L.R. 350; **Mack v. McIntosh**, 181 Ill. 633, 54 N.E. 1019; **Central Trust Co. v. Georgia Pac. Ry Co**; 83 Fed. Rep. 386 (Ga); **Porter v. Dement**, 35 Ill. 478.

The rule stated above is recognized in 45 Am. Jur., "Records and Recording Laws," Section 110, at page 483:

"Copy of Instrument. -- The recording of a copy of an instrument instead of the original, which might itself have property been recorded, is invalid if not authorized by statute . . ."

Similarly, it is stated in 76 C.J.S., "Records," Section 10 at page 118:

"The provisions of the statutes govern as to whether a particular instrument is sufficient in form to entitle it to be recorded. Ordinarily only the original and a copy thereof is entitled to be recorded . . ."

The courts have applied different rules in determining whether or not an instrument is in fact an "original" copy and in the proper form so as to be entitled to be filed or placed of record. The rule is stated in 32 C.J.S. "Evidence" Section 821 at page 749:

"Where several copies of a writing are made at the same time by the same mechanical operation, each is regarded as an original . . . The most usual application of this rule is found in the case of carbon copies, which are usually admitted as duplicate originals. . . ."

A close analogy is often drawn between the rules of evidence governing the admission of instruments at a trial and the rules applicable to the acceptance of instruments for filing as a public record. The courts have generally viewed photographs of written instruments as constituting secondary copies and not as originals. In 32 C.J.S. "Evidence" section 815, page 747, the rule is stated:

"Photographs of written instruments can be used as secondary evidence. They are but copies which may or may not be facsimiles of their originals; and whether a photographic copy of a writing when offered in evidence is a mathematically exact reproduction of its original is a question of fact."

Under the Uniform Commercial Code the strict rules cited above regarding the requisites and form for filing of instruments are relaxed. Section 50A-9-401 provides that a filing made in good faith in an improper place or not in all the places required by the Code is nevertheless effective as to any person having actual knowledge of the contents of such financing statement.

Under the authorities cited above, we conclude that the filing officer should accept any instrument presented to him for filing under the Uniform Commercial Code, where the instrument is not obviously defective upon its face. Since, under the provisions of § 50A-1-201 (39) supra, signature may in fact constitute even carbon copies or photo copies of writings, dependent upon the intent of the parties, the filing officer is not generally in a position to ascertain the intention of the parties to such instrument.

Where an instrument appears correct, it is not the duty of the filing officer to determine the validity of such document, to ascertain whether it is genuine or forged, or to rule upon its legal efficacy. Similarly, whether an instrument presented for filing is in fact an original, duplicate original, or a copy of an original, or whether the signature appearing upon an instrument filed under the Uniform Commercial Code is intended to be operative are questions which the filing officer is not normally able to judge. Consequently, the filing officer should accept instruments for filing under the Uniform Commercial Code, and which appear valid on their face, leaving the determination of authenticity, legal effect, and evidentiary value to the courts in cases where such issues are raised. We recommend, however, that as a matter of public comity, where some question may appear as to the validity of a signature, that such question be called to the attention of the individual filing such instrument.