Study B-501 July 7, 2000

Memorandum 2000-44

Uniform Unincorporated Nonprofit Association Act

CONTENTS OF MEMORANDUM

INTRODUCTION

The Commission has been directed by the Legislature to study whether the Uniform Unincorporated Nonprofit Association Act ("Uniform Act") should be adopted in California. Historically, an unincorporated association (a church group, labor union, political club, fraternal organization, etc.) has been treated as an aggregation of its members, rather than as a separate legal entity. This view of an unincorporated association has resulted in a number of problems (e.g., the incapacity of an unincorporated association to own property, the need to join every member of an association in a suit involving the association, joint and several liability of a member for a tortious act of the association, regardless of whether the member actually exercises control over the association, etc.). These types of problems have been addressed by the various states, including California, in a piecemeal fashion.

The Uniform Act is intended to provide an integrated and consistent set of rules governing the following issues:

(1) The capacity of an unincorporated nonprofit association to own and transfer property.
(2) Contract and tort liability of an unincorporated nonprofit association and its members.

(3) Procedural issues arising in litigation involving a nonprofit association.

A copy of the Uniform Act is attached for reference. See Exhibit p. 1.

The purpose of this memorandum is to introduce the various issues that will need to be addressed in deciding whether and how the law of unincorporated associations should be changed in California. Each of the major provisions of the Uniform Act is compared to existing California law to identify inconsistencies and potential problems with the Uniform Act or California law. The staff has provided preliminary recommendations as a starting point for discussion. Where an issue appears to be fairly straightforward, the staff has offered a suggested resolution. For more difficult questions, the staff has recommended further study (with input from interested parties). The memorandum concludes with a general recommendation on how the Commission should proceed.

AVAILABLE RESOURCES

The Commission has contracted with Professor Michael C. Hone of the University of San Francisco Law School, to serve as consultant on this study. Professor Hone is an expert in the law of business organizations and unincorporated associations. He will be reviewing and commenting on materials and attending Commission meetings as his schedule allows. In addition, R. Bradbury Clark has indicated that the Nonprofit and Unincorporated Associations Committee of the State Bar ("State Bar Committee") is interested in participating in the study. The State Bar Committee commented extensively on the Uniform Act during its development. Some of the State Bar Committee's criticisms of the Uniform Act are noted in this memorandum. A copy of a letter from the State Bar Committee to the Unincorporated Associations Committee of the National Conference of Commissioners on Uniform State Laws is attached (see Exhibit p. 20).

PREVIOUS COMMISSION EFFORTS

Some of the fundamental California statutes governing unincorporated associations were enacted on the Commission's recommendation. See *Suit By or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1966) (capacity to sue, liability, venue, and service of process); *Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n Reports 1403 (1966)

(service of process). These recommendations provide useful background information but may also constrain our scope of action. See Commission Handbook of Practices and Procedures at page 10:

> The Commission has established that, as a matter of policy, unless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation.

This policy should be kept in mind in considering the extent to which the existing law of unincorporated associations should be changed.

GENERAL ISSUES

There are two general issues that should be kept in mind in the course of this study: (1) the limitation of the Uniform Act to *nonprofit* associations; and (2) the absence from the Uniform Act of any provisions governing the organization or governance of an unincorporated association. These issues are discussed briefly below:

Nonprofit Associations

The Uniform Act only applies to "nonprofit associations," which it defines in Section 1(2):

> "Nonprofit association" means an unincorporated organization consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

The State Bar Committee has criticized this limitation on the scope of the Uniform Act (see Exhibit p. 22):

> The Act does not cover for-profit unincorporated associations. We have two concerns with this approach: (1) We see no reason to limit the Act to nonprofit associations. (2) If there is only a nonprofit unincorporated associations act, then it is likely that a court will apply the same law to for-profit associations. We note that the Reporter considers the differences between for-profit and nonprofit unincorporated organizations to be significant …. If this is the case, then this is all the more reason to address the law applicable to for-profits, to keep inapplicable law from being applied to them by analogy. The solution proposed to cover

> unincorporated organizations by the partnership laws, is not workable for some associations.

It should also be noted that most California statutes governing unincorporated associations apply to both nonprofit and for-profit unincorporated associations. If the Uniform Act were adopted in California, it would be necessary to examine existing California statutes and preserve modified versions of those provisions that currently apply to all unincorporated associations, so as not to disturb existing law governing for-profit associations. If, on the other hand, existing California law were improved without adopting the Uniform Act, it would be necessary to consider whether the various provisions *should* apply to for-profit associations. **Under either approach, the question of whether the law should apply to for-profit associations will need to be kept in mind as the study progresses.**

Organization and Governance

The Uniform Act does not contain provisions governing the formation, dissolution, or governance structure of an unincorporated association. This limitation has been criticized by the State Bar Committee (see Exhibit pp. 23-24):

> The Act states that it does not address "troublesome questions of governance and membership." Unfortunately, these issues are inseparable from the issues which the Act attempts to address, and are thus impossible to avoid. For example, a principal question raised when transferring property is "Who has the right to sign?"
>
> …
>
> If the Act is going to deal with items that, of necessity, concern issues of associational governance, it must address the issues of governance and membership directly, so that they can be discussed and adequately debated. To do otherwise is both unwise and unfair, and will not result in good law. It is certainly conceptually possible to have a set of default provisions addressing governance which would apply in the absence of rules or practices of the organization to the contrary. These default governance provisions might also have several levels of complexity, depending upon the size and nature of the organization to which the provisions apply.

The State Bar Committee makes a good point. In practice, it will often be necessary to determine whether an unincorporated association exists, or whether a person claiming to act for an unincorporated association is in fact authorized to do so. Provisions governing the formation, dissolution, and organization of an unincorporated association would help in making such determinations.

On the other hand, Professor Hone believes that default governance provisions would be exceedingly difficult to draft and would perhaps be counter-productive (e.g., an unincorporated association that does not satisfy the default governance requirements might be inappropriately excluded from application of the statutory provisions governing unincorporated associations). He believes that a better approach would be to draft a clear statutory definition of "nonprofit unincorporated association," and offers the following language as a starting point for discussion:

> "Nonprofit unincorporated association" means an association of two or more persons, operating under a common name for a nonprofit purpose, where justice requires that the association be treated as a nonprofit unincorporated association.

It is unclear at this time whether governance provisions, definitions, or some combination of both would be a useful addition to the law of unincorporated associations. The need for such provisions would probably be best assessed after the more substantive issues have been considered. **The staff recommends that the matter be kept in mind as other issues are considered.**

SEPARATE LEGAL ENTITY STATUS

The basic principle underlying the Uniform Act is that an unincorporated association should be treated as a legal entity separate from its members. This is reflected in Section 4 (nonprofit association can own property in its own name), Section 6(a) (nonprofit association is legal entity separate from its members for determining rights, duties, and liabilities in contract and tort), and 7(a) (nonprofit association can sue and be sued in its own name). This principle is also reflected in California law. See Code Civ. Proc. § 369.5(a) (unincorporated association can sue and be sued in its own name); Corp. Code §§ 20001 (unincorporated association can own property), 24001 (unincorporated association is liable for acts and omissions "to the same extent as if the association were a natural person"); *White v. Cox*, 17 Cal. App. 3d 824 (1971) (unincorporated association is separate legal entity in tort action by member against association).

Professor Hone suggests that it might be helpful if a general statutory provision along the following lines were added:

> A nonprofit unincorporated association is a legal entity separate from its members.

The Comment to this provision could then point out the consequences of the general principle with respect to property ownership, liability of members, and capacity of the unincorporated association to sue and be sued.

The staff believes that a provision along the lines proposed by Professor Hone might be a useful addition to California law. However, such a general rule could have unforeseen consequences. **The staff recommends that this proposal be studied carefully, with further input from interested parties.** If a general provision of the type proposed is added, it probably should not replace existing provisions that are based on the same principle (e.g., provision recognizing capacity of unincorporated association to own property).

PROPERTY ISSUES

The Uniform Act addresses three general issues relating to property:

(1) The capacity of a nonprofit association to acquire, hold, transfer, and encumber property.

(2) The authority of an officer, member, or agent of a nonprofit association, to transfer property in the name of the association.

(3) The disposition of property of an inactive nonprofit association.

The Uniform Act's approach to these three issues is discussed in detail below.

Capacity to Acquire, Hold, Transfer, and Encumber Property

Section 4 of the Uniform Act provides:

> (a) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property.
>
> (b) A nonprofit association may be a legatee, devisee, or beneficiary of a trust or contract.

This reverses the common law rule, in some jurisdictions, that an unincorporated association is not a legal entity capable of possessing property.

California law already recognizes the capacity of an unincorporated association to own and transfer property. Corporations Code Section 20001 provides as follows:

> Any unincorporated society or association, and every lodge or branch of any such society or association, and any labor organization, may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or

> otherwise, manage, and sell all such real estate and other property as may be necessary for the business purposes and objects of the society, association, lodge, branch or labor organization, subject to the laws and regulations of the society, association, lodge, or branch and of the grand lodge thereof, or labor organization; and also may take and receive by will or deed all property not so necessary, and hold it until disposed of within a period of 10 years from the acquisition thereof.

The staff has two general concerns about this provision, which are discussed below:

"Business Purposes and Objects"

Corporations Code Section 20001 restricts property transactions by an unincorporated association to those transactions that are necessary for the "business purposes and objects" of the association. It isn't clear what purpose this restriction serves. Nor is it clear how it should be interpreted. How strict is the necessity standard? What is a "business purpose and object," especially in the context of a nonprofit association. Another significant issue is the consequences of violating the restriction. If an unincorporated association transfers property and the transfer is "unnecessary," is the transfer ineffective? This could create significant title problems with respect to real property, as someone researching title to property transferred by an unincorporated association would need to inquire into the business purposes and objects of the association — matters that would not be reflected in the title records.

The staff recommends that the business purposes and objects limitation be deleted. Section 20001 recognizes the *capacity* of an unincorporated association to engage in property transactions. The question of whether a particular property transaction is consistent with the association's purpose should be determined by examining the association's constitution, bylaws, or other governing rules. Deleting the business purposes and objects limitation would also allow us to substantially simplify the section.

Ten-Year Limit on Possession of Property

Section 20001 also imposes a ten-year limit on possession of property acquired by an unincorporated association, if acquisition of the property was not necessary for the business purposes and objects of the association. This raises many of the same issues discussed immediately above. What is the purpose of the limitation? How should "necessary for the business purposes and objects" be

interpreted? What is the consequence of violating the limitation? It also raises an additional issue — how can an association comply with the limitation? It must dispose of "unnecessary" property within ten years, but apparently lacks authority to transfer such property. **The staff recommends that the ten-year limit be deleted.**

Authority to Transfer Property on Behalf of Unincorporated Association

Assuming that an unincorporated association has the capacity to acquire, hold, encumber, and transfer property (as it does under the Uniform Act and California law), the question arises: who can transact on behalf of the association? The Uniform Act addresses this in Section 5, which provides for the recordation of a statement of authority to transfer an interest in real property on behalf of a nonprofit association. The person named in such a statement has authority to transfer property in the name of the association. Section 5 also includes protection for a third party purchaser who relies on such a statement and is without notice that the person named in the statement lacks authority. California law includes a provision similar to Section 5, Corporations Code Section 20002:

> All conveyances transferring or in any manner affecting the title to real estate owned or held by an unincorporated benevolent or fraternal society or association, or lodge or branch thereof, or labor organization, shall be executed by its presiding officer and recording secretary under its seal after resolution duly adopted by the society, association, lodge, or branch authorizing the conveyance, and in the case of other unincorporated associations for which no specific provision is made by statute shall be executed by (a) its president or other head and secretary, recording secretary, or other comparable officer, or (b) other officers or persons specifically designated by a resolution duly adopted by the association or by a committee or body duly authorized to act by the articles of association or bylaws.
>
> An unincorporated association not otherwise authorized by statute may record in any county in which it owns or has an interest in real property a verified and acknowledged statement, or a certified copy of such statement recorded in another county, setting forth the name of the association, the names of its officers and the title or capacity of its officers and other persons who are authorized on its behalf to execute conveyances of real property owned or held by the association. It shall be conclusively presumed in favor of any bona fide purchaser or encumbrancer for value of real property of the association located in the county in which such statement or certified copy has been recorded that the officers and

> persons designated in the statement are duly authorized to execute such conveyances unless there is recorded in such county by anyone claiming to be a member of the association a statement, verified and acknowledged by the person executing it, which shall set forth the name of the association, particularly identify the recorded statement of the unincorporated association, and state that such previously recorded statement was recorded without authority or that the officers or other persons designated therein are not so authorized. For the purposes of this paragraph, the definitions of "conveyance" and "purchaser" in Section 15010.5 and the definition of "unincorporated association" in Section 24000 shall apply, except that "unincorporated association" shall not include partnerships.

A number of issues relating to the authority of a person to engage in a property transaction on behalf of an unincorporated association are discussed below:

Authority in Informally-Organized Association

Corporations Code Section 20002 apparently limits authority to convey association property to

> (a) [the association's] president or other head and secretary, recording secretary, or other comparable officer, or (b) other officers or persons specifically designated by a resolution duly adopted by the association or by a committee or body duly authorized to act by the articles of association or bylaws.

This assumes that the association has traditional officers and a formal process for promulgation of resolutions and could perhaps be read to preclude property transactions by associations that do not. This is an example of a provision that assumes a certain minimal formality of governance. However, the level of formality assumed by this provision seems unlikely to create any problems. All that is required is that the association officially designate an agent by resolution. The association is free to determine the method by which the resolution is adopted. **The staff recommends that existing law be preserved.**

Third Party Protection and Constructive Notice

The third party protection provided under Section 5 of the Uniform Act depends on the purchaser being without notice that the person named in the statement of authority "lacks authority." It isn't clear whether "notice" includes constructive notice, i.e., whether a purchaser has a duty to inquire into the

validity of the statement of authority. The third party protection in Corporations Code Section 20002 is stronger. So long as a statement of authority is not disputed by another statement recorded in the same county:

> It shall be conclusively presumed in favor of any bona fide purchaser or encumbrancer for value of real property of the association located in the county in which such statement or certified copy has been recorded that the officers and persons designated in the statement are duly authorized to execute such conveyances…

The stricter protection afforded by California law seems appropriate. A buyer's protection should not be contingent on constructive notice of the transferor's actual authority. That rule would require a buyer to investigate the inner-workings of the transferring association and assess the validity of its actions under its own rules. **The staff recommends that existing law be preserved.**

Fraudulent Statement of Authority

The ability of a purchaser to rely on a recorded statement of authority to transfer property may facilitate fraud. An unscrupulous person could execute and record a fraudulent statement of authority naming that person as agent, transfer association property without permission, and abscond with the proceeds. The third party protections discussed above do not protect the association against this type of misappropriation.

The Uniform Act requires that a statement of authority be executed by a person other than the person authorized by the statement to transfer association property. This is a sensible requirement, but it could still be circumvented by forgery or collusion. The Uniform Act also requires that the recorded statement of authority include the name and address of the association and a statement of the method by which authority was granted to the person named in the statement. These requirements may also help evaluate the authenticity of a statement, but are also susceptible to forgery and fraud. **It probably makes sense to add these additional requirements of the Uniform Act to California law.** We should also consider whether there are other ways in which fraud can be minimized.

Transfer Where There Is No Recorded Statement of Authority

Under the Uniform Act, authority to transfer property seems to be limited to a person designated in a recorded statement of authority. This is not so in

California. The statement of authority procedure provided in Corporations Code Section 20002 appears to be optional. Authority to transfer property derives from other provisions of Section 20002, which provide that a transfer may be made by a president and secretary (or analogous officers) or by a person authorized by resolution. Thus, under California law, an authorized person could transfer property on behalf of an unincorporated association without there being any recorded statement of the person's authority. This could create uncertainty in the title records, of the type that the recorded statement of authority is intended to avoid. For this reason, it may be appropriate to require recordation of a statement of authority in every case. On the other hand, a mandatory requirement could lead to a situation where an otherwise valid transfer is invalidated due to a failure to properly record the statement of authority.

The staff recommends that existing law be preserved. Recordation of a statement of authority should not be a prerequisite to an effective transaction. A buyer who is concerned about the authority of a person purporting to represent an unincorporated association can require that the person record a statement of authority as a condition of the transaction.

Special Rule for Benevolent or Fraternal Society or Labor Organization

Corporations Code Section 20002 provides a different set of rules for benevolent or fraternal societies and labor organizations than the rules that govern all other unincorporated associations. A transfer of real property of a benevolent or fraternal society or a labor organization must be made by the association's presiding officer and recording secretary under its seal pursuant to a duly adopted resolution. The benevolent or fraternal society or labor organization apparently cannot authorize another person to make the transfer or file a statement of authority naming a person who has authority to make a transfer. This may reflect an assumption that such organizations are more formally organized than other unincorporated associations. **The staff recommends that representatives of these types of organizations be contacted to determine whether there are any problems with existing law.**

Disposition of Property of Inactive Association

Section 9 of the Uniform Act provides for the disposition of personal property of an inactive unincorporated association:

> If a nonprofit association has been inactive for [three] years or longer, a person in possession or control of personal property of the nonprofit association may transfer the property:
>
> (1) if a document of a nonprofit association specifies a person to whom transfer is to be made under these circumstances, to that person; or
>
> (2) if no person is so specified, to a nonprofit association or nonprofit corporation pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

California has no analogous statutory provision. However, there is case law discussing distribution of the assets of a *dissolved* unincorporated association. In *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925 (1967), the court held that distribution is determined by the association's constitution and bylaws. If the association does not have an applicable provision in its constitution and bylaws, the assets should be distributed to the membership, pro rata.

The staff recommends that a statutory default rule for disposition of the property of a defunct unincorporated association be created. In doing so, the Commission will need to consider the following issues:

Definition of "Inactive"

"Inactive" is not defined in the Uniform Act. This may be a problem. The Comment to Section 9 states that the section is intended to "give a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor." However, if the meaning of "inactive" is not clear, then the provision does not provide much of a safe harbor. A person who wishes to dispose of association property could never be certain that a court would agree that the association is inactive, leaving a potential for liability if anyone were to object to the disposition. **The property distribution rule should include a clear definition of "inactivity."**

Dissolution of Unincorporated Association

Section 9 only applies to an "inactive" unincorporated association. It may be appropriate to apply the same distribution rule to the property of an unincorporated association that has been formally dissolved. This could perhaps be achieved by including formal dissolution (by whatever mechanism is

applicable to a particular organization) in the definition of "inactive." **The staff recommends this approach.**

Application to Real Property

Section 9 does not apply to distribution of real property. The Comment to Section 9 explains:

> A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

This argument is not compelling. There will be cases where an unincorporated association that owns real property will become inactive or dissolve. **The staff recommends that any default property distribution rule apply to both real and personal property.**

Distribution to Members

Section 9 provides for distribution according to the terms of a governing instruction, or if there is none, to a nonprofit association or corporation with goals similar to those of the inactive association. Alternatively, distribution to members of the association might be appropriate in some circumstances. For example, on dissolution of a nonprofit mutual benefit corporation, assets of the corporation can be distributed to members. See Corp. Code § 8717. But see *Los Angeles County Pioneer Soc'y v. Historical Soc'y of Southern California*, 40 Cal. 2d 852 (1953) (charitable corporation cannot dissolve and distribute assets to its members). **The staff recommends that distribution of property to members be permitted in an unincorporated association that is analogous to a nonprofit mutual benefit corporation, but not permitted in an unincorporated association that is analogous to a nonprofit charitable corporation.** Professor Hone believes that this is the proper rule as a matter of principle, but that it may prove difficult to implement.

Relation to Unclaimed Property Law

The Comment to Section 9 discusses the possible problem of overlap between Section 9 and a state's Unclaimed Property Law. California's Unclaimed Property Law provides for escheat of unclaimed personal property (e.g., unclaimed funds in a financial institution, unclaimed property in a safe deposit box, undistributed dividends, unclaimed life insurance benefits). See Code Civ. Proc. § 1500 *et seq.*

Thus, there could be a situation where property of an unincorporated association is subject to both the Section 9 distribution rule and the Unclaimed Property Law escheat rules. **The Commission will need to carefully consider the relationship between any property distribution rule and the existing Unclaimed Property Law.**

LIABILITY ISSUES

Section 6 of the Uniform Act addresses two issues relating to the contract and tort liability of an unincorporated association and its members:

(1) Vicarious liability of a member for the contract or tort obligations of an unincorporated association.

(2) The capacity of a member to sue an unincorporated association and vice versa.

The Uniform Act does not specifically address the liability of an unincorporated association for an action of its members or officers. Nor does it provide any special protections from liability (such as volunteer liability protections or indemnification). All of these issues are discussed below.

Vicarious Liability of Member for Contract Obligation

Section 6(b) of the Uniform Act specifically provides that:

> A person is not liable for a breach of a nonprofit association's contract merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

This makes it clear that membership *status* is not enough to establish liability. However, Section 6(b) leaves open the possibility of liability based on a member's own *conduct*. The Comment to Section 6(b) provides four examples of conduct that could result in member liability:

(1) The member is a party to the contract, in the member's own name.

(2) The member executes the contract as an agent of the association, but the association is determined not to exist as a separate legal entity with capacity to contract. Note that this is not a problem in California, which recognizes the capacity of an unincorporated association to contract.

(3) The member negotiates the contract without revealing that the member is acting as an agent for the association.

(4) The concept of "piercing the corporate veil," might apply where a member's personal affairs are sufficiently commingled with those of the association.

Under California case-law, a member can be held personally liable for a contract obligation, on an agency theory, where the member "expressly or impliedly authorizes or ratifies the contract…." See *Security-First Nat'l Bank of Los Angeles v. Cooper, et al,* 62 Cal. App. 2d 653 (1944). In *Cooper*, members of an Elks lodge were held individually liable for obligations arising from a lease negotiated by the lodge's presiding officer and secretary, after a vote of the lodge authorizing them to do so. While it was not possible to determine which members had actually participated in the vote, all had signed the association's bylaws. Those bylaws made it clear that the lease was necessary to the objects of the association. "Consequently, all who were members of the lodge at the time the lease was executed by the lodge were liable thereon as principals, even though they did not expressly authorize it by appearing at the meeting and voting for the resolution directing its execution." *Id.*

The rule stated in *Cooper* has been sharply limited by statute. Corporations Code Section 21102 provides:

> No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its by-laws.

In other words, the mere fact of membership in, or signing the bylaws of, a nonprofit association does not indicate consent or agreement to be bound by the association's obligations. Presumably, an affirmative act of authorization or ratification, such as a vote authorizing a contract, could still result in member liability, under either California law or the Uniform Act.

In addition to the general limitation provided in Section 21102, California also provides broader limits on member liability for transactions involving real property or medical societies. These special limitations are discussed below.

Real Property

Corporations Code Section 21100 provides:

> Members of a nonprofit association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural, supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association.

This provision is stated in absolute terms. Thus, it isn't clear whether a member could be liable for such an obligation where the member expressly or impliedly authorizes or ratifies the transaction. Corporations Code Section 21101 provides a partial answer:

> Any contract by which a member of a nonprofit association assumes any such debt or liability is invalid unless the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or by his agent.

This could be read to mean that the only basis for member liability for such obligations is a written contract expressly assuming liability. Alternatively, it could be read as simply stating the formalities required to assume liability by contract, without affecting noncontractual bases for liability (such as agency).

Section 21100 should perhaps be replaced with a general provision along the lines of Section 6(b) of the Uniform Act. This would provide that membership status alone is not a basis for liability on a contract obligation of the association, regardless of the subject matter of the contract. It should be made clear that the general provision limiting membership liability does not preclude liability based on a member's individual conduct. This could probably be addressed by Comment.

Medical Society

Section 21200 limits the liability of a member of an unincorporated association that is an "organized medical society" for the types of debts and obligations described in Section 21101, as well as "any debts or liabilities contracted or incurred by the association in the carrying out or performance of any of its purposes…." This very broad limitation raises the same question discussed in the context of Section 21101 — it isn't clear whether it precludes liability based on a member's individual conduct. **The staff recommends that medical associations be contacted to discuss the purpose and operation of this special limitation.**

Vicarious Liability of Member for Tort

Section 6(c) specifically provides that:

> A person is not liable for a tortious act or omission for which a nonprofit association is liable merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

This makes it clear that membership *status* is not enough to establish liability. However, Section 6(c) leaves open the possibility of liability for a member's own *conduct*.

This is consistent with California case-law. In *Orser v. George*, 252 Cal. App. 2d 660 (1967), the court notes:

> It has been held that an unincorporated association is bound to use the same care as a natural person; but that mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval.

The court went on to hold that members of an unincorporated duck hunting club were not liable, as members, for a tortious shooting where the members did not act in concert with or encourage the shooters, and the shooters were not acting within the course and scope of their activities as club members (they were shooting at frogs and mud hens, outside of duck season). In *Steuer v. Phelps*, 41 Cal. App. 3d 468 (1974), members of an unincorporated religious organization could be held liable for a tortious accident involving a car owned by the association. However, liability would be based on their conduct as individuals, not on their status as association members:

> There is evidence that each individual member, rather than an officer, manager, or committee, participated directly in entrusting the car to [the driver] to operate exclusively for purposes of the association. Under the doctrine of respondeat superior, it is elemental that one who entrusts another with the operation of his automobile is liable for the negligent operation of the vehicle, even though he neither authorized nor approved the driving in a negligent manner.

The staff recommends that a provision along the lines of Section 6(c) be added to California law. This would codify the rule that membership alone does not result in liability for a tortious act or omission of an association. The Comment could cite examples of the types of conduct that can result in liability.

Suit Between Member and Association

Section 6(d) of the Uniform Act provides:

> A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered as a member by the nonprofit association.

This provision is intended to eliminate an obstacle to a member bringing suit against an unincorporated association. At common law, each member was considered a co-principal, and liability for a tortious act of the association was imputed to each member. Thus, a member who was injured by a tortious act of the association could not recover, because the member was imputed to share liability for the tortious act. Section 6(d) expressly rejects the doctrine of imputed liability. Section 6(e) of the Uniform Act then affirmatively states the capacity of a member to sue an association and vice versa:

> A member of, or a person considered to be a member by, a nonprofit association may assert a claim against the nonprofit association. A nonprofit association may assert a claim against a member or a person considered to be a member by the nonprofit association.

Section 6(d)-(e) is consistent with California case-law. *Marshall v. International Longshoremen's and Warehousemen's Union*, 57 Cal. 2d 781 (1962), and *White v. Cox*, 17 Cal. App. 3d 824 (1971), both involved tort suits by a member against an association. In each, the courts expressly declined to impute liability to the member as a co-principal, and upheld the right of a member to sue an association for actions that the member neither participated in nor authorized. **The staff recommends that this doctrine be codified by adding a provision along the lines of 6(d)-(e).**

Vicarious Liability of Unincorporated Association

Corporations Code Section 24001 provides, in part:

> an unincorporated association is liable to a person who is not a member of the association for an act or omission of the association, and for the act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person.

The Uniform Act does not have an equivalent provision.

As originally recommended by the Commission, this provision did not exclude liability to a member. See 8 Cal. L. Revision Comm'n Reports 901, 916 (1966). The staff was not able to check archival records to determine why the limiting language (i.e., "who is not a member of the association") was added in the legislative process. It may have been felt that Section 24001 went beyond the judicial doctrine of the day by implying that all unincorporated associations were subject to suit by their members — recall that the *Marshall* court, while recognizing that a member could sue an unincorporated labor union, expressly declined to extend the principle to other unincorporated associations, and *White v. Cox* had not yet been decided. It is now well settled that a member can sue an unincorporated association. **The staff recommends that the phrase "who is not a member of the association" be deleted from Section 24001.**

Protections from Liability

The law of corporations includes protections from liability that may be appropriate for application to unincorporated associations: (1) protection of directors and officers of an unincorporated association from liability for certain types of decisions; (2) protection of certain types of association decisions from judicial review; and (3) indemnification of directors and officers in certain situations. These are discussed below:

Director Liability

Corporations Code Section 24001.5 provides immunity from liability for a volunteer director or officer of a nonprofit medical association, for

> any negligent act or omission occurring (1) within the scope of that person's duties as a director acting as a board member, or within the scope of that person's duties as an officer acting in an official capacity; (2) in good faith; (3) in a manner that the person believes to be in the best interest of the association; and (4) is in the exercise of his or her policymaking judgment.

This liability limitation is subject to a number of further limitations. See Section 24001(c) (limitation does not apply to self-dealing, conflicts of interest, intentional acts, recklessness, etc.). In order for the limitation to apply, the association must carry liability insurance of a specified amount.

The protection from liability provided to volunteer directors and officers of an unincorporated nonprofit medical association is similar to statutory limits on

the liability of a director or volunteer executive officer in a nonprofit corporation. See, e.g., Corp. Code §§ 7231(c) (director liability in mutual benefit corporation), 7231.5 (volunteer executive officer liability in mutual benefit corporation). There is no analogous provision in the Uniform Act.

It may be appropriate to add a general provision of this type protecting volunteer officers of an unincorporated association. This would be a substantial change from existing law. **The staff recommends that this question be carefully considered, with input from the interested community.**

Judicial Deference to "Economic Decisions" of Association

The California Supreme Court recently clarified the standard of review in an action challenging an "economic decision" of a governing board of a condominium association. See *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249 (1999). In that case a homeowner was suing for injunctive and declarative relief regarding a decision by her unincorporated homeowner's association as to how to carry out termite abatement in her building. The court held:

> where a duly constituted community association board, upon reasonable investigation, and in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

In justifying this analog to the common-law business judgment rule (which insulates from judicial review corporate management decisions made by directors in good faith and in what the directors believe is the corporation's best interest) the court noted:

> [Each] individual owner [in a homeowners association] has an economic interest in the proper business management of the development as a whole for the sake of maximizing the value of his or her investment. In this aspect, the relationship between homeowner and association is somewhat analogous to that between shareholder and corporation.

The holding of the court is clearly limited to "discretionary economic decisions by community association boards," and it is not clear whether the holding should be extended to other types of unincorporated associations. **The**

staff recommends that this question be carefully considered, with input from the interested community.

Indemnification

Another liability protection that is available to nonprofit corporations is indemnification. For example, Corporations Code Section 7237 authorizes a nonprofit mutual benefit corporation to indemnify an agent (including a director, officer, or employee) against expenses, judgments, fines, settlements, and other amounts incurred in any proceeding if

> such person acted in good faith and in a manner such person reasonably believed to be in the best interests of the corporation, and in the case of a criminal proceeding, had no reasonable cause to believe the conduct of such person was unlawful.

The staff can see no reason why an unincorporated association should be precluded from indemnifying its agents for good faith actions on behalf of the association. **The staff recommends that a provision similar to Section 7237 be drafted to permit an unincorporated association to indemnify its agents.**

PROCEDURAL ISSUES

The Uniform Act addresses the following procedural issues that arise in the context of lawsuits involving an unincorporated association:

(1) The capacity of an unincorporated association to sue and be sued in its own name.
(2) Abatement of an action resulting from a change in membership of an unincorporated association.
(3) Standing of an unincorporated association to bring a representative action on behalf of its members.
(4) Effect of a judgment against an unincorporated association.
(5) Service of summons or complaint on an unincorporated association.
(6) Place of trial.

These issues are discussed below:

Capacity to Sue and Be Sued

Section 7(a) of the Uniform Act provides:

> A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

Code of Civil Procedure Section 369.5(a) provides a similar, though less comprehensive, rule:

> A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.

The staff has no information on whether unincorporated associations currently participate in administrative hearings and alternative dispute resolution. However, it would probably be useful to expressly authorize such participation. **The staff recommends that Section 369.5 be revised to that end.**

Claim Not Abated by Change in Membership

Section 11 of the Uniform Act provides:

> A [claim for relief] against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

At common law, all partners were required to be joined in an action involving a partnership. If the membership of the partnership changed during the course of the action, a defect in joinder might arise, resulting in abatement of the action.

It doesn't appear that a provision along the lines of Section 11 is necessary in California. As discussed above, an unincorporated association can be sued in its own name, without joining individual members. See Code Civ. Proc. § 396.5(a). **The staff recommends against adding Section 11 to California law.**

Representative Action

Section 7(b) of the Uniform Act provides:

> A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

California case-law on representative action is not so clear-cut. In *Tenants Ass'n of Park Santa Anita v. Southers*, 222 Cal. App. 3d 1293 (1990), the court notes

that "it is not altogether clear under what circumstances an unincorporated association has standing to sue in a representative capacity." It then discusses the different decisions on the matter, differentiating between a suit to protect the public interest, a suit to obtain prospective relief to protect members' private interests, and a suit to obtain damages on behalf of members. The prevailing rule seems to be that an unincorporated association can sue on behalf of its members, in a representative capacity, if the following facts are found to be true:

> (1) Considerations of necessity, convenience, and justice justify use of the representative procedural device.
> (2) There is an ascertainable class of persons represented.
> (3) There is a community of interest in the questions of law and fact at issue in the case.

In *Southers*, the court held that an association of mobile home park tenants could sue on behalf of its members. However, the association lacked standing to maintain some of the claims asserted (e.g., emotional distress of individual members) because those claims involved individual questions of fact, and thus there was no community of interest with respect to those claims.

In *National Solar Equipment Owner's Ass'n, Inc. v. Grumman Corp.*, 235 Cal. App. 3d 1273 (1991), the court recognized the standing of an unincorporated association to sue on behalf of its members, but held that it must do so in a class action.

The Commission should attempt to clarify when an unincorporated association has standing to sue on behalf of its members, and when such an action must proceed as a class action.

Enforcement of Judgment or Order Against Association

Section 8 of the Uniform Act provides:

> A judgment or order against a nonprofit association is not by itself a judgment or order against a member.

California has a similar provision — Corporations Code Section 24002 provides:

> A money judgment against an unincorporated association may be enforced only against the property of the association.

The Uniform Act provision is slightly broader as it applies to orders (such as an injunction) as well as money judgments. The staff is unsure whether there

would be any benefit in revising Section 24002 to apply to orders as well as money judgments. **The question should be studied further.**

Service of Summons or Complaint

The Uniform Act has two sections governing service of process on an unincorporated association. Section 10 provides a procedure for appointment of an agent to receive service of process. The appointment papers are filed with the Secretary of State. Section 13 provides that a summons and complaint may be served on either an "agent authorized by appointment to receive service of process, an officer, managing or general agent, or a person authorized to participate in the management of its affairs. If none of them can be served, service may be made on a member."

California law governing service of process on an unincorporated association is very similar to the Uniform Act. Corporations Code Sections 24003-24006 provide a procedure whereby an unincorporated association can file a statement with the Secretary of State, appointing an agent for service of process. Corporations Code Section 24007 provides for service of process on a member of an unincorporated association if process cannot be served on an appointed agent and cannot be served against the unincorporated association itself by delivering or mailing the process to the unincorporated association's office. This is similar to Section 13 of the Uniform Act. However, there are substantive differences. The Uniform Act permits service on an "officer, managing or general agent, or a person authorized to participate in the management of the unincorporated association" as well as an appointed agent. California does not. Both California and the Uniform Act provide for service of process on a member, as an alternative if process cannot be served on the person or persons designated for service of process. However, California requires that a court order be obtained before serving process on a member. Corp. Code § 24007.

The staff is unaware of any problems with the California law in this area. **We should invite comment on the matter, but at present the staff recommends that existing law be preserved.**

Place of Trial

One common criterion used to determine the place of trial is the residence of the defendant. Section 12 of the Uniform Act provides: "For purposes of venue, a nonprofit association is a resident of a county in which it has an office." Thus,

under the Uniform Act, an unincorporated association could be sued in any county in which it has an office.

California takes a different approach. Code of Civil Procedure Section 395.2 provides:

> If an unincorporated association has filed a statement with the Secretary of State pursuant to Section 24003 of the Corporations Code listing its principal office in this state, the proper county for the trial of an action against such unincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

Section 395.5 then provides:

> A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.

The staff prefers the California approach. It seems reasonable that an unincorporated association should be able to designate its principal place of business for the purposes of determining venue, rather than being subject to suit in any county in which it has an "office."

However, Sections 395.2 and 395.5 could be better coordinated. Section 395.2 provides that an unincorporated association should be treated as if it were a corporation if it has filed a statement naming an agent for service of process. Section 395.5 then provides the venue rule for a corporation *or association*, without limiting itself to associations that have filed a statement naming an agent. This creates a potentially confusing overlap between the two provisions. This overlap could be eliminated by repealing Section 395.2 and revising Section 395.5 as follows:

> (a) A corporation or unincorporated association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.

> (b) For the purposes of subdivision (a), if an unincorporated association has filed a statement with the Secretary of State pursuant to Section 24003 of the Corporations Code listing its principal office in this state, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

However, Section 395.2 was enacted on the Commission's recommendation, and it may be that this type of coordination is not a sufficiently "good reason" to disturb the Commission's prior work. **The staff finds existing law confusing and recommends that the proposed change be made.**

CONCLUSION

One possible benefit of adopting the Uniform Act is interstate uniformity of the law governing unincorporated associations. However, to date the Uniform Act has only been adopted in ten states (Alabama, Arkansas, Colorado, Delaware, Hawaii, Idaho, Texas, West Virginia, Wisconsin, and Wyoming). Thus, it isn't clear that adoption of the Uniform Act in California would lead to much of an increase in interstate uniformity. What's more, it seems unlikely that the Uniform Act could be adopted in California without numerous substantive changes — there are simply too many differences between the Uniform Act and existing California law. This makes it doubtful that any meaningful uniformity could be achieved by adopting the Uniform Act.

Instead of focusing on adopting the Uniform Act to California, **the staff recommends that the Commission's efforts be focused on improving existing California law governing unincorporated associations.** The Uniform Act will be an important resource in this study, as many of its provisions can be adapted for use in California (e.g., Section 9, governing distribution of property of an inactive association).

The staff recommends that the Commission proceed as follows:

(1) Prepare a partial draft tentative recommendation, which would include only those issues on which the Commission is prepared to take a preliminary position. This would allow us to efficiently dispose of those issues that appear to be straightforward, before moving to more deliberate consideration of those issues that are likely to prove difficult.

(2) Explore the more difficult issues through our regular process of staff analysis, public input, and discussion. This could be done by preparing a series of memoranda on any issues left unresolved after consideration of the draft tentative recommendation. As these issues are resolved, they would be added to the draft tentative recommendation. Eventually the draft tentative recommendation would be complete and ready for approval and circulation.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

Uniform Unincorporated Nonprofit Association Act

UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

PREFATORY NOTE

This Act reforms the common law concerning unincorporated, nonprofit associations in three basic areas — authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association.

At common law an unincorporated association, whether nonprofit or for-profit, was not a separate legal entity. It was an aggregate of individuals. In many ways it had the characteristics of a business partnership.

This approach obviously created problems. A gift of real property to an unincorporated association failed because no legal entity existed to receive it. For example, a gift of Blackacre to Somerset Social Club (an unincorporated, nonprofit association) would fail because in law there is no legal entity to receive title. Some courts in time became uncomfortable with this result.

Some construed such a gift as a grant to the officers of the association to hold the real estate in trust and manage it for the benefit of the members of the association. Later, some legislatures provided various solutions, including treating the association for these purposes as an entity.

Proceedings by or against an unincorporated association presented similar problems. If it were not a legal entity, each of the members needed to be joined as party plaintiffs or defendants. Class action offered another approach. Again courts and legislatures, especially the latter, provided solutions. “Sue and be sued” statutes found their way on the law books of most states.

Unincorporated associations, not being legal entities, could not be liable in tort, contract, or otherwise for conduct taken in their names. On the other hand, their members could be. Courts borrowed from the law of partnership the concept that the members of the association, like partners, were co- principals. As co-principals they were individually liable. Again courts and legislatures, responding to concerns of their constituents about this result, modified these rules. Courts found that, in large membership associations, some members did not have the kind of control or participation in the decision process that made it reasonable and fair to view them as co-principals. Legislatures also took steps. Perhaps most striking are the statutes adopted in many states in the last decade excusing officers, directors, members, and volunteers of nonprofit organizations from liability for simple negligence. There is great variety in the details; a few statutes condition the immunity on the association carrying appropriate insurance or qualifying under Internal Revenue Code Section 501(c).

Related to liability is the question of enforcement of a judgment obtained against an unincorporated association, its members, and its property. If fewer than all members are liable in contract or tort, the property that members own jointly or in common may not be seized in execution of a judgment without severing the interest of those who are liable from those who are not. Again, courts using “joint debtor,” “common property,” and “common name” statutes fashioned more workable solutions. Some legislatures have also addressed the problem directly. For these purposes, unincorporated associations have been treated as legal entities — like a corporation.

What is striking about the legislative treatment of these and other legal issues concerning unincorporated, nonprofit associations is that no state appears to have addressed them in a comprehensive, integrated, and internally consistent manner.

This Act deals with a limited number of the major issues relating to unincorporated, nonprofit associations in an integrated and consistent manner.

The American Bar Association first issued its Model Nonprofit Corporation Act in 1964; it was most recently revised in 1987. The act deals comprehensively with nonprofit corporations, including troublesome questions of governance and membership. This Act, on the other hand, does not treat these and other questions. Enactment of this Act would leave these matters to a jurisdiction’s common law or its statutes on the subject. It should be noted, too, that many states have statutes on special kinds of unincorporated, nonprofit associations, such as churches, mutual benefit societies, social clubs, and veteran’s organizations. Which of these acts should be repealed and which retained in whole or part may require careful consideration.

This Act applies to all unincorporated, nonprofit associations. Nonprofit organizations are often classified as public benefit, mutual benefit, or religious. For purposes of this Act, it is unnecessary to treat differently these three categories of unincorporated, nonprofit associations. Unlike some state laws, it is not confined to the nonprofit organizations recognized as nonprofit under Section 501(c)(3), (4), and (6) of the Internal Revenue Code. There is no principled basis for excluding any nonprofit association. Therefore, the Act covers unincorporated philanthropic, educational, scientific, and literary clubs, unions, trade associations, political organizations, cooperatives, churches, hospitals, condominium associations, neighborhood associations, and all other unincorporated, nonprofit associations. Their members may be individuals, corporations, other legal entities, or a mix.

The Act is designed to cover all of these associations to the extent possible. To the extent a jurisdiction decides to retain statutes dealing with specific kinds of nonprofit associations, this Act will supplement existing legislation. As is pointed out in the NCCUSL Comments, a state

electing to adopt this Act will need to examine carefully its statutes to determine which it wants to repeal, which to amend, and which to retain.

The basic approach of the Act is that an unincorporated, nonprofit association is a legal entity for the purposes that the Act addresses. It does not make these associations legal entities for all purposes. It is left to the courts of an adopting state to determine whether to use this Act by analogy to conclude that an association is a legal entity for some other purpose.

It should be noted, too, that many of the provisions are intended to be supplemented by a jurisdiction's existing law. For example, Section 5, which provides for the filing of a statement of association authority, does not provide details concerning the filing process. It leaves to other law such details as whether the filing officer returns a copy marked "filed" and stamps the hour and date thereof, and the amount of the filing fee.

Two sections are bracketed as optional — Section 12 on venue and Section 13 on service of process. A jurisdiction may decide that its present rules are consistent with the entity view of an association and provide the appropriate rule. Therefore, it would not adopt Sections 12 and 13. Both sections deal with only a part of the questions of venue and service of process. This means that if they are adopted they are only a part of the jurisdiction's law on the subject. And perhaps they should be placed in the court rules or statutes on those subjects instead of in the state's code with the other sections of this Act.

A nonprofit organization wanting a comprehensive governance structure might consider incorporating under a nonprofit corporation statute, particularly one that follows the format of the ABA Model Nonprofit Corporation Act. These statutes provide, among other things, comprehensive governance provisions. As this Act contains none, adoption of a substantial charter and bylaws would be required to obtain similar internal rules and structure.

There has been concern that this Act may deter nonprofit organizations from incorporating and that failure to incorporate would deprive the public of protections incorporation would provide. Clearly, incorporation does provide governmental involvement that this Act does not.

Most jurisdictions regulate solicitation by charitable organizations. Many of these are comprehensive. See, for example, Ill. Ann. Stat. ch. 23, Sections 5100-5121 (Smith-Hurd 1992); Minn. Stat. Ann. Sections 309.50-309.61 (West 1992); Uniform Management of Institutional Funds Act.

These statutes frequently require, among other things, filing of a comprehensive statement with the attorney general before soliciting funds, including a copy of contracts with any professional fundraisers, and registration of professional fundraisers. A range of civil and criminal sanctions are provided. These statutes apply to all persons soliciting for charitable purposes, incorporated or not. In short, this Act's nonprofit associations are covered.

It should be noted, too, that a nonprofit corporation or unincorporated, nonprofit association is not the only choice. The Uniform Law Foundation, like many Illinois foundations, is organized as a charitable trust. Ill. Ann. Stat. ch. 14, Sections 51-69, (Smith-Hurd 1992); Uniform Supervision of Trustees for Charitable Purposes Act. Finally, it should be repeated that this Act is needed for the informal nonprofit organizations that do not have legal advice and so may not consider whether to incorporate.

§ 1. Definitions

In this [Act]:

(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties

does not by itself establish a nonprofit association, even if the § co-owners share use of the property for a nonprofit purpose.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

NCCUSL Comment.

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member's responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liability to third parties on a contract of the nonprofit association. Therefore, "member" is defined in terms appropriate to these purposes. "Member" includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fundraising device commonly used by many nonprofit associations is the membership drive. In most cases the contributors are not members for purposes of this Act. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy." Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 nevertheless protects "a person considered to be a member by a nonprofit association" even though the person is not within the definition of member in paragraph (1).

3. The role of a member in the affairs of an association is described as "may participate in the selection" instead of "may select or elect" the governing board and officers and "may participate ... in the development of policy" instead of "may determine" policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit association to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. "Person" instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated, nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (2) defines "nonprofit association." The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit, unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. The term “nonprofit association” is used instead of “association” for several reasons. The risk that this Act when placed in a state’s code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term “association” alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term “association,” which it defined to include only for-profit organizations. “Association” was held in 1938 to include an unincorporated political party and the act applied to it. Richmond County v. Democratic Organization of Richmond County, 1 NYS2d 349 (1938). Subsequent decisions applied the act to other unincorporated, nonprofit organizations. The use of “nonprofit association” instead of merely “association” should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, Statutes as Sources of Law Beyond their Terms in Common Law Cases, 50 Geo. Wash. L. Rev. 554 (1982).

Legal issues concerning unincorporated, for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a state’s other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated, for-profit association would not be appropriate.

7. Two or more persons is the common statutory requirement to constitute an unincorporated, nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number — two. Consideration was given to specifying “one” instead of “two.” For example, the developer of a condominium may have created a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be “joined by mutual consent for a common purpose?” To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several states provide that they be “joined together for a stated common purpose” (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be “stated.” Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

8. “Nonprofit” is not defined. A common definition — it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution — does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit.

9. The final sentence of paragraph (2) is adapted from Section 201(d)(1) of Revised Uniform Partnership Act (RUPA). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

10. The definition of “person” in paragraph (3) is a standard NCCUSL definition.

11. The definition of “State” in paragraph (4) is a standard NCCUSL definition.

§ 2. Supplementary General Principles of Law and Equity

Principles of law and equity supplement this [Act] unless displaced by a particular provision of it.

NCCUSL Comment.

1. This section is adapted from Uniform Commercial Code Section 1-103. The reference in Section 1-103 to "the law merchant" and its examples of supplementary rules, such as those of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act's rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by someone empowered by the nonprofit association to give the authority? To decide a case like this a court must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance — applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations — large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

§ 3. Territorial Application

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.

NCCUSL Comment.

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 makes a conveyance or devise of land located in a state that has adopted this Act effective even though it would not be effective under the law of the state in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the state is required.

§ 4. Real and Personal Property; Nonprofit Association as Legatee, Devisee, or Beneficiary

(a) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(b) A nonprofit association may be a legatee, devisee, or beneficiary of a trust or contract.

NCCUSL Comment.

1. Subsection (a) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the common law rule. Inasmuch as an unincorporated, nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, Unincorporated Non-Profit Associations 1-45 (Oxford Univ. Press 1959), 15 A.L.R. 2d 1451 (1951); Warburton, The Holding of Property by Unincorporated Associations, Conveyancer 318 (September-October 1985).

2. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. Matter of Anderson's Estate, 571 P.2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any "unincorporated society or association and every lodge or branch of any such association, and any labor organization" full right to acquire, hold, or transfer any "real estate and other property as may be necessary for the business purposes and objects of the society," and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated association is not an entity the statutory solutions are often partial — limited to special circumstances and associations. Subsection (a) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

3. Even if a nonprofit association's governing documents provide that it "may not acquire real property," subsection (a) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members against their association and its appropriate officers to undo the transaction.

4. Subsection (b) is a necessary corollary of subsection (a) and, thus, it may be unnecessary. However, several states expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (b) applies to both trusts and contracts. Not all state statutes apply expressly to both.

§ 5. Statement of Authority as to Real Property

(a) A nonprofit association may execute and [file; record] a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority [filed; recorded] in the office in the [county] in which a transfer of the property would be [filed; recorded].

(c) A statement of authority must set forth:

(1) the name of the nonprofit association;

(2) the address in this State, including the street address, if any, of the nonprofit association, or, if the nonprofit association does not have an address in this State, its address out of state;

(3) the name or title of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association; and

(4) the action, procedure, or vote of the nonprofit association which authorizes the person to transfer the real property of the nonprofit association and which authorizes the person to execute the statement of authority.

(d) A statement of authority must be executed in the same manner as a deed by a person who is not the person authorized to transfer the estate or interest.

(e) A filing officer may collect a fee for [filing; recording] a statement of authority in the amount authorized for [filing; recording] a transfer of real property.

(f) An amendment, including a cancellation, of a statement of authority must meet the requirements for execution and [filing; recording] of an original statement. Unless canceled earlier, a [filed; recorded] statement of authority or its most recent amendment is canceled by operation of law five years after the date of the most recent [filing; recording].

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is [filed; recorded] in the office of the [county] in which a transfer of real property would be [filed; recorded], the authority of the person named in a statement of authority is conclusive in favor of a person who gives value without notice that the person lacks authority.

NCCUSL Comment.

1. This section is based on Revised Uniform Partnership Act (RUPA) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. RUPA Section 303 provides for central filing, such as with the secretary of state, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. “Filed” and “recorded” are bracketed to direct an enacting state to choose. In most jurisdictions “recorded” will be the appropriate choice.

5. Subsection (c)(2) may present a problem for small, ad hoc, nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

6. Subsection (c)(3) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (c)(4) requires the statement to document the authority of the person granted power to deal with the nonprofit association’s real property and of the person authorized to execute the statement of authority.

8. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association.

9. Subsection (f) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association’s current leadership from being effective. Reliance on a filing or recording this old is, in effect, not in good faith.

10. Subsection (g) is based on RUPA Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. There remains, of course, the risk that the statement itself was unauthorized.

§ 6. Liability in Tort and Contract

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort.

(b) A person is not liable for a breach of a nonprofit association's contract merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

(c) A person is not liable for a tortious act or omission for which a nonprofit association is liable merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered as a member by the nonprofit association.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered as a member by the nonprofit association.

(e) A member of, or a person considered to be a member by, a nonprofit association may assert a claim against the nonprofit association. A nonprofit association may assert a claim against a member or a person considered to be a member by the nonprofit association.

NCCUSL Comment.

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co- principals. Subsection (a) changes that. It makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

2. This Act does not deal with liability of a member or other person acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 leaves that to the other law of the jurisdiction enacting this Act.

3. Subsections (b) through (e) are applications to common cases of the basic principle in subsection (a). Because a nonprofit association is made a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) specifies that result with respect to contracts.

4. Subsection (b) applies the principle in subsection (a) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated, nonprofit association was not a legal entity; one purporting to act for it breached this implied warranty. Smith & Edwards v. Golden Spike Little League, 577 P.2d 132, 134 (Utah 1978). Subsection (b) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. "Merely" because a person is a member does not make the person liable on an association's contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) relieves members only of their vicarious liability. Liability for one's own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent's representative status is liable on the contract. Under agency law an agent acting within the agent's scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. Restatement (Second) Of Agency 320- 322; Reuschlein and Gregory, Agency & Partnership 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. NCCUSL Comment, Piercing the Nonprofit Corporate Veil, 66 Marq. L. Rev. 134 (1984). Section 6 makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this doctrine to a nonprofit association. In Macaluso v. Jenkins, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, Law of Corporations, pp. 344- 352 (West 3d ed. 1983); Alfred F. Conard, Corporations in Perspective, pp. 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members' liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for "debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association." As noted earlier, partial and uncoordinated statutory solutions of common law problems are typical.

8. Subsection (c) applies the principle in subsection (a) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980's all states have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. State Liability Laws for Charitable Organizations and Volunteers (Nonprofit Risk Management & Insurance Institute, 1990); Developments, Nonprofit Corporations, 105 Harv. L. Rev. 1578, 1685-1696 (1992).

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution — the Open Courts provision. Note, The Constitutionality of the Charitable Immunity and Liability Act 1987, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 does not affect these statutes. As noted earlier Section 6 deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6, perhaps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In Guyton v. Howard, 525 So. 2d 918 (Fl. App. 1988) a nonprofit organization was held liable for

the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) applies the principle in subsection (a) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6, however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. Marshall v. International Longshoreman's and Warehouseman's Union, 57 Cal. 2d 781, 371 P.2d 987 (1962); Judson A. Crane, Liability of an Unincorporated Association for Tortious Injury to a Member, 16 Vand. L. Rev. 319, 323 (1963).

13. Subsection (e) applies the principle in subsection (a) to reverse the common law rule that a member may not sue the member's unincorporated, nonprofit association. A member as co-principal is logically a defendant as well as a plaintiff in such an action. The logic is that one may not sue oneself.

Subsection (a) makes an unincorporated nonprofit association a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987).

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated, nonprofit association of which the person is a member. Cox v. Thee Evergreen Church, 836 S. W. 2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated, nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The court also followed recent developments in other courts.

15. Section 6 relieves from vicarious liability not only members but also certain others. Persons who are "authorized to participate in the management of the affairs of the nonprofit association" are protected. Persons within this group — largely directors and officers, however denominated — are likely also to be members as defined in Section 1(1), and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 extends protection to this group out of abundant caution. It is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 prevents that somewhat remote possibility.

Section 6 also extends protection to a person who is not within the definition of "member" in Section 1(1) but is "considered to be a member by the nonprofit association." A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 accords this person protection.

As noted earlier, Section 6 concerns vicarious liability only. Liability for one's own conduct is covered by other law of the enacting jurisdiction.

§ 7. Capacity to Assert and Defend; Standing

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

NCCUSL Comment.

1. Subsection (a) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many states have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated, nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01 (Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) does not have — a description of the association name to be used. Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a) — (1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) does not require that it have a name.

3. Subsection (b) describes an association's standing to represent the interests of its members in a proceeding. It is the federal standing rule. Hunt v. Washington Apple Advertising Commn, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L. Ed. 2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interests of its members. If the suit concerns only the nonprofit association's interests, subsection (b) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. Warth v. Seldin, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L. Ed. 2d 343 (1975).

5. Subsection (b) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing to represent the interests of its members. Warth v. Seldin, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L. Ed. 2d 343 (1975). Some states require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This approach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many states have adopted the three-pronged federal rule, which is the rule in subsection (b).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

§ 8. Effect of Judgment or Order

A judgment or order against a nonprofit association is not by itself a judgment or order against a member.

NCCUSL Comment.

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation ... ."

2. Section 8 applies not only to judgments but also to orders, such as an award rendered in arbitration or an injunction.

3. Section 8 reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.

4. Some states changed the common law rule by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).

An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

§ 9. Disposition of Personal Property of Inactive Nonprofit Association

If a nonprofit association has been inactive for [three] years or longer, a person in possession or control of personal property of the nonprofit association may transfer the property:

(1) if a document of a nonprofit association specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) if no person is so specified, to a nonprofit association or nonprofit corporation pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

NCCUSL Comment.

1. Section 9 is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

2. "Inactive" is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

"Inactive" does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization "inactive."

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has been inactive for that period will begin functioning again. Thus, it is prudent to transfer its assets to someone likely to make appropriate use of them.

3. Section 9 applies only to personal property — tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All states have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1981) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial

institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which the Uniform Unclaimed Property Act (1981) applies is that in "a safe deposit box or any other safekeeping repository." Many states have additional statutes that apply to property abandoned in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 is very unlikely to be in the position of an obligor on such intangible property. In summary, there appears to be limited overlap.

Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a "recognized tax exempt charitable organization formed for educational, religious or scientific purposes." Tex. Code Ann. Elections Section 251.012(d) and (e) (Vernon's 1986). Minnesota provides that if an unincorporated religious society "ceases to exist or to maintain its organization" title to its real and personal property vests in the "next higher governing or supervisory" body of the same denomination. Minn. Stat. Ann. Section 315.37 (West 1992).

4. Section 9 does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

5. To obtain a Section 501(c)(3) tax classification as a nonprofit organization an association must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1).

6. If there is no bylaw or other controlling document the person may transfer the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

7. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

8. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

§ 10. Appointment of Agent to Receive Service of Process

(a) A nonprofit association may file in the office of the [Secretary of State] a statement appointing an agent authorized to receive service of process.

(b) A statement appointing an agent must set forth:

(1) the name of the nonprofit association;

(2) the address in this State, including the street address, if any, of the nonprofit association, or, if the nonprofit association does not have an address in this State, its address out of state; and

(3) the name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

§ (c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the [Secretary of State] and giving notice to the nonprofit association.

(d) A filing officer may collect a fee for filing a statement appointing an agent to receive service of process, an amendment, or a resignation in the amount charged for filing similar documents.

(e) An amendment to a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement.

NCCUSL Comment.

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5, which concerns a statement of authority with respect to property. Because one requires local and other central filing they are not combined.

§ 11. Claim not Abated by Change of Members or Officers

A [claim for relief] against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

NCCUSL Comment.

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated, nonprofit associations. Uniform Partnership Act Sections 29 and 31(4). This Act's entity approach requires this change of the old common law rule. Similar provisions are found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations, Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973).

§ 12. Venue

For purposes of venue, a nonprofit association is a resident of a [city or] county in which it has an office.]

NCCUSL Comment.

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all states for fixing venue is the county of residence of the defendant. Most states specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated, nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See Wright, Miller, & Cooper, 15 Federal Procedure & Practice 3812 (1986). Conforming to the entity view of an association, Section 12 rejects the common law view.

This section is bracketed because some states have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides." Ill. Code Civ. Prac. Section 2- 102(c).

3. Section 12 makes a nonprofit association a resident of any county (or city) in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

4. "City," in brackets, is for use by those states, such as Virginia, in which there is territory that is not in a county but in a city only.

§ 13. Summons and Complaint; Service on Whom

In an action or proceeding against a nonprofit association a summons and complaint must be served on an agent authorized by appointment to receive service of process, an officer, managing or general agent, or a person authorized to participate in the management of its affairs. If none of them can

NCCUSL Comment.

1. In most states the law with respect to service of process is in court rules. Where that is the case, this section, if adopted, should be placed in these rules.

2. Some states have expressly addressed service of process on a nonprofit association. Those states may wish to continue their rules and so should not adopt this section. For this reason this section is bracketed.

Section 13 adapts Rule 4 of the Federal Rules of Civil Procedure to this setting. However, it leaves to other applicable law details concerning service, such as who may make service and the kind of the mailing. It specifies only to or on whom the service of process must be addressed.

By rule or statute all jurisdictions have extensive law on service of process. The real question for nonprofit associations is which set of these rules should apply. This Act treats a nonprofit unincorporated association as a legal entity. Thus, the rules applicable to another legal entity, the corporation, seem most appropriate.

§ 14. Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 15. Short Title

This [Act] may be cited as the Uniform Unincorporated Nonprofit Association Act.

§ 16. Severability Clause

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 17. Effective Date

This [Act] takes effect _____.

NCCUSL Comment.

This Act provides an unincorporated, nonprofit association and its members with a legal structure that conforms to the expectations of many of them. Therefore, the need by the nonprofit association for additional time to revise procedures and forms to conform to a significant change in the law is not necessary. However, this Act materially affects third parties, particularly creditors of nonprofit associations. Anecdotal evidence suggests that many creditors place little reliance on their rights against members in extending credit. If they have any reservations about the creditworthiness of a nonprofit association they obtain guarantees from creditworthy members or insist on cash. To the extent that this is true, no change in credit policies is needed and so no extra planning time is needed.

Unless a jurisdiction's usual effective date rule provides little time for affected parties to learn of a new law, it is unnecessary to extend this Act's effective date.

§ 18. Repeals

(a) The following acts and parts of acts are repealed:

(1)

(2)

(b) The following acts and parts of acts are not repealed:

(1)

(2)

(c) This [Act] replaces existing law with respect to matters covered by this [Act] but does not affect other law respecting nonprofit associations.

NCCUSL Comment.

1. This Act is not a comprehensive revision of the law of unincorporated, nonprofit associations. It is, however, designed to apply to all unincorporated, nonprofit associations to the extent of its coverage.

Many states have a patchwork of law relating to these associations. Some laws apply to a specific kind of association, such as a denominational church or medical society. See, for example, California Corporations Code, Title 3, Unincorporated Associations, Section 21200 (West 1991) (County and Regional Medical Societies); Minn. Stat. Ann. Section 315.01 et seq. (West 1992) (religion societies). Other law deals with a very specific subjects, such as legal protection of an association's insignia. Some go beyond a subject's treatment in this Act, such as the recently enacted charitable immunity and liability acts that relieve individuals acting for an association from liability for simple negligence.

2. In preparing a bill for the enactment of this Act careful attention should be given to determining the appropriate relationship of this Act to existing statutes. It may be wise to repeal

expressly certain laws and to specify that certain others are not repealed. While it is unusual to include a provision that certain statutes are not repealed, doing so in this situation will relieve courts of difficult questions of repeal by implication.

§ 19. Transition Concerning Real and Personal Property

(a) If, before the effective date of this [Act], an estate or interest in real or personal property was purportedly transferred to a nonprofit association, on the effective date of this [Act] the estate or interest vests in the nonprofit association unless the parties have treated the transfer as ineffective.

(b) If, before the effective date of this [Act], the transfer vested the estate or interest in another person to hold the estate or interest as a fiduciary for the benefit of the nonprofit association, its members, or both, on or after the effective date of this [Act] the fiduciary may transfer the estate or interest to the nonprofit association in its name, or the nonprofit association, by appropriate proceedings, may require that the estate or interest be transferred to it in its name.

NCCUSL Comment.

1. Section 19 brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider an unincorporated, nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference in subsection (a) to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. Subsection (a) gives effect to the gift. However, if parties were informed about the common law they may have treated the gift as ineffective. In that case, the final clause of subsection (a) provides that the gift does not become effective when this Act takes effect.

2. Section 19 should not be read as a retroactive rule. It applies to the facts existing when this Act takes effect. At that time subsection (a) applies to a purported transfer of property that under the law of the jurisdiction could not be given effect at the time it was made. Subsection (a) belatedly makes it effective — effective when this Act takes effect and not when made. The practical result of this difference in when the purported transfer is effective is that the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, subsection (a) by its terms does not vest ownership in the nonprofit association.

3. Some courts gave effect to gift of property to an unincorporated, nonprofit association by determining that the gift lodged title in someone, often officers of the association, to hold the property in trust for the benefit of the association and its members. Subsection (b) addresses this situation. When the Act takes effect it authorizes the fiduciary to transfer the property to the association. If the fiduciary is unwilling or reluctant, the association may require the fiduciary to transfer the property to the association. In either case, the association will get a deed transferring the property to it which, in the case of real property, the association may record.

4. Jurisdictions may face one of three different legislative situations with respect to Section 19. First, a jurisdiction may not have changed the common law. In that case, Section 19 fits its situation well. Subsections (a) and (b) address the two approaches taken by the courts under the common law. Secondly, a jurisdiction may have changed the common law so as to make effective transfers of real and personal property to some but not all nonprofit associations. In this case Section 19 should be made applicable to those nonprofit associations that did not have the benefit of the special acts. Thirdly, some jurisdictions may have extended to all nonprofit associations the privilege of acquiring in their names real and personal property. In this case, the jurisdiction does not need Section 19 and so should not adopt it.

5. Jurisdictions that have a statute like New York's concerning grants of property by will have a problem that needs special attention. The New York statute provides that a grant by will of real or personal property to an unincorporated association is effective only if the association incorporates within three years after probate of the will. McKinney's N.Y. Estates, Powers & Trust Law Section 3-1.3 (1991). The grants by will that need attention are those that have not become effective by incorporation of the association and have not become ineffective by the running of the three year period. These grants seem entitled to the benefits of Section 19. If so, some modification of Section 19 may be required.

§ 20. Savings Clause

This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.

NCCUSL Comment.

1. Section 20 is adapted from RUPA Section 1006(c). It continues the prior law after the effective date of this Act with respect to a (i) "right accrued" and (ii) pending "action or proceeding." But for this section the new law of this Act would displace the old in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act's enactment is substantial. Millard H. Ruud, The Savings Clause — Some Problems in Construction and Drafting, 33 Tex. L. Rev. 285, 286-293 (1955). A court generally applies the law that exists at the time it acts.

2. Almost all states have general savings statutes, usually as a part of their statutory construction acts. These are often very broad. See, for example, Model Statutory Construction Act, Section 53. As this Act is remedial, the more limited savings provisions in Section 20 are more appropriate than the broad savings provisions of the usual general savings clause. Section 20 and not a jurisdiction's general savings clause applies to the Act.

3. "Right Accrued." It is not always clear whether an alleged right has "accrued." Some courts have interpreted the phrase to mean that a "matured cause of action or legal authority to demand redress" exists. Estate of Hoover v. Iowa Dept. of Social Services, 299 Iowa 702, 251 N. E. 2d 529 (1977). In Nielsen v. State of Wisconsin, 258 Wis. 1110, 141 N. E. 2d 194 (1966), a landowner brought suit after the repeal of an act granting a landowner the right to recover from the state for damages to her land caused by the state's failure to install necessary culverts and the like to prevent flooding. Before the act's repeal the landowner's land had been damaged by flooding caused by the state's failures. The court held that the statutory saving of "rights of action accrued" saved her cause of action. In both of these cases, conduct that gave rise to a cause of action had occurred before the act was repealed. It is said that it is not enough that there is an inchoate right. Apparently, there is no "accrued right" under a contract, for example, until there is a breach.

4. "Action or Proceeding" Pending. The principal question is what is an "action or proceeding" for this purpose. "Action" refers to a judicial proceeding. "Proceeding" alone, especially when used with "action," is broader and so includes administrative and other governmental proceedings. It has been given the broader meaning. For example, in State ex rel. Carmean v. Board of Education of Hardin County, 170 Ohio 2d 415, 165 N.E.2d 918 (1960) a petition to transfer certain land from one school district to another filed before a change in the law was a "pending proceeding" to be decided under the old law. Similarly, a request for permission to petition for an election to consolidate school districts was held to be a "proceeding commenced" so that the substance and procedure of the old law, which was materially different from the new, was preserved. Grant v. Norris, 249 Iowa 236, 85 N. E. 2d 261 (1957).

5. RUPA provides that the Act does not "impair obligations of contract existing." This is not carried forward. This phrase is intended to save only obligations protected by the contracts clauses of state and federal constitutions. However, as it might be construed more broadly and the constitution would protect without the phrase, the phrase is not present in Section 20.

July 20, 1992

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To: Carl H. Lisman, Chair
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Millard Ruud, Reporter
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Re: National Conference of Commissioners on Uniform State Laws,
Unincorporated Associations Act Committee

Dear Mr. Lisman and Mr. Ruud:

This letter is written on behalf of the Nonprofit and Unincorporated Associations Committee of the Business Law Section of the State Bar of California, to provide you with our overall comments concerning the Draft of the Unincorporated Associations Act which has been prepared for the July 30 - August 6, 1992 meeting of the National Conference of Commissioners on Uniform State Laws (the "Act"). Please note that the comments expressed herein are the comments of the committee, and do not necessarily reflect the position of the entire State Bar.

We would like to start out by noting that this most recent draft is a substantial improvement over the draft that was presented last year; however, it is our opinion that the draft is still not in a final form, and that additional time and consideration (including exposure of the draft to a wider audience) is necessary before such an act should be adopted

by the Conference. Some of the general areas that remain of concern to our committee are as follows.

ISSUES TO BE COVERED

As is noted in lines 14-22, page 2 of the Act, there is a need for a comprehensive legislative treatment addressing unincorporated associations. For example, in California, most of the present statutory law regarding unincorporated associations was adopted or codified from earlier law in 1947, and there has been no comprehensive review of the law since that time, despite the fact that all of the business, nonprofit and cooperative corporations laws have been completely revisited.

Unfortunately, the Act continues to deal only with a limited number of issues. Further, the issues the Act addresses are scattered and lack a common theme. Issues which are described in the Reporter's comments as "troublesome" and "impractical", are not tackled. The Reporter notes that a number of issues will be left to the states to deal with. What is left is a patchwork of quick-fix solutions to a limited number of issues. This would appear to run contrary to the purpose of uniform legislation, and the result would add little to the set of laws already in effect in California.

An additional problem resulting from this approach, which relies upon a jurisdiction's existing law to supplement many of the provisions (page 2-3, lines 8-15), is that this fails to take into account the fact that many, if not most, jurisdictions do not <u>have</u> a meaningful statutory framework, or, as is the situation with California, have only fragmentary statutory provisions applicable to unincorporated associations. As a result, if the uniform law, in its present form, were to be adopted, the state would have a law, which by its very nature, would be incomplete. From our experience in working with the California legislature, it is not good drafting procedure to give a state legislature 50% of the necessary law, with the idea that they will come up with the remaining 50%. They will not.

Accordingly, we strongly recommend that the additional time be taken and the additional workforce be assembled that are necessary to draft a law that addresses in a thorough way, issues as to organization, governance

rights, liabilities and other matters which ought to be covered in a general law regarding unincorporated associations.

NONPROFIT VS. PROFIT

Although it is our understanding that NCCUSL is of the position that essentially all unincorporated associations which are organized for profit should be considered partnerships, this is not and is unlikely to be the law in California. There are a number of organizations in California which consider themselves to be unincorporated associations rather than partnerships or corporations, and which operate for-profit. We suppose this is true in other jurisdictions.

The Act, does not cover for-profit unincorporated associations. We have two concerns with this approach: 1) We see no reason to limit the Act to nonprofit associations. 2) If there is only a nonprofit unincorporated associations act, then it is likely that a court will apply the same law to for-profit associations. We note that the Reporter considers the differences between for-profit and nonprofit unincorporated organizations to be significant (page 5, lines 48-51). If this is the case, then this is all the more reason to address the law applicable to for-profits, to keep inapplicable law from being applied to them by analogy. The solution proposed to cover unincorporated organizations by the partnership laws, is not workable for some associations.

We would also suggest that, before one defines a nonprofit unincorporated association, one should first define an unincorporated association. Such a definition will help avoid confusion. For example, gay couples, who do not have a legal right to marry, have begun to register with the California Secretary of State as unincorporated associations. This is not what one normally thinks of when one describes an unincorporated association, either for-profit or nonprofit. In addition, the definition proposed does not clearly exclude trusts, either nonprofit, business, or personal, from coverage.

GOVERNANCE/MEMBERSHIP

The Act states that it does not address "troublesome questions of governance and membership". Unfortunately, these issues are inseparable from the issues which the Act attempts to address, and are thus impossible to avoid. For example, a principal question raised when transferring property is "Who has the right to sign?"

By not addressing these foundational issues directly, the Act is reduced to making numerous indirect references to governance. For example the Prefatory Note refers to members and officers; apparently directors are not considered to be involved with unincorporated associations. Even more distressing is the definition of members. The definition of member as one who "may participate in the selection of persons authorized to manage the affairs of the association" fails to recognize that some unincorporated associations parallel a corporate form, where the members elect directors, who elect officers. Under the Act's definition, it appears that both members and directors may be considered members. On the other hand, with other unincorporated associations, "members" act directly, rather than selecting someone else to act. This Act fails to allow for such method of governance.

The Reporter's Note includes the ABA Nonprofit Corporation Law definition of member, but fails to note how this definition relates to the Act. It should be noted, as well, that, unlike this Act, the Nonprofit Corporation Law also discusses directors and officers in detail and specifically does not require the existence of members.

The Reporter's Note also states that the definition of member used is based on case law. We would be interested in knowing to what case law the reporter is referring.

If the Act is going to deal with items that, of necessity, concern issues of associational governance, it must address the issues of governance and membership directly, so that they can be discussed and adequately debated. To do otherwise is both unwise and unfair, and will not result in good law. It is certainly conceptually possible to have a set of default provisions addressing governance which would apply in the absence of rules or

practices of the organization to the contrary. These default governance provisions might also have several levels of complexity, depending upon the size and nature of the organization to which the provisions apply.

The Reporter's Note to Section 2 states that by not including rules addressing governance, the risk of violation of the free exercise clause of the First Amendment is avoided. This is not necessarily so. First of all, as is discussed above, the issue of governance has not been avoided, but is covered by indirect references that rely upon assumptions as to how the organization is governed. Secondly, by not addressing the issue directly, the law-making burden is only shifted to the courts, should a controversy arise. On the other hand, as long as the rules or practices of the organization prevail over default provisions, this should not interfere with religious organizations. Further, special deference to religious organizations can be added, when necessary (see, e.g. the Revised Model Nonprofit Corporations Law, for examples of how this can be done).

In short, a meaningful act relating to unincorporated associations really must address these questions of membership and governance, and that need is not obviated by any of the concerns of which we are aware.

TITLE TO PROPERTY

Section 4(a) states that a nonprofit association may acquire property "in its name." By implication, it may not acquire property in another name. Section 4(b) allows an association to be given property through a trust or contract; it is not clear they may receive it by will.

According to the Reporter's Note, Section 5 is similar to California Corporations Code Section 20002. In this California code section, the filing is clearly optional, and simply provides for a "safe harbor", so that the association my convey clear title that can be conclusively relied upon by the purchaser. There is no requirement in California law that an unincorporated association "must" or even "should" file.

LIABILITY

Section 8 of the Act is a vast improvement over prior revisions we have seen. Unfortunately, the existing state laws referred to on page 15, lines 32-38 often refer to nonprofit corporations. At a minimum, we would suggest that the comment recommend that the law be extended to cover associations. However, it should also be noted that the laws of the various states in this area are extremely inconsistent; a uniform provision is certainly both necessary and appropriate.

In addition to the direct liability issues, California provisions concerning indemnification of nonprofits are limited to organizations having a corporate form and do not apply to unincorporated associations. We would strongly recommend that indemnification provisions also be included in a uniform law.

The Reporter's Note also refers to the liability of a national organization for torts or contracts of its local chapters and vice versa. The conclusion in the Note is that this is not a special problem for unincorporated nonprofit associations. To the contrary, it appears to us that this is very much a special problem of unincorporated nonprofit associations and recommend that this issue be addressed.

FORMATION/EXPIRATION

One additional question raised by our committee is what purpose is served by having a uniform law that addresses issues of property ownership, lawsuits, service of process and venue without addressing the issue of whether an entity even exists. Barr v. United Methodist Church, referred to by the Reporter, has demonstrated the importance of being able to determine if and when an unincorporated association has been formed. It would seem that this issue should be addressed by a uniform act. Along with this would be the related question of when an unincorporated association terminates. Section 12 only addresses the distribution of personal property of an unincorporated association that has been inactive for a period of time. We would recommend that there be a method of termination set forth, as well as the safe harbor for distribution of property 3 years after the association has ceased to be active. In addition, it is

unclear to us why the safe harbor is limited to tangible personal property. We would recommend that it apply to all property, both real and personal. To say that it is not a significant problem today ignores the fact that if this Act is successful, the problem, especially of real property, may increase.

CONCLUSION

Although our committee is not opposed to a Uniform Unincorporated Association Act, is has strong reservations about the present draft. In addition to the general comments set forth above, we would be happy to comment specifically on the language if that would be helpful. However, it was our opinion that many of our specific comments may be irrelevant at this time, in light of the larger concerns expressed above.

Thank you for your attention to this matter. If you have any questions or comments on any of these items, please do not hesitate to contact us.

Very truly yours,

STATE BAR OF CALIFORNIA,
Business Law Section
Nonprofit and Unincorporated
Organizations Committee

By: _____
Curtis C. Sproul

cc: _____, Section Chair
[liaisons]
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