

#44

7/9/68

Commissioner primarily responsible: Wolford

Memorandum 68-64

Subject: Study 44 - Fictitious Business Name Statute

Attached to this memorandum is a staff study, prepared by a former staff member, concerning the California fictitious business name statute. The study is reprinted from the Hastings Law Journal and is referred to hereinafter as "Study." You should read the Study prior to the meeting so that you will have the background information needed to make informed policy decisions at the meeting.

Background

For a number of years prior to October 1966, the Commission was engaged in a study of the fictitious business name statute. The Commission prepared and distributed for comment a tentative recommendation that included a recommendation that the publication requirement be eliminated. After the comments were received from various persons on the tentative recommendation, the Commission had a meeting with representatives of the newspaper industry and representatives of the county clerks and determined to discontinue work on the topic until a new, comprehensive research study could be prepared by the staff. The study was to include a consideration of the statutory provisions of other states, especially those concerned with publication.

The study was prepared and has been printed in the Hastings Law Journal and is now available in convenient reprinted form. This topic was included on our January and February 1968 agendas. However, at the March 1968 meeting, in response to a request from the newspaper industry, we deferred further consideration of the topic until our July 1968

meeting so the newspaper industry would have further time to study the research study and provide us with their analysis of it and their suggestions for alternative solutions to the problems identified in the study. This action was taken with the realization that the resulting delay would make it impossible to submit a recommendation on this subject to the 1969 Legislature. We requested that any comments the newspaper industry might have be in our hands by June 15, 1968, so that they could be reproduced and reviewed by the Commissioners prior to the July 1968 meeting. We have deferred preparing this memorandum until the last possible moment in order to pick up any late comments. Attached to the memorandum are the two comments we received from the newspaper industry, a brief report from the association of county clerks, and one additional comment from a lawyer who wrote us for a copy of the research study after he had been contacted by a representative of the newspaper industry who indicated the research study was available.

Basic Policy Question for Commission Decision

The California fictitious business name statute (Civil Code Sections 2466-2471) requires any individual, partnership, or corporation doing business under a fictitious name or a name that does not disclose the names of all the persons interested in the business to file a certificate with the county clerk of the county in which the principal place of business is located. The certificate must be published four times in a newspaper of general circulation in that county. A new filing and publication is required upon any change in the owners of the business. An action on any transaction had in the fictitious name may not be maintained unless the business is in compliance with the statute.

If the objection of noncompliance is not made, it is waived. If the objection is made, the action will be abated until compliance with the statute is had.

The major defects in existing law are the publication requirement (which serves no useful purpose in its present form), the lack of a central filing system, and the lack of an effective sanction for failure to comply with the statute. The Commission has previously considered this topic and prepared and distributed a tentative recommendation that would have eliminated the publication requirement. A great number of California businessmen advised the Commission that the publication requirement no longer serves a useful purpose. A similar view was taken by various public officials in California whose agencies frequently use the fictitious name information for purposes of investigation. See the letters attached as Exhibit I to Memorandum 68-2 (sent 12/11/67). Nevertheless, the newspaper industry strenuously opposed the Commission's tentative recommendation. Hence, the study suggests a modified form of publication that would substantially reduce the expense of publication and would provide a form of publication that would be useful. See Study at 1384-1389. The savings that would be realized from the publication system recommended in the study would finance the cost of a central filing system.

Many businesses that are required to comply with the fictitious business name statute already file other information with the Secretary of State. This information includes data relating to domestic and foreign corporations, foreign partnerships, unincorporated associations, and financing statements. Central filing would permit a person to obtain information at a minimum of expense where he is not located in the county of the principal office of the firm doing business in a fictitious name or does not know the county in which the principal office of that firm is located. Using data processing equipment already located in the Office of the Secretary of State, it would be possible to obtain quick and accurate searches of fictitious business name information. These searches are not now economically feasible. In addition, the use of a central filing system would permit application of the fictitious business name statute to foreign partnerships that do not maintain a place of business in California. At the same time, a local file of fictitious business name information should be retained at the county level to permit a businessman easily to check the files in his county when that is all that is required. The study recommends adoption of the substance of the Oregon system--a central filing with a state officer who sends fictitious business name information to the county in which the principal place of business is located. The use of data processing equipment should permit the preparation of information for transmittal to the counties at a modest cost.

The basic policy question presented by this topic is whether:

(1) The publication requirement should be eliminated. See the comment of Mr. Agay on page 3 of Exhibit IV to this memorandum. See also Exhibits I and II to this memorandum for the view of the newspaper industry.

(2) The publication requirement should be modified as suggested in the research study. See Study at page 1388. Adoption of the suggested scheme in the Study would permit the financing of a central filing system without imposing any additional cost on persons filing statements and would provide a meaningful publication system since a person could obtain all information for one county by subscribing to one paper rather than to every paper in the county. On the other hand, revenue from this source may be important to small papers and certainly is important to the legal newspapers. The staff suspects that the major Los Angeles legal newspapers would have to raise subscription rates or otherwise reduce expenses and increase revenue if revenue from publication of fictitious business name certificates were lost. The significant economic impact of any substantial change in the publication requirement--whether by elimination or by putting the publication out on bid on a competitive basis to one paper in each county--is a most important factor to consider in determining what decision the Commission should make on publication.

(3) The publication requirement should be retained in substance but made meaningful. Specifically, the number of publications could be reduced, and the content of the published material reduced to essential information by specifying in the statute the form of the

certificate to be published. A suggestion along these lines is made in Exhibit II (yellow) attached to the memorandum. The staff believes that this suggestion offers a promising line of further study.

Unless approach (1) or (2), mentioned above, for publication is taken, the staff believes that the idea of a central filing system should be abandoned as well as any idea of extension of the statute to cover persons such as those not having a place of business in this state. We do not believe that it would be desirable to impose a significant additional burden on those who are now required to comply with the statute such as that that would be imposed by a central filing system. In this connection, it should be noted that the county clerks strongly object to having the initial filing taken from their offices so we probably are considering in substance a system for a duplicate filing with all the administrative expenses that would be involved in such a system.

In fact, unless some significant improvements in the publication requirement can be made, the staff believes that it is questionable whether the expenditure of time and resources on this topic would be a profitable utilization of the Commission's resources in view of the other assignments the Legislature has given the Commission. For example, we doubt the advisability of expanding the coverage of the statute or providing effective sanctions and at the same time retaining a statutory system that was designed in 1872 and fails to provide any central source of information to meet 1968 needs unless additional revisions were made that would permit compliance at a minimum expense with an effective statute.

For further discussion of publication, see pages 12 to 13 of this memorandum.

The answer to the basic policy question outlined will determine whether the coverage of the statute should be extended or restricted.

After this basic question is determined, the following policy questions are presented for Commission consideration and determination.

Persons and Firms Affected (Study, pages 1354-1372)

The substance of the recommendations contained in the Study are set out in recommended statutory provisions (pages 1371-1372).

Individuals. Subdivision (a)(1) and (b) (pages 1371-1372) would make clear the application of the statute to individuals transacting business in a fictitious name. The substantive change in existing law would be that an individual would be required to comply with the statute if the trade name includes the word "Company" because the inclusion of this word in the trade name suggests the existence of additional owners. The change would eliminate the distinction between "Jones Company" (not now required to file) and "Jones & Company" (apparently required to file). As under existing law, a name such as "Jones Laundry" would not be one that would require a filing if Jones is the sole owner. Note that Exhibit IV to this memorandum suggests that the coverage of the statute be extended to a name such as "Jones Laundry."

Partnerships. Subdivision (a)(2) and (b)(page 1372) would clarify the California law without making any substantive change in existing law.

Limited partnerships. Although there is a substantial overlap in filing requirements under the Uniform Limited Partnership Act (Corporations Code Sections 15501-15531) and the fictitious business name statute and although a number of states have exempted limited partnerships from their fictitious business name statutes, the study recommends that limited partnerships be included under the fictitious business name statute (as under existing law). If there were not a central filing system, there would be no substantial reason for requiring a limited partnership to file both a limited partnership statement and a fictitious business name statement. However, the central filing system would collect all business name information in one central location; hence, the filing under the fictitious name statute should be required. The statement should not be required to contain the names of limited partners but should indicate that the business is a limited partnership and the place or places where the limited partnership certificate is filed so that an interested person may find that information.

The recommendation contained in the study would be effectuated by including subdivision (c) (page 1372). As a matter of practice, limited partners are often listed in certificates published under existing law.

Joint ventures and similar unincorporated associations. Any unincorporated association engaging in business for profit should be required to comply with the statute. This recommendation would

be effectuated by subdivision (a)(2), subdivision (c)(2), and the suggested language in the last paragraph of the suggested section on page 1372. The extent to which this states existing law is unclear.

Partnerships established and transacting business in a foreign country. This exception, found in existing law, should be eliminated. See Study at 1363-1364.

Law and other professional partnerships. Medical partnerships that come under Section 2393 of the Business and Professions Code should be excepted from the fictitious business name statute, and the fictitious name permits issued by the Medical Examiner's Board should be filed with the county clerk and indexed by him. See Study at 1364-1365.

Law partnerships also should be excepted from the business name legislation. See Study at 1365.

Corporations. A corporation that transacts business under a name other than its corporate name should be required to comply with the statute. This requirement would continue existing law. See subdivision (a)(3) on page 1372 and discussion on pages 1367-1369.

Foreign corporations qualified to transact business in California. These corporations should file a fictitious business name statement if they transact business in a name other than their corporate name. This retains existing law. The statement should also indicate that the corporation is a foreign corporation so that the person seeking information concerning the corporation is aware of that fact and can obtain the other information on file with the Secretary of State concerning the corporation. See Study at 1369-1370.

Persons not regularly transacting business in California. The courts have developed an exception to the California statute--the statute does not cover a person who does not maintain a place of business in California. This exception should be eliminated, but the statute should be drafted so that it applies only to persons who "regularly" transact business in California. Use of the word "regularly" will make it clear that the statute does not apply to a person who engages in only isolated transactions in California. See Study at 1370-1371.

Place of Filing (Study, pages 1372-1375)

The study recommends a central filing system (Secretary of State) and that certain of the filed information be transmitted to the county clerk of the county of the principal place of business by the Secretary of State. The central filing system would have many advantages. It would make the filed information readily available. It would provide a place for filings by persons who do not maintain a place of business in California. It would permit consolidated publication, a practice that would substantially reduce the cost of publication. It would permit inquiries to be directed to a central office that would have information filed pursuant to a number of statutes.

Information Required in Certificates (Study, pages 1375-1378)

The study recommends that the fictitious business name statement include the following information:

- (1) Fictitious business name (now required by implication)
- (2) Name and address of each owner (now required)

(3) Principal place of business (not now required)

(4) Indication whether the person filing is (a) an individual, (b) a domestic partnership or other domestic unincorporated association and, if a limited partnership, that the person is a limited partnership, (c) a foreign partnership or other foreign unincorporated association, (d) a domestic corporation, or (e) a foreign corporation. This information is not now required but inclusion of this information will make it possible to obtain any other information required to be filed by the person.

Indexing Requirements (Study, pages 1378-1380)

The study recommends that a comprehensive index be maintained at the state level and that an index of fictitious business names be maintained at the county level. Existing law requires that counties maintain an index that will permit determination of the fictitious business name from the name of any person interested in the business. Counties are not in compliance with this requirement and sought to have it repealed in 1967 without success. Cost of compliance would result in significant additional county cost.

Updating the Files (.Study, pages 1380-1382)

The study recommends that a new statement be filed if there is a change in the name of the business, the principal address of the business, or the ownership of the business. Existing law does not require a new certificate if the principal address of the business changes. A new filing should not be required if an address of an owner changes because of the substantial expense involved in filing and publishing a new statement and the limited value of the information.

Purging the Files (Study, pages 1382-1384).

Expiration. The study recommends that the substance of the existing expiration provision be retained.

Destruction of outdated certificates. The study recommends that certificates be permitted to be destroyed four years after the certificate has expired or been superseded. Under existing law, the certificate can be destroyed only if a microfilm copy is made and retained. The limited usefulness of expired or superseded certificates after four years would not appear to justify the expense of microfilming.

The Publication Requirement (Study, pages 1384-1389)

Existing California law requires that a person filing a fictitious name certificate also publish the certificate once a week for four successive weeks in a newspaper of general circulation in the county where the principal place of business is located.

Of the forty-two states that have fictitious business name statutes, only ten require any publication. Only four states require four publications. States that formerly required publication have eliminated this requirement. Posting of the certificate in each place of business would be a desirable alternative to publication. However, elimination of publication is not possible because of the objections of the newspaper industry.

Many persons have advised the Commission that newspaper publication in accordance with existing law provides no useful information to them.

See the Study at pages 1387-1388. The Study recommends that a modified form of publication be required. See Study at pages 1388-1389 for the publication scheme suggested by the author of the law review article. The adoption of the scheme suggested in the Study would result in a sufficient reduction in the cost of publication that would permit a central filing system to be established without significant additional cost to persons required to comply.

It should be noted, however, that many small local papers rely upon the revenue from these notices. The major legal newspapers in Los Angeles, and perhaps elsewhere, probably would be required to increase subscription charges to cover the loss of revenue from publication of fictitious business name certificates or to otherwise increase charges to make up for the lost revenue. Thus, the economic impact upon the newspaper industry of adopting the publication scheme suggested in the Study (which would concentrate all publication in one newspaper in the county at a cost that would be negligible) could well be significant.

Sanctions (Study, pages 1389-1392)

The existing sanction does not obtain compliance with the statute. The Study recommends that a civil penalty be provided as a sanction. Such penalty would be the sole statutory sanction to compel compliance.

Evidentiary Effect of Statement (Study, page 1393)

Under existing law, a certified copy of a fictitious name certificate is presumptive evidence of the facts stated therein. The presumption should be classified as a presumption affecting the burden of producing evidence. This would dispense with proof of the facts stated in the statement unless those facts are contested by a party against whom the statement is offered.

Respectfully submitted,

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Executive Secretary