

#44

3/25/66

Memorandum 66-13A

Subject: Study 44 - The Fictitious Name Statute

BACKGROUND

At the February meeting, the Commission directed the staff to informally obtain the opinions of various persons and organizations concerning the advisability of repealing the Fictitious Name Statute. Attached to this memorandum and to the supplement to this memorandum are a number of letters we received as a result of our efforts to obtain the views of interested persons:

- Exhibit I (Pink) - Form letter sent to various Bay Area credit agencies
- Exhibit II - (Yellow) - Credit Bureau of San Francisco
- Exhibit III - (Green) - County Clerk, Sacramento County
- Exhibit IV - (Buff) - Form letter to County Clerks and reply from Santa Clara County Clerk
- Exhibit V - (Blue) - Dun & Bradstreet
- Exhibit VI - (Gold) - County Clerk, San Francisco
- Exhibit VII - (White) - McCords Daily Notification Sheet
- Exhibit VIII - (Pink) - The Recorder
- Exhibit IX - (Yellow) - Division of Corporations, State of California
- Exhibit X - (Green) - County Clerk, Los Angeles
- Exhibit XI - (Buff) - Assets Research
- Exhibit XII - (Blue) - Credit Bureau of Santa Clara Valley
- Exhibit XIII (Gold) - Bank of America

Note also the two exhibits attached to the supplement to this memorandum:

Exhibit I (Pink) - Jewelers Board of Trade

Exhibit II (Yellow) - Division of Real Estate, State of
California

We refer to these two exhibits in this memorandum as Exhibit S-I and Exhibit S-II.

GENERAL REACTION OF INTERESTED PERSONS

It is apparent from the responses that there is substantial opposition to the repeal of the Fictitious Name Statute generally. Although most persons favor the repeal of the publication requirement, they favor the retention of the filing requirement. These persons apparently feel that the registers provide the public generally and certain businesses (such as credit agencies) with a valuable source of information in their dealings with firms using fictitious names. The letters from the county clerks, which indicate that in some counties there is considerable use of the fictitious name registers, support the conclusion as to the value of the filing requirement. Indeed, it appears that there may well be a considerably higher degree of compliance with the filing requirement than was originally thought to be the case.

Only The Recorder (Exhibit VIII), the San Francisco legal newspaper, McCords Daily Notification Sheet (Exhibit VII), and the County Clerk of San Francisco County (Exhibit VI) favor retention of the publication requirement. However, they made no argument that would justify the retention of the publication requirement.

In view of the strong, well organized opposition that would exist, it appears that it would be politically impossible (and probably undesirable as a matter of policy) to attempt to obtain the repeal of the Fictitious Name Statute entirely.

Recommendation. In view of the reaction outlined above, it is recommended that we drop further consideration of the original tentative recommendation on this subject (copy attached to this memorandum), and proceed to work on the Alternative Tentative Recommendation attached to the first supplement to this memorandum and the other suggestions made in this memorandum.

POLICY QUESTIONS

The letters attached as exhibits to this memorandum and the first supplement thereto suggest a number of policy questions. These are outlined below:

1. Repeal of requirement of publication. There is general agreement (except for the legal newspapers and one county clerk) that the publication requirement should be repealed. The Alternative Tentative Recommendation would accomplish this objective and we recommend that the Commission approve the repeal of the publication requirement. Few other states have a similar requirement. Of the 37 jurisdictions which have fictitious name statutes, only 7 of them, including California, require publication. See Exhibit XIV (white) attached.

2. Method of insuring compliance with statute. Several writers suggest that some sanction be provided to insure compliance with the statute. The sanction should be one that does not operate as a trap to deprive a person of a cause of action because he failed to comply with a statutory requirement of which he was unaware. We think that the sanction recommended in the Alternative Tentative Recommendation is a good one. Briefly stated, any person could serve a demand that a person transacting business in a fictitious name comply with the Fictitious Name Statute within 10 days.

Failure to comply within 10 days would give the person serving the notice a cause of action to recover a civil penalty of \$50 plus all actual damages he suffers as a result of the failure to comply with the statute. This is similar to the sanction provided when a witness disobeys a subpoena. Perhaps the statute should also provide that a copy of the certificate should be sent to the person who served the demand that the statute be complied with. For a discussion of the sanctions used in other states, see Exhibit XV (pink) attached.

3. Filing requirement. Most jurisdictions require the filing of a fictitious name certificate in each county or town (depending on the basic filing level) where the person or firm intends to do business. A few states have a rule similar to that adopted in California requiring the filing of the certificate in the county of the firm's principal place of business. A number of other jurisdictions require central filing with the Secretary of State or a similar official. Some jurisdictions require both a central filing and a county by county filing of the fictitious name certificates. (For a more complete discussion of the provisions in other states, see Exhibit XVI (yellow) attached,)

Under existing California law, the filing of the fictitious name certificate is with the county clerk in the county where the firm's principal place of business is located. Several writers suggest that a central state filing might be considered. (See Exhibits II-S and V.)

An advantage of a central filing system would be that it would be easier for out-of-state firms and persons to obtain the desired information. Central state filing also might make it easier for a person who is not in the county of the principal place of business of a particular firm to obtain the information contained in a fictitious name certificate. In

addition, cases may arise where the person does not know and cannot determine the county where the principal place of business is located. On the other hand, the letters indicate that considerable use is made in some counties of the information contained in the fictitious name register maintained by the county clerk. Since most inquiries are made by local persons or firms about other local firms, convenience would be served by retaining the files at the local level. Undoubtedly, the public would be afforded more complete protection if the statute required the filing of a fictitious name certificate in every county where the firm was doing business. However, this would substantially increase the cost and burden of complying with the statute.

Another approach would be to require a central filing in Sacramento in addition to the filing with the county clerk of the county where the principal place of business is located. This system is preferable to requiring filing in each county where the firm is doing business. It is a compromise position that would increase protection and make it easier for persons in counties other than the county of the principal place of business to obtain information without imposing too great an additional burden on the persons who would have to file the additional certificate.

The choice seems to be between (1) a central state filing combined with filing in the county where the principal place of business is located and (2) the present system of filing. The first alternative would afford increased protection to creditors and would increase the cost of compliance; the second alternative would provide the same protection as now exists and would not increase the cost of compliance.

4. Elimination of obsolete records. A bill attached to Exhibit X would have provided a procedure for purging the records of obsolete

fictitious name certificates. We suggest that such a procedure be included in the proposed legislation. If this recommendation is adopted, we suggest that the Alternative Tentative Recommendation be revised in part to read as set out in Exhibit XVII (green) attached.

5. The fictitious name statute as a means of obtaining exclusive right to use a fictitious name. Exhibit VIII suggests that "through filing and publication of a fictitious name an individual, or partnership protects business title." It is unclear what the writer meant by this comment. There do not appear to be any cases holding that the filing of a fictitious name certificate reserves the exclusive use of that name for the registrant. In fact, it has been specifically held in Tomsky v. Clark, 73 Cal. App. 412, 417-418, 238 Pac. 950, 952 (1925) that, in the situation where the copartnership certificate was filed to operate the business in the family name of another, the filing of the certificate gave the filer no exclusive right to the use of the name.

Business and Professions Code Section 14400 provides that "Any person' who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner." Such a trade name is treated as if it were personal property and its owner is entitled to protection in suits at law or equity, including the enjoining of an unlawful use of his trade name. Although some provision is made for registering and protecting specific types of names such as farm names, no provision is made for registering and obtaining the exclusive use of trade names generally. Whatever protection is to be obtained must be obtained by application of common law doctrines of protection of trade names and by application of the various theories of unfair competition. (See, Comment, Protection of

Tradenames in California, 29 SO. CAL. L. REV. 488 (1956).) At best it would appear that a showing that one has filed a fictitious name certificate as required might be used as evidence of first adoption and use. One case alluded to the certificate that was filed but did not seem to give any particular weight to this fact in reaching its decision. Lutz v. Western Iron & Metal Co., 190 Cal. 554, 557, 213 Pac. 962, 964 (1923).

Thus, it appears that the Fictitious Name Statute has at best a tenuous relationship to obtaining the exclusive use of a trade name. On the other hand, a few states have combined their fictitious name statute with provisions for registering and obtaining exclusive use of trade names. Although such a statute might be desirable, no recommendation should be made in this important area without an extensive research study on the problems presented. In addition, it seems to be outside the scope of our existing authority.

Respectfully submitted,

John L. Reeve
Junior Counsel

CALIFORNIA LAW REVISION COMMISSION

ROOM 30, CROTHERS HALL
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

The California Law Revision Commission is a state agency that was created to study areas of the law that are in need of revision and to submit recommendations to the Legislature.

One of the topics the Commission is studying is whether the fictitious name statute (Civil Code Sections 2466-2471) should be revised or repealed. This statute requires that a person transacting business in a fictitious name must file a certificate with the clerk of the county in which the principal place of business is located and must subsequently have the certificate published four times in a newspaper. The Commission is considering whether or not the fictitious name statute should be repealed. In addition to the legal fees in connection with the filing and publication of the fictitious name certificate, the cost of publication itself may impose a significant expense on a person transacting business in a fictitious name. This requirement is especially onerous because the existing law requires a new filing and the four publications each time there is a change in the membership of the firm transacting business in a fictitious name.

It would be helpful to the Commission if we could have your views on the following questions:

(1) Are you aware of any purpose served by the fictitious name statute? In this connection, it should be noted that the only sanction to compel compliance with the statute is that a person transacting business in a fictitious name may not maintain an action on a transaction had in the fictitious name until the fictitious name certificate has been filed and published. If the person commences such an action and the defendant objects to the failure to comply with the fictitious name statute, the person conducting business in the fictitious name may not file and publish the certificate after the action is commenced and still maintain his action.

(2) Does the requirement of publication serve any useful purpose? In other words, would it be sufficient if the information were merely required to be filed with the county clerk?

(3) Do you use the fictitious name statute to any extent in the operation of your business? Would you object to the repeal of this statute?

In order that any tentative conclusions the Commission reaches on this subject can be distributed for comment by interested persons as soon as possible, we would appreciate receiving your views on the questions set out above by March 18, if possible.

Very truly yours,

John H. DeMouly
Executive Secretary

Sent to:

Universal Credit Rating Bureau
Retailers Commercial Agency
Retail Stores Reporting Service
Mutual Credit Exchange
Metropolitan Reporting Service, Inc.
McCord Company
The Jewelers Board of Trade
Informative Research
Financial Reports, Inc.
Dun & Bradstreet, Inc.
Credit Reporting Co.
Credit Data Corporation
Credit Bureau Reports, Inc.
Credit Bureau of Santa Clara Valley
The Credit Bureau of San Francisco, Inc.
Credit Managers Association of Northern
& Central California
Central Reporting Bureau
California Material Dealers Association
Assets Research Division of
National Business Factors, Inc.

Memo 66-13

EXHIBIT II

THE CREDIT BUREAU OF SAN FRANCISCO, INC.

15 STOCKTON STREET

SAN FRANCISCO 8

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

Gentlemen:

This is in response to your letter of March 4 in connection with the "fictitious name" statute.

We believe that the best interests of the public would be served if there was an official record required at either the County or State level. This would specify that anyone transacting business under a fictitious name should record with the Secretary of State or County Clerk the fact, and thus the public could look beyond the name and discover the principals of any such business.

We do not feel that the publication requirement serves any special benefit.

From the forgoing you can conclude that our answer to your question designated No. 2 is affirmative, and our answer to No. 3 is that we would object to the repeal of the statute but would not oppose a revision.

Yours very truly,


Charles J. Benson
General Manager

CJB/mw
cc Mr. Robert C. Kopriva

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COUNTY OF SACRAMENTO

EXHIBIT III

MEMO 66-13

COUNTY CLERK, CLERK OF SUPERIOR COURT,
REGISTRAR OF VOTERS

WILLIAM N. DURLEY

ROOM 103, COUNTY COURT HOUSE
720 NINTH STREET
SACRAMENTO, CALIFORNIA 95814

March 14, 1966

Mr. John H. DeMouilly, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

In answer to your letter of March 11, 1966 regarding the use of the fictitious name register (Civil Code Section 2470) by persons visiting this office, we would estimate this register is used from thirty to fifty times each day by persons desiring a variety of information.

Most of our inquiries concern whether or not a particular fictitious name is now in use, usually by persons desiring to file on such a fictitious name. However, we also have many inquiries concerning the names and addresses of the owners of such business and other related information.

If we can be of further assistance in this matter, please do not hesitate to call on us.

Very truly yours,

W. N. DURLEY, COUNTY CLERK

By 
Deputy

WND:bjs

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CALIFORNIA LAW REVISION COMMISSION

March 11, 1966



ROOM 30, CROTHERS HALL
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

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JOHN R. McDONOUGH
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
GEORGE H. MURPHY
Ex Officio

Mr. Paul R. Teilh
County Clerk
County Court House
San Jose, California

REPLY: "Use in Santa Clara County varies
from rarely to occasionally."
Paul R. Teilh, County Clerk

Dear Mr. Teilh:

The California Law Revision Commission is a state agency that was created to study areas of the law that are in need of revision and to submit recommendations to the Legislature.

One of the topics the Commission is studying is whether the fictitious name statute (Civil Code Sections 2466-2471) should be revised or repealed. This statute requires that a person transacting business in a fictitious name must file a certificate with the clerk of the county in which the principal place of business is located and must subsequently have the certificate published four times in a newspaper. The Commission is considering whether or not the fictitious name statute should be repealed. In addition to the legal fees in connection with the filing and publication of the fictitious name certificate, the cost of publication itself may impose a significant expense on a person transacting business in a fictitious name. This requirement is especially onerous because the existing law requires a new filing and the four publications each time there is a change in the membership of the firm transacting business in a fictitious name.

It would be helpful to the Commission if you could give us some idea of the extent to which the fictitious name register (Civil Code Section 2470) is used by persons who visit your office to obtain information contained in the register. Is the register used only rarely, occasionally, frequently, or to a great extent?

In order that any tentative conclusions the Commission reaches on this subject can be distributed for comment by interested persons as soon as possible, we would appreciate receiving your estimate of the use now being made of the fictitious name register by March 18 if possible.

Very truly yours,

John H. DeMouilly
John H. DeMouilly
Executive Secretary

Paul R. Teilh



Memo 66-13

EXHIBIT V

Dun & Bradstreet, Inc.

PUBLICATIONS AND SERVICES FOR MANAGEMENT

LOUIS M. MARZLUFT
REGIONAL REPORTING MANAGER
P. O. BOX 232 TERMINAL ANNEX
LOS ANGELES, CAL. 90054
TELEPHONE: AREA CODE 213 400-1858

March 15, 1966

Mr. John H. De Moully,
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

RE: California Law Revision Commission
Study On
Fictitious Name Statute

Dear Mr. De Moully:

This letter is in response to your letter of March 4, 1966, which invited certain views in connection with the possible revision or repeal of the "Fictitious Name Statute".

We feel that the interests of the members of the business community would be best served by a statute of this nature. A strong fictitious name law is an aid to the free flow of goods and services and the continued economic health of the states even more than sound sureties between businesses. Service Organizations, wholesalers and manufacturers when they receive orders from a concern doing business under an assumed name expect and need to know the identity of those persons conducting such enterprises, to effectively reach a sound business decision. Access to a central source of information within the State on all such names can best serve the mutual interests of both of the parties to such a transaction. A central location for recording such data would prevent less technical difficulties in recording and obtaining such data.

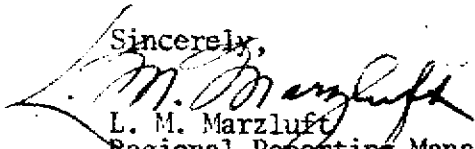
The publication requirement is less apparent today than heretofore and as your letter suggests, this requirement often presents an undue financial burden upon persons transacting business under an assumed name. Public filing obviates the necessity of publication.

A statute of this nature is less effective when there is frequent non-compliance. As presently constituted, the non-compliance may be effectively rectified even after bringing a legal action. Other states have effectively reduced this possibility by treating violations of such a statute as a misdemeanor. Prosecutions under such statutes are reportedly practically non-existent.

We recommend a revision of the Statute and feel that if such a revision is enacted within the guidelines suggested above, it would be in the best public interest.

We appreciate your inviting our views on this significant legislative matter.

Sincerely,


L. M. Marzluft
Regional Reporting Manager

LMM:kb

CITY AND COUNTY OF SAN FRANCISCO

COUNTY CLERK
CLERK OF THE SUPERIOR COURT

March 15, 1966

Mr. John H. DeMouilly,
Executive Secretary,
Clif. Law Revision Comm.
30 Crothers Hall,
Stanford University, Calif.

Re: Fictitious Names
Statute.

Dear Mr DeMouilly:

This refers to your letter of inquiry of March 11th, 1966 regarding the fictitious name statute.

We will answer your question immediately by saying that this register is used to a great extent. In fact, next to the Civil and Probate indexes, it is by all odds, the most frequently used index in the office. The general public, as distinguished from attorneys, make especially heavy use of this index.

In San Francisco County, all business plaintiffs in the Small Claims Court must furnish a certificate attesting to the fact that their firm is registered either in the Fictitious Names register or the Corporations Register. If they cannot do so, their filing is refused. The number of these small claims actions is constantly increasing.

We feel strongly that from a public service viewpoint, the fictitious name statute should be left "as is".

Very truly yours,

Martin Mongan
MARTIN MONGAN
County Clerk-Recorder.

PORTLAND

Memo 66613

EXHIBIT VII
SEATTLE

LOS ANGELES

MCCORDS DAILY NOTIFICATION SHEET

Published by McCord Company • Established 1910

1581 MISSION STREET • SAN FRANCISCO 3, CALIFORNIA • TELEPHONE MARKET 1-4674

March 15, 1966.

Mr. John H. DeMouly, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouly:

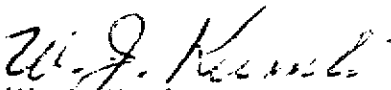
In answer to question one of your letter regarding the fictitious name statute; I know without a doubt that it aids business in general, from a practical point of view. Any credit grantor carrying the account under the DBA must know the names of the owners if he is to be prudent in the extension of credit. Additionally, if the account goes sour he must have the names and addresses of the owners in order to best effect collection of any monies due. Another purpose is to prevent the confusion that would be caused by several different people using the same fictitious trade name.

The publication of the filing serves a very useful purpose for the reasons stated above and from the point of view of the various trade publications and credit reporting agencies. They are frequently asked; "Who is the owner of the Corner Grocery at Vallejo?", and need to be in a position to adequately answer such a question. Also, the publication acts as a "check" for reporting agencies for verification of a report it may have received from a County Clerk's office or a correspondent. The publication also contains all of the information, such as the residence addresses of owners; which is important for verification purposes.

Additionally, as a business man, if we were a corporation, partnership or individual, we want the advantages of the fictitious name statute for the purpose of filing any fictitious trade names we would desire to use and I would strongly object to the repeal of this statute.

Sincerely,

MC CORD COMPANY


W. J. Kumli
President
WJK/ofc

99 South Van Ness Avenue • San Francisco 3, California
MARKet 1-5400



Office of the Editor

March 15, 1966

Dear Mr. DeMouilly:

Within recent weeks I have been informed by several persons -- editors of legal newspapers, county clerks and credit company executives -- that the California Law Revision Commission has under consideration a plan to amend, if not repeal Civil Code Sections 2466-2471 which require filing and publishing of notices of doing business under a fictitious name.

Without exception, my informants are opposed to amendment or repeal, and I hasten to join them.

Several years ago a similar proposal was presented. Objections came from many sources, particularly banks, credit houses, collection bureaus and newspapers. One of the strongest objectors was Bank of America, which, so I am told, required public notice, through fictitious name procedures, when business loans are under consideration.

Yesterday I conferred with our County Clerk Martin Mongan, and I learned that not alone is he against disturbance of statutory provisions as extant, but that his objection is general throughout the County Clerks' Association of California.

Mr. Mongan informs me that at least five requests are received by his department each day for information relative to companies operating under fictitious names.

Credit companies would find it extremely costly, if not impossible to obtain proper and sufficient information for their clients if the Statute were to be amended or repealed.

The cost of filing and publishing a fictitious name notice is minimal, a properly deductible and pro-rated expense, therefore not a financial burden to the large or small businessman.

Mr. DeMouilly - 2

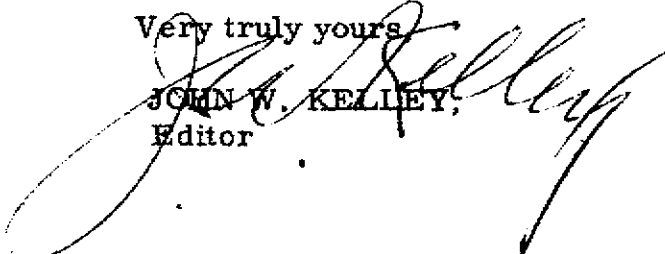
And -- I believe this is most important, too -- through filing and publication of a fictitious name an individual, or partnership protects business title.

Mr. DeMouilly, I am certain your Commission is concerned with equities and advantages, otherwise you would not seek an expression of opinion as you are now doing.

Therefore, may I suggest that a copy of the letter you sent to County Clerk Mongan and William Kumli, President of McCord's Dily Notification Sheet, be forwarded to the executive secretary of the Credit Managers' Association of Northern and Central California. His address is 989 Market Street, San Francisco, California.

I am certain he will be a source of sound and factual reasons why statutory provisions of Civil Code Sections 2466 - 2471 are beneficial in business operations and should be retained.

Very truly yours,


JOHN W. KELLEY,
Editor

JWK: sn
1 enc.

STATE OF CALIFORNIA—BUSINESS AND COMMERCE AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF INVESTMENT

DIVISION OF CORPORATIONS

JERALD S. SCHUTZBANK
CommissionerSACRAMENTO 95814—PRINCIPAL OFFICE
1020 N STREETSAN FRANCISCO 94103
1460 MISSION STREETLOS ANGELES 90012
107 SOUTH BROADWAYSAN DIEGO 92101
5068 STATE OFFICE BLDG.Los Angeles, California
March 15, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

This is in reply to your letter of March 2, 1966, addressed to Commissioner Rickershauser, my predecessor, and to your letter of the same date addressed to Mr. Hans A. Mattes, the Assistant Commissioner in charge of my San Francisco Office.

The four questions posed in each of the foregoing letters are the same, and for that reason, the following is intended to be in reply to both of the letters mentioned above:

1. We are aware of the information set forth in the first of your questions.
2. It would appear to be highly desirable, in the event that the fictitious name statute were repealed, for the Check Sellers and Cashers Law to be amended, so as to require that information similar to that now required pursuant to the Civil Code be furnished directly to our agency, in order that a roster of check sellers and cashers operating under fictitious names could be maintained. In this regard, you may be interested in Sections 22405 and 24405 of the Financial Code, which provides that no licensee under the Personal Property Brokers Law or Small Loan Law may transact any business under any name other than that which is named in the license granted to such licensee.
3. It does not appear to me that the requirement of publication serves any useful purpose. It would appear entirely sufficient if the information required were to be instead filed with the County Clerk.

Mr. John H. DeMouilly

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March 15, 1966

4. We are in the process of attempting to determine whether our investigators make extensive use of the fictitious name statute in its present form. It would appear that from time to time, any investigative unit would find it necessary to use the fictitious name statute in order to determine the real name of an enterprise being operated under a fictitious name. Such information is, of course, essential in many situations where it is necessary to determine the true parties in interest who are operating a given enterprise. It would appear that a revised statute which provided for the filing of information, as opposed to the publication of such information, would be entirely as satisfactory for such investigative purposes. It must also be borne in mind, as alluded to in your letter, that the present statute only affords information to our investigators when by some chance the fictitious name has already been published. As you indicate in your letter, such publication need be made only in the event that litigation is undertaken. As a personal observation, it would seem that if any type of fictitious name statute is desirable, it should be one which requires the filing of the fictitious name information prior to the commencement of the business under the fictitious name, so that such information will be available to all persons who may have use for it, without the necessity of waiting until the fictitious name has been filed in connection with litigation, since the latter event may never occur.

If we may provide any additional information in connection with this matter, please do not hesitate to call upon us.

Very truly yours,


JERALD S. SCHUTZBANK
Commissioner of Corporations

JSS:fa

WILLIAM G. SHARP
COUNTY CLERK

COUNTY OF LOS ANGELES
COUNTY CLERK AND CLERK OF THE SUPERIOR COURT

E. G. HATCHER
CHIEF DEPUTY

111 NORTH HILL STREET
MAILING ADDRESS: P. O. BOX 151
LOS ANGELES, CALIFORNIA 90053
MADISON 5-3414

March 17, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

There is considerable use of the fictitious name index referred to in your letter of March 11, 1966. In 1965, we had a total of 77,417 index searches, including both fictitious and corporate names. These included 42,974 telephone searches, 32,116 counter searches, and 2,327 responses by mail for which a fee was charged. The telephone lines to the fictitious indexes have been some of the most crowded in the Courthouse causing us to arbitrarily limit the number of searches per call and the amount of information we will give by telephone. (We limit information to that contained on the index.) There was also considerable use of the files at the counter where additional information was requested.

In 1965, we filed approximately 21,000 certificates of business. There are approximately 345,000 separate business names on file. The number of firms would exceed this since similar names are given existing file numbers.

This information affords the public the means of determining the names of owners against whom it has a claim. It is used extensively by various credit service bureaus, Dunn and Bradstreet, collection agencies, Post Office, U.S. Treasury Department, and various state and local agencies.

The County Clerk's Association of California proposed an amendment to several code sections relating to this subject which was incorporated in A.B. 1043 introduced at the 1965 Regular Session, copy of which bill is enclosed. This amendment was prompted by the fact that the County Clerk's records contained thousands of names of firms no longer in existence which is confusing to the public particularly in determining whether a proposed name should be adopted for a new business. The amendment would have updated the file and purged it of many firms which had ceased business. The bill had favorable action from both the original Assembly and Senate committees to whom it was referred but

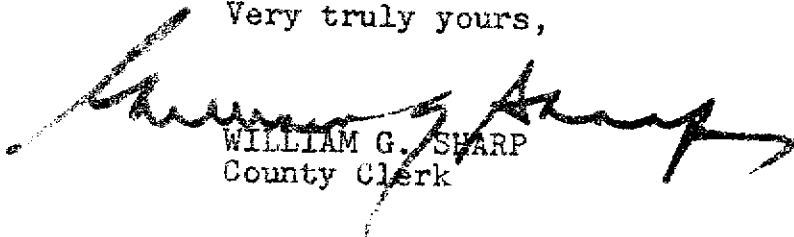
Mr. John H. DeMouilly
March 17, 1966

Page 2

finally got sidetracked when combined with several other bills relating to fees.

I hope this information will be of assistance to your commission. Please advise if we can be of any further help to you.

Very truly yours,



WILLIAM G. SHARP
County Clerk

WGS:gq

Enclosure

Introduced by Assemblyman Willson

February 9, 1966

REFERRED TO COMMITTEE ON PUBLIC UTILITIES AND CORPORATIONS

An act to amend Section 2470 and to add Sections 2469.2 and 2469.3 to the Civil Code and to amend Section 26848 of the Government Code, relating to certificates of fictitious names.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2470 of the Civil Code is amended to
2 read:

3 2470. Every county clerk must keep a register of the names
4 of firms and persons mentioned in the certificates filed with
5 him pursuant to this article, entering in alphabetical order the
6 name of every such person who does business under a fictitious
7 name, and the fictitious name, and the name of every such
8 partnership, and of each partner therein.

9 Upon the abandonment of the use of a fictitious name, or
10 upon the expiration of the certificate of fictitious name, the
11 clerk shall enter the fact of abandonment or expiration in the
12 register.

13 SEC. 2. Section 2469.2 is added to said code, to read:

14 2469.2. Every certificate of fictitious name filed under the
15 authority of this chapter shall expire and be of no further
16 force and effect at the end of five years following the first day
17 of January next after the filing of a certificate of fictitious
18 name with the county clerk in accordance with Section 2466
19 unless during the month of December immediately preceding
20 said date of expiration a renewal certificate containing all in-
21 formation required in the original certificate and subscribed

LEGISLATIVE COUNSEL'S DIGEST

AB 1043, as introduced, Willson (P.U. & C.), Certificate of fictitious names.

Amends Sec. 2470 and adds Secs. 2469.2 and 2469.3, Civ.C. Amends Sec. 26848, Gov.C.

Provides that certificates of fictitious names filed with county clerk shall expire within certain period unless renewal certificate is filed. Authorizes county clerk to destroy certificates which have expired. Establishes \$2 fee for filing and indexing renewal certificate of fictitious name.

1 and acknowledged as required by that section is filed with the
2 county clerk with whom said original is on file. No such re-
3 newal certificate need be published.

4 Every certificate of fictitious name heretofore filed with the
5 county clerk pursuant to Section 2466 shall expire and be of
6 no further force and effect on and after January 1, 1971 unless
7 at any time on or after January 1, 1970, but not later than
8 December 31, 1970, a renewal certificate in accordance with
9 this section is filed with said county clerk.

10 SEC. 3. Section 2469.3 is added to said code, to read:

11 2469.3. Upon the filing of a certificate of abandonment
12 pursuant to Section 2469.1 or upon the expiration of a certifi-
13 cate of fictitious name pursuant to Section 2469.2 and follow-
14 ing the making of the entry required by Section 2470 the
15 county clerk may destroy the certificate of fictitious name the
16 use of which was so abandoned or which has expired.

17 SEC. 4. Section 26848 of the Government Code is amended
18 to read:

19 26848. The fee for filing and indexing a certificate of ficti-
20 tious name, including affidavit of publication, and the fee for
21 filing and indexing a renewal certificate of fictitious name, is
22 two dollars (\$2).



ASSETS RESEARCH

A DIVISION OF NATIONAL BUSINESS FACTORS

March 18, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

ATTENTION: John H. DeMouilly

Dear Sir:

In answer to your letter of March 4, 1966. We are not aware of any purpose served by the fictitious name statute. Also, the requirement of publication does serve a useful purpose and would be sufficient if the information were merely required to be filed with county clerk.

We do not use the fictitious name statute and would not object to the repeal of this statute.

Very truly yours,

C. Shaber

CS/kk

Memo 66-13

EXHIBIT XII

Credit Bureau of Santa Clara Valley
425 Almaden
San Jose, California

"We have no objection to a revision and in fact would favor
this change as outlined."

Credit Bureau of Santa Clara Valley
K. P. Frasin, Vice Pres.

Memo 66-13

EXHIBIT XIII

Cable Address — BANKAMERICA

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

SAN FRANCISCO HEADQUARTERS

SAN FRANCISCO, CALIFORNIA 94120

KENNETH M. JOHNSON
VICE PRESIDENT AND COUNSEL

March 18, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Fictitious name statute (Civil Code
Sections 2466-2471)

Dear Mr. DeMouilly:

This is in reply to your letter of March 16 relating to the possible revision or repeal of the California Fictitious Name Statute.

Insofar as the bank is concerned, it would have no objection to the complete repeal of this legislation. I cannot see that it serves any real purpose insofar as we are concerned.

On the other hand, I think that the statute or something similar serves some purpose insofar as the general public is concerned. For example, if I am hit by a truck bearing the name XYZ Supermarket, it would be helpful to me if I could find out quickly the names of the persons who in fact constitute XYZ Supermarket. A similar situation is where the ABC Laundry ruins my wife's evening gown.

My specific suggestion would be to retain the section in modified form but eliminate the requirement for publication.

Also I am not very fond of the only sanction imposed i.e. the inability to file suit in a fictitious name. As you point out, this can be eliminated at the time legal action is

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Mr. John H. DeMouilly

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desired. Possibly, the statute might provide for a dollar penalty where a fictitious name is used, and there is no filing.

In practice, under the present statute it has been difficult at times to determine what is a fictitious name. i.e. For example, Smith & Sons.

Incidentally, I find your project rather interesting and would appreciate your keeping me informed as to developments.

Sincerely,



Kenneth M. Johnson
Vice President and
Counsel

KMJ: sb

EXHIBIT XIV

PUBLICATION REQUIREMENTS IN THE FICTITIOUS NAME STATUTES OF OTHER STATES

The vast majority of the jurisdictions in the United States do not require publication of the fictitious name certificates as a part of their statutes. Among the 37 jurisdictions¹ which were found to have fictitious name statutes, only 7 jurisdictions,² other than California, have any publication requirement. The publication requirements of these jurisdictions are discussed below.

³ Florida requires that before the fictitious name certificate can be filed the person or persons desiring to engage in the business under a fictitious name must advertise his intention to register his certificate at least once a week for four consecutive weeks in some newspaper in the county where the registration is to be made. No registration will be accepted until proof of publication as required is made. A similar⁴ provision in Montana requires publication of the certificate once a week for four successive weeks in a newspaper of the county of the firm's principal place of business, or if there is no paper in that county, then in a newspaper published in an adjoining county.

⁵ Georgia requires that the notice of the application to engage in business in a fictitious name must be published in the paper in which the sheriff's advertisements are printed once a week for two weeks.

⁶ Minnesota requires that the fictitious name certificate be "published in a qualified newspaper in the county where the certificate is filed for two successive days in a daily newspaper or for two successive weeks in a weekly newspaper."

Nebraska¹ requires that a copy of the certificate be filed at least once in a newspaper of general circulation in the city or village where the business is to be located. If there is no newspaper in such town or village, then the publication is to be made in a newspaper in the county where the town or village is located. North Dakota⁸ has an identical provision.

Pennsylvania⁹ provides that before the fictitious name certificate may be filed, the applicant ~~must~~ publish a notice of his intention to file such a certificate once in a newspaper of general circulation published within the political subdivision of the county in which the principal place of business is located and also once in a legal newspaper if any is published within the county.

Finally, it should be noted that in each of these instances the information which is published is practically identical to the information contained in the California fictitious name certificate regardless of the name applied to designate the notice which is being filed.

EXHIBIT XIV - FOOTNOTES

1. ALA. CODE, Tit. 14, § 230; ARIZ. REV. STAT. ANN. §§ 29-101 to 29-103; ARK. STAT. ANN. §§ 70-401 to 70-405; CAL. CIVIL CODE §§ 2466-2471; COLO. REV. STAT. ANN. §§ 141-2-1 to 141-2-2; CONN. GEN. STAT. ANN. § 35-1; DEL. CODE ANN., Tit. 6, §§ 3101-3107; FLA. STAT. ANN. § 865.09; GA. CODE ANN. §§ 106-301 to 106-304; IDAHO CODE ANN. §§ 53-501 to 53-507; ILL. ANN. STAT., Ch. 96, §§ 4-8 (SMITH-HURD 1958); IND. ANN. STAT. §§ 50-201 to 50-203; IOWA CODE ANN. §§ 547.1-547.5; KY. REV. STAT. § 365.010; LA. REV. STAT. §§ 51:281-51:284; ME. REV. STAT. ANN., Tit. 31, §§ 1-5; MASS. GEN. LAWS ANN., Ch. 110, §§ 5-6; MINN. STAT. ANN. §§ 333.01-333.06 (Supp. 1965); MO. ANN. STAT. §§ 417.200-417.230; MONT. REV. CODE ANN. §§ 63-601 to 63-605; NEB. REV. STAT. §§ 87-201 to 87-207; NEV. REV. STAT. §§ 602.010-602.090; N.H. REV. STAT. ANN. §§ 349.1-349.11; N.J. REV. STAT. §§ 56:1-1 to 56:1-7; N.Y. PEN. CODE § 440; N.C. GEN. STAT. §§ 66-68 to 66-71 (Supp. 1965); N.D. CENT. CODE §§ 45-11-01 to 45-11-08; ORE. REV. STAT. §§ 648.005-648.990; PA. STAT. ANN., Tit. 54, §§ 28.1-28.13; R.I. GEN. LAWS ANN. §§ 6-1-1 to 6-1-4; S.C. CODE ANN. § 48-1 to 48-4; S.D. CODE §§ 49.0801-49.9901; TEX. REV. CIV. STAT. ANN., Arts. 5924-5927; TEX. PEN. CODE ANN., Arts. 1067-1070; UTAH CODE ANN. §§ 42-2-5 to 42-2-10; VT. STAT. ANN., Tit. 11, §§ 1621-1634; VA. CODE ANN. §§ 50-74 to 50-78, 59-169 to 59-176; WASH. REV. CODE ANN. §§ 19.80.010-19.80.040; W. VA. CODE ANN. §§ 4655-4658.
2. FLA. STAT. ANN. § 865.09(3); GA. CODE ANN. § 106-301; MINN. STAT. ANN. § 333.01; MONT. REV. CODE ANN. 63-601; NEB. REV. STAT. § 87-205; N.D. CENT. CODE § 45-11-01; PA. STAT. ANN., Tit. 54, § 28.3.

3. FLA. STAT. ANN. § 865.09(3).
4. MONT. REV. CODE ANN. § 63-601.
5. GA. CODE ANN. § 106-301.
6. MINN. STAT. ANN. § 333.01.
7. NEB. REV. STAT. § 87-205.
8. N.D. CENT. CODE § 45-11-01.
9. PA. STAT. ANN., Tit. 54, § 28.3.

EXHIBIT XV

FICTITIOUS NAME SANCTIONS IN OTHER STATES

The vast majority of jurisdictions in the United States provide a criminal sanction for noncompliance with their fictitious name statute. ¹ Twenty jurisdictions provide a criminal penalty as the sole or primary sanction under their statute. The penalty takes the form of a fine, a period of imprisonment, or both. An example of this type of statute is Ill. Stat. Ann., Ch. 96, § 8, which provides:

Any person or persons carrying on, conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$25.00 nor more than \$100.00, or imprisoned in the County Jail for not less than ten days nor more than thirty days, or both so fined and imprisoned, and each day any person or persons so conducts business in violation of this Act shall be deemed a separate offense.

² Nine jurisdictions combine a criminal penalty with a prohibition against maintaining an action until such time as the person wishing to bring the action has filed the necessary certificate. Failure to comply with the statute generally is treated as a matter to be pleaded in abatement and it is deemed waived if it is not raised in an appropriate manner. ³ Florida not only provides that a person who has failed to comply with the fictitious name statute cannot bring an action but also provides that he may not defend an action. However, the annotations do not make clear the manner in which this prohibition operates.

⁴ Six jurisdictions have civil sanctions which are identical to the sanction that is provided for in the California statute. These states, however, are definitely in a minority position.

5

Georgia provides that the only penalty for noncompliance with its statute is that the person who has failed to file a certificate will be cast with court costs in any action which he brings. In addition to its other sanctions, Minnesota⁶ provides that when an action is brought by a person who has not complied with the fictitious name statute, the defendant in the action may add or subtract \$5 costs, depending on whether he wins or loses in the action.

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New Hampshire permits its Secretary of State, with whom the fictitious name certificate is to be filed, to demand compliance of anyone whom he believes has not complied with the statute. If the person who is in violation of the statute does not then comply, the Secretary of State reports the matter to the attorney general, who may institute a criminal action against the person. Florida⁸ permits any person, who is aggrieved or is believed to be aggrieved by the failure of another to file a certificate as required, to file an information to enforce the state's criminal sanction against the person who has not complied.

A few states permit some person or official to collect a forfeiture from a person who has failed to comply with their statute. North Carolina provides in N.C. Gen. Stat. § 66-71 that:

Any person, partner or corporation failing to file the certificate as required by this article--

* * * * *

(2) Shall be liable in the amount of fifty dollars (\$50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

This provision is similar to that proposed in the Alternative Tentative Recommendation. Delaware⁹ provides that an unincorporated association of

persons who does not file a certificate as required "shall forfeit and pay \$500 to any person who sues for the same." The section does not apply to partnerships and there is no requirement that a demand of compliance be made prior to suing to collect the forfeiture. Vermont 10 permits its Commissioner of Taxes to collect a forfeiture of ten dollars in a tort action against any person who has failed to comply with its fictitious name statute.

EXHIBIT XV - FOOTNOTES

1. ALA. CODE, Tit. 14, § 230; ARK. STAT. ANN. § 70-405; CONN. GEN. STAT. REV. § 35-1; DEL. CODE ANN., Tit. 6, § 3106; ILL. ANN. STAT., Ch. 96, § 8 (SMITH-HURD 1958); IND. ANN. STAT. § 50-203; IOWA CODE § 547.4-547.5; LA. REV. STAT. § 51:284; ME. REV. STAT. ANN., Tit. 31, § 5; MASS. GEN. LAWS ANN., Ch. 110, § 5; MO. REV. STAT. § 417.230; NEB. REV. STAT. § 87-206; N.H. REV. STAT. ANN. § 349.9; N.J. REV. STAT. § 56:1-4; N.Y. PEN. CODE § 440; N.C. GEN. STAT. § 66-71; R.I. GEN. LAWS ANN. § 6-1-4; S.C. CODE ANN. § 48-4; TEX. PEN. CODE ANN. § 1070; W. VA. CODE ANN. § 4658.
2. COLO. REV. STAT. ANN. § 141-2-2; FLA. STAT. § 865.09(5); IDAHO CODE ANN. §§ 53-506 to 53-507; NEV. REV. STAT. §§ 602.070, 602.090; ORE. REV. STAT. § 648.090, 648.990; PA. STAT. ANN., Tit. 54, §§ 28.4, 28.12-28.13; S.D. CODE §§ 49.0802, 49.9901; UTAH CODE ANN. § 42-2-10; VA. CODE ANN. §§ 50-77 to 50-78, 59-175 to 59-176.
3. FLA. STAT. § 865.09(5).
4. ARIZ. REV. STAT. ANN. § 29-102(A); MINN. STAT. § 333.06; MONT. REV. CODE ANN. § 63-602; N.D. CENT. CODE § 45-11-04; VT. STAT. ANN., Tit. 11, § 1634; WASH. REV. CODE § 19.80.040.
5. GA. CODE ANN. § 106-303.
6. MINN. STAT. § 333.06.
7. N.H. REV. STAT. ANN. § 349:7.
8. FLA. STAT. § 865.09(5).
9. DEL. CODE ANN., Tit. 6, § 3104.
10. VT. STAT. ANN., Tit. 11, § 1629.

EXHIBIT XVI

FILING REQUIREMENTS IN THE FICTITIOUS NAME STATUTES OF OTHER STATES

The predominant rule adopted in other states is to require ~~that~~ a fictitious name certificate be filed in each county where business is to be transacted.¹

A number of other states² have adopted a rule similar to the California rule and require that the certificate be filed in the county or town of the firm's principal place of business.

Another group of states³ require a central state filing with the Secretary of State or Corporations Commissioner.⁴ Pennsylvania requires filing both with the Secretary of State and with the prothonotary in the county of the principal place of business.⁵ New Jersey requires the filing of a certificate with the county clerk in the county where such business is transacted and a duplicate thereof with the Secretary of State.

Although in a few other states filing would be either in the county or town of the principal place of business or in each county or town where business is to be transacted, it is not entirely clear what interpretation is to be given to their filing requirements.⁶ Probably the statutes would be interpreted to mean that the filing is to be made in the county or town of the principal place of business.

⁷ Oregon has a unique statute which requires filing with the Corporations Commissioner who then sends a copy of the certificate to the county clerk of each county in which the registrant has indicated an intent to do business.

EXHIBIT XVI - FOOTNOTES

1. ALA. CODE, Tit. 14, § 230; ARK. STAT. ANN. § 70-401; DEL. CODE ANN., Tit. 6, § 3101; IDAHO CODE ANN. § 53-501; IND. ANN. STAT. § 50-201; KY. REV. STAT. § 365.010(1); LA. REV. STAT. § 51:281; MINN. STAT. § 333.01; NEV. REV. STAT. § 60A.010; N.Y. PEN. LAW § 440; N.C. GEN. STAT. § 66-68; S.D. CODE § 49.0801; TEX. REV. CIV. STAT. § 5924; WASH. REV. CODE § 19.08.010; W. VA. CODE ANN. § 4655. See also MASS. GEN. LAWS ANN., Ch. 110, § 5 (every city or town where an office of any such person or partnership may be situated).
2. FLA. STAT. § 865.09(3); GA. CODE ANN. § 106-301; MONT. REV. CODE ANN. § 63-601; N.D. CENT. CODE § 45-11-01; S.C. CODE ANN. § 48-1; VT. STAT. ANN., Tit. 11, § 1621 (town wherein principal place of business is located).
3. MO. REV. STAT. § 417.200; NEB. REV. STAT. § 87-202; N.H. REV. STAT. ANN. § 349:1; UTAH CODE ANN. § 42-2-5. See also VT. STAT. ANN., Tit. 11, § 1621 (Commissioner of Taxes in addition to every city or town where an office is situated).
4. PA. STAT. ANN., Tit. 54, § 28.1.
5. N.J. REV. STAT. § 56:1-1.
6. ARIZ. REV. STAT. ANN. § 29-102 ("county recorder of the county in which the place of business is located"); COLO. REV. STAT. ANN. § 141-2-1 ("clerk and recorder of the county of the residence of and in which such business or trade is carried on"); CONN. GEN. STAT. REV. § 35-1 ("office of the town clerk in the town in which such business is or is to be conducted or transacted"); ILL. REV. STAT., Ch. 96, § 4 ("office of the county clerk of the county in which such person or persons conduct or transact or intend to conduct or transact such business"); IOWA CODE § 547.1 ("county recorder of the county in

which the business is to be conducted"); ME. REV. STAT. ANN., Tit. 31, § 1 ("office of the clerk of the city or town in which the same is to be carried on"); R.I. GEN. LAWS ANN. § 6-1-1 ("office of the town or city clerk in the town or city in which such person or persons conduct or transact, or intend to conduct or transact, such business"); VA. CODE ANN. §§ 50-75, 59-169 ("office of the clerk of the court in which deeds are recorded in the county or corporation wherein the business is to be conducted").

7. ORE. REV. STAT. §§ 648.010, 648.045.

EXHIBIT XVII

In order to make the Fictitious Name Statute more effective and, at the same time, reduce the expense of compliance, the Commission makes the following recommendations:

1. The Fictitious Name Statute should be amended to include a provision whereby any interested person could compel a person transacting business in a fictitious name to comply with the Fictitious Name Statute. This can be accomplished by permitting any person to serve a demand that a person or partner transacting business in a fictitious name comply with the Fictitious Name Statute. Failure to file the fictitious name certificate with the county clerk within 10 days after service of the demand should result in a forfeiture of fifty dollars and all damages which the person serving the demand may sustain by reason of the failure to comply with the statute, which forfeiture and damages should be recoverable in a civil action. This sanction is based on Code of Civil Procedure Section 1992 which provides a somewhat similar sanction when a witness disobeys a subpoena.

2. The publication requirement of the Fictitious Name Statute should be eliminated. Of 37 states having fictitious name statutes, only 7 (including California) require publication. Publication is burdensome and expensive, especially for large partnerships and those unincorporated associations which are treated as partnerships for the purpose of determining liability. This is particularly true with respect to the requirement that a new certificate be published once a week for four successive weeks on each change in the memberships of the organization. Moreover, where the certificate was not filed and published, a large partnership with a

fluctuating membership apparently would be required, as a condition to maintaining an action, to file and publish a series of certificates reflecting each change in membership during the period covered by the transaction upon which the action is based. Since the fictitious name certificate must be filed with the county clerk and maintained by him in a fictitious name register, no purpose is served by the publication requirement that can justify the expense of publication.

3. The Fictitious Name Statute should be revised to provide a procedure that will permit the county clerks to destroy obsolete certificates relating to firms that have ceased business. The Commission is advised that the offices of the county clerks contain thousands of certificates for firms no longer in existence. It is a waste of public funds to maintain these obsolete records. Moreover, it is confusing to the public, particularly in determining whether a proposed name should be adopted for a new business.

Specifically, the Commission recommends that a fictitious name certificate expire at the end of five years following the first day of January next after the filing of a certificate of fictitious name with the county clerk unless a renewal certificate is filed with the county clerk prior to the date of expiration. This recommendation is based on Assembly Bill No. 1043 of the 1965 Regular Session. This bill was proposed by the County Clerk's Association of California.