Study B-501 September 5, 2003

Memorandum 2003-28

Uniform Unincorporated Nonprofit Association Act (Comments on Tentative Recommendation)

The Commission has circulated a Tentative Recommendation on *Unincorporated Associations* (March 2003). We received three letters commenting on the tentative recommendation. These letters are attached in the Exhibit as follows:

The letter from the Religious Organizations is signed by the California Catholic Conference, the Southern Baptist Ethics & Religious Liberty Commission, the Christian Science Committee on Publication for Northern California, the Christian Science Committee on Publication for Southern California, the Synod of Southern California and Hawaii – Presbyterian Church, the Synod of the Pacific – Presbyterian Church, the Seventh-day Adventists Church State Council, and the International Church of the Foursquare Gospel.

A staff draft recommendation is also attached. The staff draft implements many of the changes suggested by the Nonprofit Organizations Committee. It also includes conforming revisions to correct cross-references to provisions that would be renumbered under the proposed law. After considering the issues discussed in this memorandum, the Commission should decide whether to adopt the staff draft recommendation as its final recommendation, with or without changes.

GENERAL REACTION

The Nonprofit Organizations Committee of the Business Law Section of the California State Bar ("the Nonprofit Organizations Committee") is generally supportive of the approach taken in the proposed law, but offers a number of

suggestions for improvement. Some of these suggestions have been addressed in staff notes in the attached staff draft. The staff does not intend to discuss those issues at the meeting, unless questions are raised by the Commission or members of the public. Other, more substantive, suggestions are discussed in this memorandum.

The Religious Organizations express concern about application of the proposed law to religious institutions. In particular, they are concerned that the proposed law would subject religious institutions to state regulation in ways that are inconsistent with the institutions' spiritually-derived organizational structure and governance practices. The Religious Organizations believe this could lead to unconstitutional state interference in religious self-governance. These issues are discussed below.

The California-Hawaii Elks Association is "generally in accord" with the proposed law. Mr. Morse, general counsel for the Elks, notes: "Personally, I am mightily impressed with the work of the Revision and on behalf of the Elks and myself, would appreciate being kept advised of developments in the future." See Exhibit p. 21. Mr. Morse suggested one minor change to the preliminary part of the tentative recommendation.

RELIGIOUS ASSOCIATIONS

The Religious Organizations write, at Exhibit p. 9:

> The principal concern addressed by the undersigned is that the proposed revision does not clearly and expressly defer to the internal law, governing documents, and settled practices of religious entities on basic questions such as organization and structure. Only if such internal law and practice permits an unincorporated association, in the circumstances of the matter in dispute, may a court find that one exists. There exists the real possibility, not mere potential, that the [proposed law] could be applied subjectively to impress upon a religious institution an organization that is contrary to the one chosen by it in accord with its own internal religious law, tradition and practice. If realized, such a possibility would extinguish the right of religious self-governance in violation of the federal and state Constitutions.

For purposes of analysis, the Religious Organizations' concern can be broken down into two propositions:

(1) Any governance provisions in the proposed law should defer to a religious association's governing documents.

(2) The question of whether an unincorporated religious association exists, for the purpose of determining capacity to sue and be sued, should be determined by reference to the association's own governing documents. Considerations of fairness alone should not be sufficient reason to treat an association as a legal entity that is subject to suit.

The first proposition is consistent with the Commission's current approach. The second presents a more difficult issue. Both are discussed below.

Governance Provisions

The Religious Organizations urge that any statutory provisions on the governance of an unincorporated association should defer to the association's own governing documents. See Exhibit p. 19. This is consistent with the general approach of the Commission to date. As currently drafted, the proposed law contains only a few provisions that touch on governance matters. Each of these provisions is drafted so as not to disturb an association's own governing practices (if any):

- Section 18010 defines a "member" of an unincorporated association. It expressly defers to any definition provided in the association's governing documents.
- Section 18115 specifies certain formalities for execution of property transactions by an unincorporated association. It provides for execution by any "body duly authorized to act by the governing instruments of the association."
- Section 18130 provides rules for distribution of the assets of an unincorporated association that is winding up its affairs. Except where the assets are subject to a trust, the proposed law defers to the association's own governing documents.

The State Bar Committee has proposed that additional governance provisions be added to the proposed law. In discussing that proposal, the Commission has provisionally agreed that any governance provisions should be drafted as default rules, which would only apply if an unincorporated association's governing documents are silent on the subject of the rule.

The staff does not believe that any changes need to be made to the proposed law to address the Religious Organizations' concerns about

governance provisions. However, as consideration of governance issues proceeds on a separate track, the Commission should seek to avoid any provisions that might improperly infringe on a religious associations' right to determine its own form of governance.

Legal Existence

The Religious Organizations also suggest that the law should defer to the governing documents of religious associations in determining whether an unincorporated religious association exists as an entity with the capacity to sue and be sued. The Religious Organizations propose that the following language be added to the proposed law:

> A court may not find a grouping of religious organizations or entities is an unincorporated association for purposes of this title unless the governing documents (by laws, mission statements, or internal law) requires such an affiliation with respect to the specific transaction in question or dispute. In such cases, a court must defer to such internal documents on questions of membership, governance, and the exercise of authority.

See Exhibit pp. 10-11. In other words, the law should defer to religious organizations governing documents in determining "whether an association even [exists]." *Id*.

This concern seems to be prompted by the proposed law's consistency with the definition of "unincorporated association" stated in *Barr v. United Methodist Church*, 90 Cal. App. 3d 259 (1979), *cert. denied,* 444 U.S. 973 (1979). The holding in that case was objectionable to many in the religious community, because it held that the United Methodist Church was amenable to suit, despite Methodist insistence that no such entity exists under their spiritually-derived organizational structure. The Religious Organizations write (at Exhibit p. 15):

> *Barr* is widely regarded in the religious community as one of the more egregious violations of the principle of separation of church and state. That unconstitutional exception should not be the basis on which California revises its law on unincorporated associations and applies that law to religious entities.

In a nutshell, the objection is that religious institutions derive their organizational structure from their spiritual beliefs. For the state to dictate whether a particular organizational entity exists within a religious institution is tantamount to the state telling a religious institution how to organize itself. That

would constitute interference with religious self-governance, in violation of the free exercise clause of the First Amendment of the U.S. Constitution and Article I, Section 4 of the California Constitution.

In addition to concerns about state interference in religious self-governance, the Religious Organizations may also be concerned about the practical consequences of imposing liability on an entity that does not exist.

Hypothetical Example

In order to focus discussion, it is helpful to keep an example in mind: A hypothetical religious denomination ("the Denomination") is structurally decentralized. Local parishes form the highest organizational unit. The pastor of the local parish is not answerable to any other religious authority. However, members of different parishes have much in common, including adherence to a single unified doctrine. Their doctrine encourages local parishes to meet together in order to explore their common history, doctrine, and values, and to cooperate on worthwhile projects. To that end, the local parishes send representatives to periodic national and regional conferences. These conferences hold meetings, issue statements, and propose various joint projects.

For administrative convenience, conference organizers maintain minimal assets in the conference name (e.g., "the Northern Conference of the Denomination"). These assets are obtained from individual member parishes and are used to rent meeting facilities, publish and mail announcements and joint statements, maintain websites, pay temporary clerical staff, etc. However, the Denomination's doctrine expressly provides that management of a parish and its property resides solely in the local parish.

A parishioner falls on the grounds of her local parish and is severely injured. The fall was caused by negligent upkeep of parish property. The parishioner sues the parish for damages, but the parish has few assets. Seeking another source of recovery, the parishioner also sues the Northern Conference, arguing that the Northern Conference is vicariously liable either as the local parish's principal in an agency relationship on an alter ego theory.

Distinguishing Liability from Legal Existence

As a starting point for discussion, it is important to distinguish the question of existence from the question of liability. The court in *Barr* drew that distinction expressly:

> [We] wish to stress that our decision in the pleading phase of this litigation does not imply any lack of compassion by UMC or infer liability on its part. Our holding based upon neutral principles of law simply determines UMC is suable. What the outcome of that suit will be or should be is not before us.

Barr at 270.

In other words, a court would decide whether the Northern Conference exists and can be sued, without considering the merits of the claim against the Conference. In doing so, the court might rely on the fact that the Northern Conference maintains a checking account in its own name, pays intermittent employees from that fund, and occasionally enters into rental agreements in its own name, and conclude that the Northern Conference does exist as a legal entity. That determination is not a determination of liability. The plaintiff must now prove that the asserted agency or alter ego relationship.

Cases cited by the Religious Organizations illustrate that being sued is not the same as being liable. See Exhibit p. 13-15. In each of the cited cases, a religious entity was sued for harm caused by another entity in the same faith. The plaintiffs sought to impose vicarious liability on theories of agency and alter ego. In each case the defendant prevailed — not because the defendant didn't exist, but because the plaintiff failed to prove agency or alter ego.

Suit Against Nonexistent Association

The court in *Barr* stated the criteria to be applied in determining whether an unincorporated association can be sued as a legal entity:

> The criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity.

Barr at 266-67. This standard establishes two specific factual requirements (common purpose and common name), then requires a general consideration of fairness. Consideration of fairness blurs the definitional boundary, making it difficult to know for sure whether a particular group has legal existence or not.

It is conceivable that a court could, in the interest of fairness to an injured plaintiff, recognize the existence of a legal entity where there is none. In our example, the court might sympathize with the severely injured plaintiff, who clearly suffered a wrong but has no ready source of compensation (the

responsible local parish having no assets). The court might conclude that the overarching institution of the Northern Conference should stand trial to determine whether it is somehow responsible for the harm. Concern for fairness to the plaintiff might lead the court to this result despite there being little concrete evidence that the Conference operated as a legal entity.

The staff sees three potential problems that might result:

(1) The case is tried and the Northern Conference is held liable. Because the Northern Conference has no assets of its own, the plaintiff argues that the judgment should be satisfied from the assets of individual member parishes.

(2) In order to avoid the first problem, member parishes collect funds to defend the lawsuit. Not only does this reinforce the notion that the Northern Conference exists, it might also be seen as evidence of the claimed agency or alter ego relationship. Furthermore, it imposes an unnecessary financial burden on the individual parishes.

(3) In order to avoid recurrence of the first two problems, the Denomination decides to suspend all conference activity. This infringes on the doctrinally-derived preference for fellowship and cooperation between parishes. It also strains the unity of the Denomination, because there is no longer a forum in which to resolve emerging differences on matters of doctrine.

These are significant problems. However, the proposed law would not create these problems. To the contrary, the proposed law would help avoid these problems.

Proposed Law Would Not Create New Problems

The question of whether a religious association exists and can be sued is determined under Code of Civil Procedure Section 369.5. The court in *Barr* was interpreting and applying the predecessor to that section, former Code of Civil Procedure Section 388. *The proposed law makes no change to Section 369.5.* Any problems with application of that section to religious associations are existing problems that would not result from the proposed law.

That said, the proposed law does include a definition of "unincorporated association" that is largely consistent with the criteria stated in the *Barr* case. See proposed Section 18025. It also includes a fairness-based catchall, that allows a court to treat a group as an unincorporated association, regardless of whether it satisfies the statutory definition. See proposed Section 18050. In that sense, it is

very similar to the rule stated in *Barr*, and that similarity is noted in the Commission's Comments to those two sections.

Those provisions do not govern Code of Civil Procedure Section 369.5. By their terms, they only apply to the Corporations Code provisions of the proposed law. Strictly speaking, they should have no effect on the application of Section 369.5. However, it is possible that a court might conclude that the proposed law's acknowledged similarity to the rule stated in *Barr* represents approval and ratification of *Barr.* It is therefore worth considering whether the proposed law could be modified in some way to address the Religious Organizations' concerns.

Proposed Law Would Avoid Many Problems

Before considering whether to make any changes to the proposed law, it should be noted that the proposed law would actually reduce the risk of member liability.

Proposed Section 18605 provides that a member of a nonprofit association is not liable for a debt, obligation, or liability of the nonprofit association solely by reason of being a member. Proposed Section 18610, provides that a member of a nonprofit association is not liable for a contractual obligation of the association unless the member (1) expressly assumed responsibility for the obligation, (2) ratified or authorized the specific contract, or (3) knowing of the contract, received a benefit under the contract (in which case liability would be limited to the value of the benefit received). Proposed Section 18620 provides that a member of a nonprofit association is not liable for injury caused by the association or an agent of the association unless the member expressly assumed liability or the member's own tortious conduct caused the injury.

So, in our example, if the plaintiff prevailed against the Northern Conference, only the Conference itself would be liable. Member parishes would not be liable unless they had expressly assumed liability or were themselves involved in causing the injury. This limitation on member liability would eliminate any incentive to sue the nonexistent Northern Conference (which has little or no assets itself). Even if there were a suit, there would be need for the member parishes to defend the Northern Conference — they face no liability themselves. Because member parishes would not need to defend the suit and face no liability, there would be no pressure to change their doctrinal practices regarding inter-parish cooperation through conferences.

Rather than creating a problem for religious associations, the proposed law would substantially eliminate the possibility of vicarious liability extending through a nonexistent religious entity to reach other religious entities that have no actual responsibility for the harm.

Constitutionality

Regardless of the temporal consequences of determining that a nonexistent religious association exists and can be sued, the Religious Organizations also maintain that such a result unconstitutionally inhibits the free exercise of religion (at Exhibit p. 17):

> The [United Methodist Church] did not involve itself in the business world except through its civil agencies. Ignoring these agencies meant ignoring the polity. Ignoring the polity meant substituting a court-directed governance. When the state dictates religious governance it violates the Constitution. … Courts constitutionally may not impose on a church an organizational structure contrary to the structure the church has chosen for itself.

In response to a similar argument, the court in *Barr* stated:

> To hold UMC suable is not equivalent to a review of its polity thus interfering with its internal affairs in violation of the free exercise clause of the First Amendment. There is no evidence to show that rendering UMC amenable to suit would affect the distribution of power or property within the denomination, would modify or interfere with the modes of worship affected by Methodists or would have any effect other than to oblige UMC to defend itself when sued upon civil obligations it is alleged to have incurred.

Barr at 274.

Supreme Court doctrine on when state action unconstitutionally infringes on free exercise rights varies by circumstance and has changed over time. However, there is single dominant theme that has emerged in recent cases:

> In the course of the 1980s, the Supreme Court slowly reduced the free exercise clause down to a single and simple principle of neutrality. The court's earlier concerns to protect the conscience of the religious individual and the autonomy of the religious group from state intrusions slowly fell aside. The Courts earlier decisions to strike down laws that imposed taxes or discriminatory restrictions on religious expression also fell aside. In a series of cases culminating in Employment Division v. Smith [494 U.S. 872

> (1990)], the court systematically read each of these constitutive principles out of the free exercise clause, reducing it to a single and simple principle of neutrality.

John Witte, Jr., Religion and the American Constitutional Experiment 137 (Westview Press 2000).

This trend toward a principle of neutrality can be traced through two prominent lines of free exercise cases: those involving church property disputes, and those involving a neutral state statute that incidentally burdens religious practice.

Church Property Cases

The typical church property case presents an interesting problem: two groups within a church each claim to represent the true faith and therefore have the exclusive right to use church property. In deciding such cases, a court may stray into dangerous ground, being asked to decide essentially theological disputes. One safe path through this thicket is to rely on the application of "neutral principles of law":

> [Not] every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.

Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). The use of "neutral principles of law" to decide a property dispute was specifically approved in the case of *Jones v. Wolf*, 443 U.S. 595, 604 (1979):

> In undertaking such an examination, a civil court must take special care to scrutinize [religious] documents in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

> On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. … We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.

Under this approach, a court is required to defer to "the authoritative ecclesiastical body" only if the case cannot be resolved by application of neutral principles. The majority in *Jones* specifically rejected the dissent's proposed rule of compulsory deference to higher church authority in every case. *Id*. at 604-606.

Neutral Statute Cases

The other major line of "free exercise" cases involve a religiously-neutral government regulation that has the incidental effect of burdening the free exercise of religion. For example, military uniform regulations may preclude wearing of religious garments; compulsory military service may violate a spiritual commitment to pacifism; drug prohibition laws may punish the sacramental use of peyote; etc. Similarly, it might be argued that a determination that a particular entity exists within a religious faith may burden adherents' commitment to a different organizational structure.

In these cases, the Supreme Court has varied in the degree of deference it accords neutral state laws. However, the current expression of the doctrine is quite deferential to states. In *Employment Division v. Smith*, 494 U.S. 872 (1990), a man was fired and denied unemployment benefits for violation of a law prohibiting consumption of peyote, despite the fact that his religious beliefs required him to use peyote for sacramental purposes. The court held that:

> [The] right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).

Id. at 879. The majority in *Smith* declined to apply the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). Under that test, a governmental action that substantially burdens a religious practice must be justified by a compelling governmental interest. After discussing prior application of that test, the majority stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to

> hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, *like its ability to carry out other aspects of public policy*, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." … To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself" … -- contradicts both constitutional tradition and common sense.

Smith at 885 (citations omitted) (emphasis added).

That holding in *Smith* was quite controversial. In reaction, Congress passed the Religious Freedom Restoration Act (1993), by which it attempted to restore a balancing test similar to that rejected in *Smith*. However, that Act was held unconstitutional as applied to the states. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The decision in *City of Boerne* apparently restored *Smith* as the law governing state laws that incidentally burden religious practices. After the decision in *City of Boerne*, Congress reacted again. It enacted the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. § 2000cc *et seq.*), which restored the compelling state interest test, but only in disputes involving state regulation of land use or the religious liberty of institutionalized persons. The Supreme Court has not yet considered the constitutionality of that statute. In any event, that Act does not govern the issue at hand.

The end result of all of this wrangling is that *Smith* sets the standard governing neutral state statutes that incidentally burden religious practice (other than land use and the liberties of institutionalized persons).

Conclusion

Code of Civil Procedure Section 369.5 is a neutral statute of general application. A court could apply that section to a religious association using neutral principles of law. For example, the court could examine bank records, title documents, insurance policies, employment records, an association's governing documents, etc., without improper scrutiny of religious precepts. The neutral principles doctrine would restrain the court from too close an entanglement with religious doctrine. One could argue that *Barr* was decided wrongly on its facts, but the staff sees no constitutional problem with Section 369.5 or with the general approach articulated in *Barr*.

Possible Compromise

The staff is not convinced that the proposed law should be changed. It does not directly affect the determination of whether an unincorporated association exists and can be sued. That determination is made under Code of Civil Procedure Section 369.5, which the proposed law would not affect. What's more, the proposed law would add clear member liability limitations that would eliminate most of the practical problems that might result if a plaintiff seeks to find a deep pocket by suing a fictitious religious entity. Finally, the staff finds nothing in current Supreme Court doctrine to suggest that a civil court is barred from applying neutral principles of law to determine whether a religious association exists and can be sued.

However, there may be a fairly simple compromise that could avoid the issue entirely. The Religious Organizations' concern seems to have been triggered by the fact that the proposed law includes language similar to that used in *Barr*. In particular, codification of a rule that allows a court to determine that an unincorporated association exists as a legal entity, based entirely on considerations of fairness, may be seen as opening a loophole through which nonexistent associations might be forced into court.

The Commission should consider replacing the *Barr*-derived definition with the definition of "unincorporated association" provided in existing Section 24000(a) (which the Commission drafted):

> As used in this part, "unincorporated association" means any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but does not include a government or governmental subdivision or agency.

That language would need to be modified slightly, to conform to other aspects of the proposed law. The staff would also recommend including the "common lawful purpose" element, which seems helpful and harmless. Revised Section 18025 and Comment would read:

> 18025. (a) "Unincorporated association" means any unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.
>
> (b) Joint tenancy, tenancy in common, community property, or other form of property tenure does not by itself establish an unincorporated association, even if coowners share ownership of the property for a common purpose.

(c) Marriage or creation of a registered domestic partnership does not by itself establish an unincorporated association.

Comment. Section 18025 is similar to former Section 24000.

Subdivision (c) makes clear that marriage or creation of a registered domestic partnership does not by itself create an unincorporated association. This does not prevent spouses or domestic partners from forming an unincorporated association for any purpose beyond the purposes inherent in marriage or registered domestic partnership.

See also Sections 18020 ("person" defined), 18055 (exempt entities), 18060 (relation to other law).

Because that definition would be so broad, there would no longer be any need for the fairness catchall provided in Section 18050. Nor would there be any need to reference *Barr* in the Comment. Deletion of the *Barr*-derived language and the reference to *Barr* in the Comment would eliminate any implication that the proposed law somehow ratifies the *Barr* court's interpretation of Section 369.5. Removal of the fairness catchall would remove any perceived loophole that might somehow be exploited to bring suit against a nonexistent entity. Consequently these changes should go far toward addressing the Religious Organizations' concerns about the potential effect of the proposed law on religious self-governance.

Note on Use of Common Name

One aspect of the compromise approach described above is the deletion of the "common name" element of the definition of "unincorporated association." That change was suggested by the Nonprofit Organizations Committee in its letter. See Exhibit p. 2. The merits of that change are discussed below. The Commission should consider that issue before making a decision regarding the compromise described above.

REQUIRING A "COMMON NAME"

The proposed law is intended to serve as a default, which would apply to any unincorporated association that is not governed by some other, more specific, body of law. Accordingly, the definition of "unincorporated association" used in the proposed law is quite broad. Proposed Section 18025(a) provides:

> "Unincorporated association" means an unincorporated organization of two or more persons joined by mutual consent for a common lawful purpose and operating under a common name.

Limitations on the application of the proposed law are set out in proposed Sections 18055 (exempting specific types of entities) and 18060 (providing that law specific to a particular type of entity prevails over the proposed law).

Should Operation Under a Common Name be Required?

The Nonprofit Organizations Committee is concerned that limiting the definition of "unincorporated association" to groups that operate under a common name does not reflect existing law and would be too restrictive (Exhibit p. 2):

> This requirement is not currently the law, and is too restrictive (it excludes at least some organizations that currently are unincorporated associations – and we are not sure what they would turn into, under this definition). The Comment refers to the Barr decision but that decision does not make a common name a requirement of unincorporated associations; it simply makes it clear that use of a common name may be an indicium that a group is or groups are operating as an unincorporated association. Further, the concerns raised by Barr are taken care of in Section 18050.

The existing definition of "unincorporated association" that governs the unincorporated association provisions of the Corporations Code does not require operation under a common name. That requirement was read into Code of Civil Procedure Section 388 (now 369.5) by the court in *Barr*. Should it be codified?

Consequences of Requiring a Common Name

It is difficult to imagine a group that should be treated as a legal entity despite the fact that it has not given itself a name. When a group gives itself a name, that shows a subjective intent to create something more formal than a casual grouping. When a group holds itself out to the public under a common, third parties will form reasonable expectations that an entity exists. Absent a name, it is hard to know whether a group of people is just a group of people, or is something more. There is the potential for confusion and misunderstanding. For these reasons, the staff feels that requiring a common name makes sense.

The consequences of granting legal entity status to a group without a name are discussed below.

Ability to Own Property and Engage in Property Transactions

Proposed Section 18105 provides: "An unincorporated association in its name may acquire, hold, manage, encumber, or transfer an interest in real or personal property." Because that section specifically requires that title be taken in the name of the unincorporated association, it would not seem to matter whether it applied to a group without a name. Either way, the group without a name derives no benefit from Section 18105.

Member Liability

The proposed law limits the liability of a member of a nonprofit association for a debt, obligation, or liability of the association. Without this protection, a group of persons might be vicariously liable for the torts of other members of the group under a theory of "joint enterprise." 6 B. Witkin, Summary of California Law, *Torts* § 997, at 388 (9th ed. 1990). Witkin has this to say about joint enterprise liability:

> The negligence of one person is not imputed to another nonparticipant except in the clearest of cases and where the interests of justice demand it. The fundamental rule is that one person, himself free from fault, shall not be required to bear the consequences of the actions of another. Vicarious liability is the exception. It is only where a person actually acts through another to accomplish his own ends that the law will or should impose such vicarious liability. Right of control over the other person is a test of the required relationship, but it is not itself the justification for imposing liability. Aside from such legal relationships as master and servant, principal and agent, etc., before the courts will find that the parties were joint adventurers there must be a clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction.

Id. at 399-400 (quoting *Roberts v. Craig*, 124 Cal. App. 2d 202, 208 (1954)).

In *Shook v. Beals*, 96 Cal. App. 2d 963 (1950), defendants jointly chartered an airplane for a fishing excursion. Only one of the group was a pilot and he flew the plane. He then crashed the plane, negligently. The court found that there was sufficient evidence to show that a joint enterprise existed and that all of the members of the enterprise were therefore liable for the pilot's negligence. Each of the defendants had jointly planned and financed the trip and had a legal right to control use of the airplane (despite the fact that only one of them could fly).

The proposed law would eliminate joint enterprise liability for the members of an unincorporated association. Removal of the common name element of the definition of "unincorporated association" would make that limitation on member liability universal. Any member of a group of two or more persons joined by mutual consent for a common lawful purpose would be immune from vicarious liability for the actions of another member. This would seem to eliminate noncommercial joint enterprise liability.

Discussion

Common sense suggests that it is appropriate to require a group to have a name before according it the status of a legal entity. However, it may not be strictly necessary that a common name be required. The only apparent effect of removing the common name element from the definition of "unincorporated association" would be to eliminate joint enterprise as a basis for liability.

That may be an acceptable change. Joint enterprise liability seems somewhat threadbare. The staff could not find any recent cases in which joint enterprise liability was applied (outside the context of a commercial joint venture, which the proposed law would not affect). One court noted that joint enterprise liability is "rarely invoked outside the automobile accident context." See *Christensen v. Superior Court*, 54 Cal. 3d 868, 875 (1991). The liability of a car owner for the negligence of a person driving the car with permission is now governed by statute. See Veh. Code § 17150 ("Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.")

As a separate proposition, the staff would recommend in favor of preserving the common name requirement. As part of an accommodation of the Religious Organizations' concerns, elimination of the common name requirement may be justifiable.

LIABILITY LIMITATIONS

The proposed law limits the liability of a member of an unincorporated nonprofit association. See proposed Sections 18610, 18620, and 18630. It also provides rules governing the liability of an agent of an unincorporated nonprofit association. See proposed Sections 18615, 18620.

The Nonprofit Organizations Committee suggests that the liability limitation provisions should be applied to all unincorporated associations, not just nonprofit associations:

> We do not believe that there is any proper basis for limiting these provisions as to liability of members, directors, officers, employees and agents of nonprofit associations. Of course, the general partnership law does include provisions for liability of partners but it does not include provisions for liability of employees or agents of general partnership (other than as partners) as such. In addition, California law as to a number of other types of unincorporated organizations provides limitation on liability of members, directors (or managers), employees and agents; e.g., limited liability partnerships; limited partnerships, limited liability companies; real estate investment trust (as to shareholders); etc. The portions of these proposed sections that do impose liability seem appropriate and sufficient as to the entire category of unincorporated associations. As a result, the general rules of non liability of members, directors, officers, agents and employees seem appropriate.

See Exhibit p. 6.

In evaluating this proposal it is important to consider what entities would be affected and to what extent. Section 18050 would categorically exempt a partnership or limited liability company from application of the proposed law. Regardless of whether the Nonprofit Organizations Committee proposal is adopted, the proposed liability provision would not apply to a partnership, joint venture, or limited liability company.

The liability of shareowners in a real estate investment trust is limited by statute. That specific provision would control over the more general member liability provisions provided in the proposed law. Under the Nonprofit Organizations Committee approach, the proposed agent liability provisions would apply to a real estate investment trust. That would be a harmless change, as the agent liability provision is really just a reiteration of existing agency principles.

Where the proposed broadening of the member liability provisions could create problems is in the application of statutory member liability limitations to two types of for-profit unincorporated association that are governed by judicially developed liability rules: the business trust and the joint stock company.

Business Trust

A business trust (sometimes called a "Massachusetts trust") is a form of business organization where property is conveyed to one or more trustees, in accordance with the terms of a trust instrument, to manage for the benefit of persons holding transferable certificates representing shares of beneficial interest. These certificates, which resemble shares of stock in a corporation, entitle the holders to share ratably in the income of the trust, and on termination of the trust, in the proceeds. See *Goldwater v. Oltman*, 210 Cal. 408 (1930).

In a true business trust, the trustee is not the agent of the certificate holders, and is individually liable for contracts entered into as trustee (unless the contract stipulates otherwise). The shareholders are not liable. However, if the trust agreement gives substantial control over the trust property to the shareholders, such that they are "the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property," then a partnership is formed rather than a trust, and partnership law controls. In that case, the shareholders are liable, as partners, for contracts made on their behalf. *Id*. See generally, 15 Cal. Jur. 3d Corporations § 557 (2003).

The limitation on the immunity of the beneficiaries of a true business trust for the liabilities of the trust appears to be unqualified. Proposed Section 18610 would impose three qualifications:

(1) *The member would be liable if the member expressly assumed liability.* Proposed Section 18610(a). That qualification would probably not be a problem. Even under existing law, it seems likely that a beneficiary of a business trust would be estopped from asserting immunity from liability on a contract if the beneficiary expressly assumed that liability.

(2) *The member would be liable if the member expressly authorized or ratified the specific contract.* Proposed Section 18610(b). This shouldn't be a problem either. In a true business trust, beneficiaries do not exercise managerial control. If the beneficiaries exercise control, then a partnership is formed and the law of unincorporated associations would not apply.

(3) *The member would be liable for the value of any benefit knowingly received under a contract between the business trust and a third party.* Proposed Section 18610(c). This could be a problem. The purpose of a business trust is for the beneficiaries to receive benefits from the management of the trust property. Liability for benefits received could open a significant loophole in the existing rule shielding beneficiaries from liability for the obligations of the trust.

Application of proposed Section 18610(c) to a business trust would potentially cause a significant substantive change in the law.

Joint Stock Company

Like a partnership, a joint stock company is an unincorporated association of individuals for the purpose of carrying on a business and making profits. However, like a corporation, it issues stock representing shares of ownership of the enterprise and these shares are transferable by the owner, without the consent of the other shareholders. A joint stock company is governed by articles of association that prescribe its objects, organization, and the rights and liabilities of its members, and typically provide that its business shall be controlled by selected individuals designated as "directors" or "managers." In the absence of express provisions otherwise, the rights and liabilities of members of a joint stock company are determined by the same rules that apply to partnerships, that is, each member is liable for the obligations of a joint stock company. *Old River Farms Co. v. Roscoe Haegelin Co.*, 98 Cal. App. 331 (1929). See generally, 15 Cal. Jur. 3d Corporations § 548 (2003).

Application of the proposed member liability limitation to a joint stock company would cause a significant substantive change in the law.

Conclusion

The staff is reluctant to override existing law on the liability of members of a business trust or joint stock company absent any demonstrated need for the change. The staff welcomes additional input from the Nonprofit Organizations Committee on this point.

One alternative would be to broaden the liability provisions of the proposed law to apply to all unincorporated associations, then add an express exception for business trusts and joint stock companies. The staff sees little value in that approach. It appears that partnerships, joint ventures, limited liability companies, real estate investment trusts, business trusts, and joint stock companies comprise all of the recognized types of for-profit unincorporated association. If the proposed liability rules apply to none of those entities, there would be no point in providing that the rules apply to for-profit associations. Of course, there may be some unusual form of for-profit unincorporated association that has escaped the staff's notice (and that is not swept up in partnership law's general catch-all definition of "partnership" — see Corp. Code § 16202). If so,

then it too would need to be analyzed before the staff would recommend blanket application of the proposed law to that type of association.

The staff recommends against the proposed change unless some rationale is offered for changing the existing law governing the liability of members of business trusts and joint stock companies.

AUTHORIZATION OR RATIFICATION OF CONTRACT BY OFFICER OR AGENT

Under the proposed law, one of the bases on which a member of a nonprofit association may be held liable on a contract of the association is if the member expressly authorizes or ratifies that contract. See proposed Section 18610(b). An officer or agent would not be held liable merely for authorizing a contract (assuming the officer or agent had the authority to do so). See proposed Section 18615.

There is an ambiguity that could arise if an officer or agent is also a member. For example, the president of a nonprofit labor union is also a member of the union. Under the union's governing documents, only certain "big ticket" contracting decisions must be submitted to the membership for approval. All other contracts require only the approval of the union president. If the president happens to be a member of the union, is the president therefore liable for any "routine" contract the president approves (as distinguished from contracts approved by the president as part of a general vote of the membership)?

The Nonprofit Organizations Committee suggests that a member should not be liable as a consequence of approving a contract when the member acts as an agent of the association. The staff agrees. As a general rule, an agent is not liable when acting on behalf of a principal. That distinction should not be lost merely because the agent is also a member.

In the attached staff draft, proposed Section 18610(b) is revised as follows:

> 18610. A member of a nonprofit association is not liable for a contractual obligation of the association, except in one of the following circumstances:
>
> (a) The member expressly assumes personal responsibility for the obligation.
>
> (b) The member expressly authorizes or ratifies the specific contract. <u>This subdivision does not apply if the member authorizes or ratifies a contract solely in the member's capacity as a director, officer, or agent of the association.</u>

(c) With notice of the contract, the member receives a benefit under the contract. Liability under this subdivision is limited to the value of the benefit received.

The staff recommends that this change be included in the proposed law.

ENFORCEMENT OF JUDGMENT AGAINST NONPROFIT ASSOCIATION

The proposed law includes two provisions relating to enforcement of a judgment against an unincorporated association. Proposed Code of Civil Procedure 695.080 would continue existing Corporations Code Section 24002 without substantive change:

695.080. A money judgment against an unincorporated association, whether organized for profit or not, may be enforced only against the property of the association.

Proposed Corporations Code Section 18635 is drawn from partnership law (see Corp. Code § 16307(d)) and generally provides that a judgment creditor must exhaust a nonprofit association's assets before levying execution on the assets of a member, officer, or agent to satisfy a judgment against both that person and the association.

18635. (a) A judgment creditor of a member, officer, or agent of a nonprofit association may not levy execution against the assets of the member, officer, or agent to satisfy a judgment based on a claim against the nonprofit association unless a judgment based on the same claim has been obtained against the nonprofit association and one or more of the following conditions is satisfied:

(1) A writ of execution on the judgment against the nonprofit association has been returned unsatisfied in whole or in part.

(2) The nonprofit association is a debtor in bankruptcy.

(3) The member, officer, or agent has agreed that the creditor need not exhaust the assets of the nonprofit association.

(4) A court grants permission to the judgment creditor to levy execution against the assets of a member, officer, or agent based on a finding that the assets of the nonprofit association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the nonprofit association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

(b) Nothing in this section affects the right of a judgment creditor to levy execution against the assets of a member, officer, or agent of a nonprofit association if the claim against the member,

officer, or agent is not based on a claim against the nonprofit association.

On occasion, the staff has considered whether the two sections might be usefully combined and the introductory sentence in Section 18635(a) made clearer. The Nonprofit Organizations Committee now suggests adding language to Section 18635 that would be substantively very similar to the language in proposed Code of Civil Procedure Section 695.080. After considering the merits of that suggestion, **the staff recommends that Section 695.080 be combined with Section 18635(a) as follows**:

> 18635. (a) A judgment against a nonprofit association is not by itself a judgment against a member, director, officer, or agent of the association. A judgment against a nonprofit association may not be satisfied from the assets of a member, director, officer, or agent of the association unless there is also a judgment against that person, the judgment against that person is based on the same claim as the judgment against the nonprofit association, and one or more of the following conditions is satisfied:
>
> (1) A writ of execution on the judgment against the nonprofit association has been returned unsatisfied in whole or in part.
>
> (2) The nonprofit association is a debtor in bankruptcy.
>
> (3) The member, director, officer, or agent has agreed that the creditor need not exhaust the assets of the nonprofit association.
>
> (4) A court grants permission to the judgment creditor to levy execution against the assets of a member, director officer, or agent based on a finding that the assets of the nonprofit association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the nonprofit association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.
>
> (b) Nothing in this section affects the right of a judgment creditor to levy execution against the assets of a member, director, officer, or agent of a nonprofit association that is not based on a claim against the nonprofit association.

That approach has been implemented in the attached staff draft.

DEFINITION OF "GOVERNING DOCUMENTS"

A number of provisions of the proposed law look to an association's governing documents for guidance on specific governance matters. See, e.g., proposed Sections 18010 (definition of "member"), 18115 (authority to execute

property transaction for association), 18130(b) (distribution of assets of unincorporated association winding up its affairs). The term "governing documents" is defined in proposed Section 18005 as follows:

> 18005. "Governing document" means a constitution, articles of association, bylaws, or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its members.

The Nonprofit Organizations Committee points out that many unincorporated associations have incomplete governing documents or have none at all. The Nonprofit Organizations Committee proposes that the "established practices of the association" should substitute for written governing documents in such cases. See Exhibit p. 1.

This could be accomplished by revising the definition of "governing documents" to include an association's established practices where its written documents are silent on an issue or are nonexistent. However, it might be confusing to use the term "document" to refer to something other than a writing. Perhaps the term "governing documents" could be replaced with the term "governing principles" (as the Nonprofit Organizations Committee's letter seems to suggest). That term could then be defined as follows:

> 18005. "Governing principles" means the principles stated in a constitution, articles of association, bylaws, or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its members. In the absence of a relevant writing, an association's governing principles may be inferred from its established practices.

The staff recommends that a change along these lines be made. It would allow a court to consider evidence of the actual intent and expectations of the members, based on their collective conduct. While it may raise some difficulties of proof, the proposed language is permissive, so a court would not be required to reach a conclusion about an association's "established practices" where the evidence is unclear.

The staff is inclined against defining "established practice" with the specificity suggested by the Nonprofit Organizations Committee (i.e., as "the historical practices used by an association without material change or exception during the most recent five years of its existence or if shorter, the period of its existence, as applicable." Exhibit p. 1. The staff favors a more flexible approach.

USE OF TERM "DIRECTOR"

Throughout the proposed law, there are instances where the phrase "officer or agent" is used. Strictly speaking, "agent" would probably have been sufficient, as it is a very broad term that encompasses anyone working on behalf of a principal in an agency relationship. However, that concept is probably not familiar enough to lay persons who may form and operate unincorporated associations. "Officer" was added as a more familiar term.

The Nonprofit Organizations Committee now suggests that the term "director" also be used. In everyday usage, "officer or agent" would probably be understood to include a director. However, the Corporations Code distinguishes between directors and officers of a corporation. It does so for functional reasons — directors have different powers and duties than officers. Because the proposed law does not, for the most part, dictate the governance structure or practices of unincorporated association, there is no functional reason to distinguish between directors and officers. Nonetheless, the fact that the distinction is so common in the rest of the Corporations Code could lead to confusion if the term director is not used in the proposed law as well. For that reason, the phrase "officer or agent" has been changed to "director, officer, or agent" throughout the attached staff draft.

Proposed definitions of the terms "officer" and "director" will be discussed in another memorandum, in connection with the Nonprofit Organizations Committee's proposed governance provisions.

CONCLUSION

After making any necessary adjustments to reflect decisions on the issues discussed in this memorandum, the Commission should decide whether to adopt the tentative recommendation as its final recommendation. If it does, implementing legislation could be introduced next year.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

THE STATE BAR OF CALIFORNIA
BUSINESS LAW SECTION
NONPROFIT ORGANIZATIONS COMMITTEE

July 1, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4709

Re: No. B-501, Tentative Recommendation, Unincorporated Associations, Distributed in March 2003.

Ladies and Gentlemen:

Following are comments on and suggestions for changes in the above Tentative Recommendation. The comments are organized in tabular form showing the section on which a comment is made, the page of the Tentative Recommendation in which that section appears and the comment or suggestion itself. This letter is submitted by the Nonprofit Organizations Committee of the California State Bar's Business Law Section, which fully supports this project of the Commission and urges the Commission to add the provisions on governance that we submitted in February 2003 in addition to the following suggestions. State Bar policy requires that we include the disclaimers set forth in the final paragraph below.

Page	Section	Comments
9	18005, 18010, 18115, 18130	This section defines "governing document" as a writing of types described in the definition. It is used in several places in the Commission's suggested provisions. We suggest that when it is used in the following provisions, it should be followed by the expression "or if not so governed then by the established practices of the association". This language should be added in Section 18010(a) (Line 19[*]) and (b) (Line 22), Section 18115 (Line 34) and Section 18130 (Line 13). In Section 18115 the term "governing instruments" should be changed to "governing documents". In the proposed provisions respecting governance referred to above,[**] the term, "established practices" is defined in Section 18028 as "'established practices' means the historical practices used by an association without material change or exception during the most recent five years of its existence or if shorter, the period of its existence, as applicable." If our suggested governing provisions are not adopted, this definition could be added to the Commission's provisions as Section 18026. We believe this is necessary because our experience indicates that a good many unincorporated associations do not have complete, and some have no, written governing documents.

[*] References to lines in these comments are to the line numbers set forth in the left margin of the Tentative Recommendation.

[**] These provisions are referred to below in several places as "the governing provisions".

9	18010	This section defines "member" of an unincorporated association and includes in the definition a person who "may participate in the selection of persons authorized to manage the association's affairs or development of its policy but does not include a person who participates solely as an agent of the association". We have two suggestions to this section. First, that "may" be changed to "has the right to"; we believe "may" is ambiguous. Second, the comment on subdivision (b) adds an exception to the definition of member for a person who participates in decision making solely as an agent of the association and states that this does not preclude an agent from being a member if the agent otherwise qualifies. The comment then gives an example that we believe should be changed. The example states that if an association hires a consultant to assist in developing association policy, the consultant's involvement does not make the consultant a member of the association. Since in many, if not most cases, a "consultant" is not an agent in the normal sense but is an independent contractor, we believe the example should be revised to read as follows: "For example, if a director, officer or employee of an association assists in developing its policy, action by the person in that capacity would not make him or her a member of the association but would not preclude that person from having, as an additional capacity, membership in the association under its general membership rules and practices."
10	18015 (b)	Lines 29-31 - change to read: "(b) A nonprofit association may carry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage." This makes the provision in line with the powers of nonprofit benefit corporations referenced in the comment (Corp. Code § 5141(l)).
10	18025 (a)	Delete "and operating under a common name." This requirement is not currently the law, and is too restrictive (it excludes at least some organizations that currently are unincorporated associations–and we are not sure what they would turn into, under this definition). The Comment refers to the Barr decision but that decision does not make a common name a requirement of unincorporated associations; it simply makes it clear that use of a common name may be an indicium that a group is or groups are operating as an unincorporated association. Further, the concerns raised by Barr are taken care of in Section 18050. The use of the term "unincorporated organization" seems almost to be used as a term of art, both here and in 18050. It also seems to somehow create (by exclusion from the definition of "unincorporated association") a new type of entity that is not an unincorporated association because it does not operate under a common name. This is confusing, since our understanding of the concept of "unincorporated association" is that it is a "catch-all" term

that applies when two or more people operate together for a specific purpose, without forming a corporation or other specified entity and that the statutory provisions in Corp. Code Title 3 are intended to cover this catch-all area. We would suggest that the term "unincorporated organization" not be used to refer to some type of entity that includes "unincorporated associations" and should be deleted, and that whatever it means be spelled out.

11 18055 This section defines groups to which the Commission's proposal does not apply. We suggest that the words "or joint venture" be added to subdivision (c) of this section and that a new subdivision (e) be added reading "(e) except Part 3, a trust, including a real estate investment trust." We also suggest adding new subdivision (f) reading: "(f) Any other entity covered by another state law."

This section should also be reconciled with the definition contained in 18025(b) and (c) that also set forth exclusions. Perhaps 18055 could be combined with 18025 to put all of the exclusions in one place.

This section provides that Title 3 does not apply, among others, to a partnership but Section 18200(g) (Page 16) creates an exception to Section 18055 as to partnerships. We suggest that the Commission's comment on Section 18055 include a reference to Section 18200(g).

12 18100 Amend to read: "Any property interest that a member of an unincorporated association has in the association is personal property." Add to the comment a note that if the unincorporated association is a charity exempt under 501(c)(3), members may be found not to have a property interest, personal or otherwise.

12 18105 With regard to the question raised by the Commission as to whether there should be a limitation on the ability to hold real property, we believe that the Commission made the correct decision. At the time 20001 was first drafted, it was not clear that unincorporated associations could hold real property. However, the trend is to allow the same, and to continue a limitation would only confuse whether an unincorporated association could legally hold title to real property, which is what this section is designed to resolve.

12 18110 This section provides that property acquired "by" an unincorporated association is property of the association and not of the members individually regardless of how title is held. We suggest that the words "or for" be added after the word "by" in this section. This seems important because property acquired "by" an association would more often than not actually be acquired

in its name but property that is intended to be its property could also be acquired in a variety of other ways for its benefit. There should be no question that such property belongs to the association and not to its members.

13 18120 This section provides that an unincorporated association may record a statement containing specified information in any county in which it has an interest in real property. It also provides a conclusive presumption in favor of a bona fide purchaser or encumbrancer for value of real property of the association that the persons designated in the statement have the authority therein set forth. This section goes on to provide that the presumption does not apply among other things if the statement is revoked. We believe that the section should indicate how the statement may be revoked and how it must be recorded. We suggest that the following language be added to subdivision (c)(i) "such revocation must be effected by a statement executed in the same manner as the revoked statement and recorded where the revoked statement was recorded."

(c)(2): Insert "or director" after member in line 17. This expansion, to allow either a member or director to record a statement repudiating the prior recorded statement, is consistent with our definition of a director as part of the governing provisions.

This section also provides that the presumption just described does not apply if a specified document is recorded stating that the previously recorded statement was recorded without authority or that the persons designated in it are not authorized as stated in it. In its note on this section the Commission asks whether this provision for "repudiation" of a recorded statement should be included in its provisions. We think that it should and would encourage the Commission to do so.

14 18125 (c) Insert "or director" after member in line 17. This expansion, to allow either a member or director to record a statement repudiating the prior recorded statement, is consistent with our definition of a director as part of the governing provisions.

14 18130 Page 2 lines 28-29 in the Commission's introductory comments, suggests that the distribution of assets on an association's dissolution will be in accordance with the doctrine of "charitable trusts", and if there is no charitable trust, then the distribution will be to the members. This is not a correct reading of this section, as currently drafted. It provides that the assets will be distributed in accordance with any trust (be it charitable or otherwise), then in accordance with the governing documents of the association, and then to the members. With most unincorporated associations, any distribution after payment of debts would be in accordance with the governing documents, as it is unlikely that

		most of the assets would be held in trust. This description of § 18130 should be corrected in any future use of this material. Likewise, the comment to 18130 should be revised in any future materials, to make it clear that (a) is not limited to assets held in charitable trust, and that distribution in accordance with the governing documents does not necessarily mean distribution to the members.
14	18135	Section 18130 provides for disposition of assets of a dissolved unincorporated association. Section 18135 provides for recovery of distributed assets, presumably if needed to pay obligations of the dissolved association. It provides that a cause of action against an unincorporated association may be enforced against a person who received assets so distributed subject to certain limitations. It also provides that to enforce a cause of action under this section a claimant must commence a proceeding to enforce the cause of action before expiration of the statute of limitations applicable to the cause of action and within four years after dissolution of the unincorporated association. In its note on this section the Commission refers to Corporations Code 8723 relating to dissolution of mutual benefit corporations, which imposes a time limit for recovery of assets from a distributee but creates an exception to the time limit for a quiet title action. The Commission asked for comments on whether such an exception should be added to Section 18135. We believe that it should and encourage the Commission to do so.
18-22	18250 et seq.	All references to members, officers and/or agents should be amended to also refer to directors, in all provisions concerning liability. This is consistent with our definition of a director as part of the governing provisions. "Officer", as referred to herein, also needs to be defined; we have also included an appropriate definition in the governing provisions.
18-22	18605-18635	These sections deal with liability issues relating to nonprofit associations. We strongly believe that these sections should be moved to Chapter 5, "Liability" (page 18), and renumbered 18251, etc. They should be reworded to refer to "an unincorporated association" not to "a nonprofit association", so that these provisions would be applicable to all of the unincorporated associations that fall within the definition of that term in this law. We do not believe that there is any proper basis for limiting these provisions as to liability to members, directors, officers, employees and agents of nonprofit associations. Of course, the general partnership law does include provisions for liability of partners but it does not include provisions for liability of employees or agents of general partnerships (other than as partners) as such. In addition, California law as to a number of other types of unincorporated organizations provides limitation on liability of members, directors (or managers), employees and agents; e.g., limited liability partnerships; limited partnerships, limited liability companies; real estate investment trusts (as to shareholders); etc. The portions of these

proposed sections that do impose liability seem appropriate and sufficient as to the entire category of unincorporated associations. As a result, the general rules of non liability of members, directors, officers, agents and employees seem appropriate. The foregoing is designed concisely to explain our reasons for suggesting these changes; we would, however, be happy to provide the Commission with further details if it so desires and will give further thought to our explanation. The suggestions below as to some of those sections should be integrated into them as so moved.

19-20	18610, 18620	This section deals with contract liability of a member of a nonprofit association and in a note on this section the Commission asks for comments on whether existing Section 21100 should be deleted. The same question is raised in the Commission's note to Section 18620. We believe that Section 21100 should not be continued and encourage the Commission not to do so. As to Section 18610, we suggest revision of subsection (b) of this Section (line 16) to read: "(b) The member expressly authorizes or ratifies the specific contract, unless such authorization or ratification is specifically done on behalf of the unincorporated association." This is our interpretation of the comment to this section, but should be clarified in the black letter.
20	18615	This section deals with the contract liability of an officer or agent of a nonprofit association and provides that such an officer or agent may be held personally liable if the officer or agent does any of specified things. We suggest that the approach of this section should be reversed and that the opening language should read "an officer or agent of a nonprofit association may not be held personally liable for contractual obligations of the nonprofit association unless the officer or agent does any of the following:
20	18620	This section deals with tort liability of a member, officer or agent of a nonprofit association and states that with certain exceptions they may not be liable "for an injury". We suggest that this phrase be expanded to read "for an injury, damage or harm". We also suggest in subdivision (b) the word "causes" be changed to "is a cause of".
21	18630	This section deals with when a member may be held personally liable for obligations of an association under "alter ego" concepts. The paragraph of the Commission's comment beginning on Line 41 gives examples of when these concepts should be applied to a nonprofit association. Two examples are given of specific situations and we believe an additional example should be given reading essentially as follows: "If, as an incident to its other activities, a nonprofit association operates an activity that is commercial in nature of a type that could be carried on by a for profit entity, the association should have with respect to that activity, and should only be required to have, the capital,

insurance, etc. for that activity that is reasonably foreseeable as needed for it and not whatever turns out in hindsight as necessary to meet any judgment, however large or unforeseen." This example would make it clear that the alter ego liability of a member of an unincorporated association would not be greater than that of a business organization as to commercial activities.

22 18635 (a) and (b) should be renumbered (b) and (c); a new (a) should be inserted to read: "(a) A judgment against an unincorporated association is not by itself a judgment against a member. A judgment against an unincorporated association may not be satisfied from a member's assets unless there is a judgment against the member." This new section parallels, and brings the UA in line with 16307(c) of the Partnership Act.

The improvements being discussed to California's laws governing unincorporated associations also will likely lead the Commission to consider various conforming changes, including to other parts of the Corporations Code. One such change has to do with mergers between different types of organizations.

Most of the laws governing other types of entities in common use now provide that those entities may merge with others of their own kind and also with other types of entities, the latter being the so-called "interspecies merger." Our February 13, 2003, letter to the Commission proposed (in draft section 18254) that "An unincorporated association [be allowed to] merge with any other unincorporated association, domestic corporation (Section 5050), foreign corporation (Section 171), or other business entity (Section 5063.5)...." Such a merger would not be possible, though, unless the laws governing those other entities likewise permitted them to merge with unincorporated associations.

To permit California nonprofit corporations to merge with nonprofit unincorporated associations, we suggest deleting "(other than a nonprofit association)" from Section 5063.5 of the existing Nonprofit Corporation Law, as follows: "'Other business entity' means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association ~~(other than a nonprofit association)~~,.... As used herein, ... 'unincorporated association' has the meaning set forth in Section 18025~~24000~~."

This definition is invoked in existing Corporations Code Sections 6010, 8010, and 9640.

And to permit the same flexibility to California stock corporations, we would suggest parallel changes to the comparable provision of the General Corporation Law, Section 174.5, which is invoked in Sections 1100 and 1113.

* * *

We appreciate the opportunity to submit these comments and suggestions. If there are

any questions about them, we will be glad to attempt to answer them.

Please note that positions set forth in this letter are only those of our Committee. As such, they have not been adopted by either the State Bar's Board of Governors, its overall membership, or the overall membership of the Business Law Section, and are not to be construed as representing the position of the State Bar of California. The Committee is composed of attorneys regularly advising nonprofit corporations and unincorporated associations in California. Membership in the Committee is voluntary and funding for activities of them, including all legislative activities, is obtained entirely from voluntary sources. There are currently nearly 10,000 members of the Business Law Section.

Respectfully submitted on behalf of the
Nonprofit Organizations Committee,

R. Bradbury Clark
Laurie J. Gould
Louis E. Michelson
Lisa A. Runquist
Gregory E. Siegler
(Committee Task Force on Unincorporated Associations)

cc: Brian Hebert

CALIFORNIA
CATHOLIC
CONFERENCE

ARCHDIOCESES OF LOS ANGELES AND SAN FRANCISCO
DIOCESES OF FRESNO, MONTEREY, OAKLAND, ORANGE, SACRAMENTO, SAN BERNARDINO, SAN DIEGO, SAN JOSE, SANTA ROSA AND STOCKTON
BYZANTINE CATHOLIC EPARCHY OF VAN NUYS, MARONITE CATHOLIC EPARCHY OF OUR LADY OF LEBANON OF LOS ANGELES

July 30, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Dear Sir or Madam:

The undersigned religious organizations file these comments in response to the tentative draft of the Commission concerning a proposed revision of California's law on unincorporated associations. We apologize that it was not possible to submit this letter in advance of the Commission's June 30 date and ask that it be considered in making further revisions to the draft during the Commission's future deliberations.

The principal concern addressed by the undersigned is that the proposed revision does not clearly and expressly defer to the internal law, governing documents, and settled practices of religious entities on basic questions such as organization and structure. Only if such internal law and practice permits an unincorporated association, in the circumstances of the matter in dispute, may a court find that one exists. There exists the real possibility, not mere potential, that the revision could be applied subjectively to impress upon a religious institution an organization that is contrary to the one chosen by it in accord with its own internal religious law, tradition and practice. If realized, such a possibility would extinguish the right of religious self-governance in violation of the federal and state Constitutions. Included below is a proposed definition of

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"religious associations" to clarify this basic point.

One of the most venerable rights of religious institutions in the United States is self-governance, free of both the assistance and the interference of the government. Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696, 708-09 (1976). This right is fundamental to the nature of religious institutions which express themselves corporately in a variety of ways according to the doctrinal self-understanding of the religion. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). The First Amendment protects "freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Id.

Self-governance includes an allocation of various functions of the religious institution into temporal, civil entities (or not) depending on the internal law and doctrine of the faith community. Structure reflects fundamental religious belief translated into practice. How a denomination chooses to organize and govern itself is no mere nicety, but often is the result of centuries of struggle within the faith community.

Although often dramatically oversimplified by courts into neat categories of hierarchical (e.g., Catholic), connectional (e.g., Methodist), and congregational (e.g., Baptist), the reality challenges the imagination. Some are incorporated, some are not. Some are organized as trusts; others are non-profit corporations; others are corporations sole. One commentator, University of San Francisco law professor William Bassett, notes more than a dozen identifiable religious

structures. I W. Bassett, Religious Organizations and the Law, § 1:16 (1997). Such variations reflect differing ecclesiologies, based on differing theological convictions as to how each church should exist and carry out its mission in the world. The choice of organizational form therefore embodies a theological judgment by each religious community, grounded in its own religious convictions, and based on its Scripture, its tradition, and other doctrinal sources. As noted in Schmidt v. Bishop, 779 F.Supp. 321, 332 (S.D.N.Y. 1991), "[t]he traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia." Through various organizations, each denomination allocates or withholds power to persons and entities within the denomination with the expectation that each part of the church will function in a particular way. In other words, the churches themselves decide who may and who may not exercise authority within the church. As Professor Bassett describes it:

> The relationships between persons and groups within the churches, often constrained to the legal forms of agency, delegated authority, and scope of employment patterns as a method of establishing liability and legal accountability, are more correctly understood in terms of covenant, fellowship and mission.

Religious Organizations, supra at § 1:1.

Consider these examples –

Baptists express themselves in a largely single congregation form. This reflects a theology whereby matters of faith and the exercise of stewardship over resources and governance rest with individuals. Like-minded individuals gather together for common worship. That they all refer to themselves as Baptists often strikes even Baptists as remarkable. But the core belief,

the primacy of the individual's personal relationship to God, is expressed by single congregations, some incorporated but many unincorporated. These churches may choose to affiliate into regional, state, or national "conventions" for purposes of forging more common understandings of faith and moral principles. Such affiliation does not change the theology vesting authority in congregations for matters of stewardship of resources, governance of property, and decision making. Applying a rule linking these congregations together as an "association" would be something Baptists would find shocking, offensive, and unconstitutional.

Catholics express themselves through churches within dioceses. These are regional judicatories that express governance on matters of clergy discipline. But property is held and organized by a variety of means, mostly through dioceses but increasingly in the hands of local churches. Although Catholics belong to what they call a "universal" Church, the church exists only as a community of believers who choose to belong. Corporately, the "universal" church in the United States is 195 dioceses and nearly 20,000 local churches, civilly and ecclesiastically separate from each other. Applying a rule linking these entities into an association would give the government a power denied to those who govern the church.

For the most part, the courts respect these various structures for both corporate and constitutional reasons. A law review analysis of the results of decades of litigation in this area of law concluded that courts allow for the liability of a religious entity for the actions of some individual purporting to act in its name or a related religious entity only when one of three tests is satisfied. Mark E. Chopko, Ascending Liability of Religious Entities for the Actions of

Others, 17 American Journal of Trial Advocacy 289 (1993).[1] Liability may only properly be extended when the proposed defendant institution has the requisite civil corporate authority to act on the subject of the underlying dispute, ecclesiastical authority unambiguously placed in the entity, or situationally has involved itself in the subject matter notwithstanding its lack of authority. *Id.* at 300-09.

For example, in a dispute arising on the property of a local church, a regional ecclesiastical body may or may not be a proper defendant depending on whether the regional body, 1) was the property owner, 2) exercised governance over the property (not a mere ecclesiastical relationship), or 3) involved itself directly in the property so as to implicate itself in the disputed matter (tort or contract usually). Thus, in a case involving an accident at a local church, appellate courts have reversed findings of liability in a regional body which exhibited none of those characteristics, Folwell v. Bernard, 477 So.2d 1060, 1063 (Fla. App. 1985). The temporal affairs of the parish church where the accident occurred giving rise to the lawsuit was entirely managed by the parish church vestry and not some other body within the church. Respect for the proper corporate boundaries and the limitations of civil and ecclesial governance require that result. To open the door to a contrary result if a court decides that "fairness" requires an "association" to be impressed on the relationships would transgress this black letter law.

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1 This work has been twice updated as Mark Chopko, "Derivative Liability" in The Structures of American Churches, (Mousin, ed. 2003)(forthcoming) and Chopko, "Stating Claims Against Religious Institutions", Boston College Law Review (2003)(forthcoming). Continuing developments in the case law confirms the original analysis.

In another example in a commercial transaction, a group of churches banded together in an incorporated joint venture to run a Lutheran retirement center. In doing so each local church preserved its separate civil and ecclesial structure. Together, they incorporated a new structure – a retirement home – capitalized it and let it operate . Although representatives of the church constituted the board of directors, the center was self-governing. The appellate court in the state of incorporation rejected the claim that the local churches were responsible for the center's breach of contract with a resident. Hope Lutheran Church v. Chelluw, 460 N.E.2d 1244 (Ind. App. 1984). The fact that the articles of incorporation called the home "a joint agency" of the churches, *id.* at 1248, was insufficient to manifest a principal-agent relationship or to overcome the usual presumption that civil incorporation separates the incorporated entity from its organizers. Mere participation of individual churches in the formation of the corporation was not enough to impose liability upon them. *Id.* at 1248-49. Use of the word "Lutheran" in the name of the retirement home operated by the corporation did not render the individual Lutheran churches liable for the conduct of the corporate entity, which was wholly distinct and separate from the individual churches. *Id.* at 1249-51. A concurring judge observed:

> The very purpose for which a corporation is created is to create a vehicle with which the organizers and backers can conduct some business enterprise they are interested in, financially or otherwise, with limited liability to themselves.... In many fields of endeavor a single interest group may compartment the areas of activity into separate corporate entities, all controlled by a single holding company or by individuals. Such does not result in residual liability to the organizers, officers, directors and supporters so long as the corporate entity is respected. Any contrary holding would render corporate endeavors in the world a shambles, and the corporate concept would become of no purpose.

Id. at 1252 (Neal, P.J., concurring). Applying the proposed California rule on associations here would trump the protections that religious (and other) entities depend on. The associations rule would provide results that "veil piercing" could not.

In a third example, a disappointed California purchaser of a St. Bernard dog from an Abbey in Switzerland sued "the Roman Catholic Church", the Archbishop of San Francisco, numerous others, and the breaching Abbey in Switzerland in a contract dispute. Plaintiff claimed that spiritual conformity and use of the common name "Catholic" made these entities "alter egos" for purposes of assessing damages. Holding such a theory untenable, the Court of Appeal reversed the trial court denial of demurrer. Roman Catholic Archbishop of San Francisco v. Superior Court, 93 Cal. Rptr 338 (Cal. App. 1971). A common name and common spirituality does not mean common liability. But application of the "association" rule was not part of the case. Applying such a rule would have led to the fanciful result that separate civil entities, unrelated to the transaction, would suffer the liability for something done by an entity only related because it was Catholic. That possibility would, if realized, violate first principles.

These are the examples that could be offered, but the point is that Barr v. United Methodist Church, 90 Cal. App.3d 259 (1979), relied upon so heavily for the application of the proposed revision to religious organizations, is the only instance a court so utterly disregarded the principles on which liability is impressed on related religious bodies. Barr is widely regarded in the religious community as one of the more egregious violations of the principle of separation of church and state. That unconstitutional exception should not be the basis on which California revises its law on unincorporated associations and applies that law to religious entities.

The United Methodist Church is a community of faith and not a legal entity. It has no headquarters, no employees, and no assets. It pays no taxes, files no reports, and has no

insurance. Individual United Methodist conferences, separate civil and ecclesiastical entities, were responsible for the Pacific Homes retirement centers. The Pacific Homes retirement centers were separately incorporated by the regional Methodist judicatories. They were chartered and capitalized and expected to be fully funded through fees and other resources. The decision by the California Court of Appeal in Barr focuses only on whether a claim may be stated against an entity called "The United Methodist Church," but the court never faces what kind of claim is involved. The fallacy in Barr is deciding there is an unincorporated association defendant in a liability situation without ever asking and answering the fundamental question "liable for what?"

From the traditional liability perspective, liability follows responsibility. The United Methodist Church never had as part of its civil charter (if it even had one) that it would insure the life care contracts of individual churchgoers, if and when a separately incorporated and chartered Methodist agency entered a chapter proceeding. If it had a charter, it was an ecclesial document that also did not vest such guarantor responsibility in the entire "United Methodist Church." Finally the entire faith community did not involve itself in the Pacific Homes -- the Annual Conferences which chartered the Homes were the requisite bodies. Barr fails the test of traditional liability theory. It "simply recast the Church's self-understanding according to an alien structure and found it liable." Bassett, Religious Organizations, §1:4.

Having failed at that threshold, the only basis for making the United Methodist Church an unincorporated association for purposes of the dispute was the court's evaluation of the denominational Book of Discipline and the fact that the United Methodist Church had been sued

in litigation. On one occasion a local lawyer filed an action in the name of "the United Methodist Church" erroneously and without anyone's permission. The pleasure of being sued does not a legal entity make. Neither would erroneous filings of lawyers. The real issue is whether the United Methodist Church conducted its affairs with respect to the business enterprise Pacific Homes as some unitary body corporate. That is the focus of the liability principles discussed above and what is missing from the Court's analysis. The Court of Appeal, in a passage quoted by the Commission's staff counsel, says the Church "elected to involve itself in worldly affairs" and "must now, as part of its involvement, be amenable to suit." That involvement, however, was through separately incorporated civil and ecclesiastical entities, not as a civil jural entity itself. The Barr Court ignored the settled polity of the faith community which had organized itself in a particular way, incorporating certain activities in regional judicatories, as is the practice of that religion, and separately and deliberately allocating certain risks to separate corporations.

The religion did not involve itself in the business world except through its civil agencies. Ignoring these agencies meant ignoring the polity. Ignoring the polity meant substituting a court-directed governance. When the state dictates religious governance it violates the Constitution. The Barr court's self-effacing conclusion about involvement in the world is error. It should not form the basis for further regulation of religious bodies. The principle of religious autonomy found in the federal and California Constitutions precludes the government, through the courts or the legislature, from re-allocating the enforcement of ecclesial responsibilities among various structures of a religious denomination and substituting liability exposure based on affiliation, and not on conduct. Courts constitutionally may not impose on a church an organizational structure contrary to the structure the church has chosen for itself. Kedroff, 344

U.S. at 116.

"The religious denominations in America. . . are not legal entities in themselves. Each unit must be incorporated separately . . . ." Bassett, Religious Organizations, supra §1:21. At common law, the Church of England was not a suable entity, but local Bishops and Vicars had the requisite legal character to sue and be sued. That proposition was carried forward to other churches in the Edict of Toleration in 1690, and transplanted to the New World. Id. See Severight v. Attorney General of Canada, and Brass v. Attorney General of Canada, 2001 SKQB 427 (Sept. 14, 2001); Doe v. Roman Catholic Episcopal Corp. of St. George's, Dec No. 2002 NFCA 47 (Supreme Court of Newfoundland & Labrador Aug. 23, 2002). America's religions are, first and foremost, communities of faith that transcend the limits of civil form and the language of law. When a church chooses a civil law structure, the courts must respect that structure and apply the law that pertains to it. Shah Maghsoudi v. Kianfar, 179 F.3d 1244, 1250 (9th Cir. 1999). A denomination is formed when groups of local churches and/or regional churches agree to come together in communion with each other for the common purpose of discerning and carrying out the will of God, an intention reflected in the ecclesial structures and governance of the church body.

While this body might be fit under the common definition of an "unincorporated association," Cal. Rev. §18025, impressing such a structure because a judge thinks it is "fair" to do so (Cal. Rev. §18050) violates these principles. A solution would be to add a new definition section, "religious associations", which would provide –

A court may not find a grouping of religious organizations or entities is an

unincorporated association for purposes of this title unless the governing documents (by laws, mission statements, or internal law) require such an affiliation with respect to the specific transaction in question or dispute. In such cases, a court must defer to such internal documents on questions of membership, governance, and the exercise of authority.

We understand that a similar comment about deference was advocated by a Committee of the California Bar Association which wrote in a February, 2003, letter to this Commission, "To the extent an unincorporated association has governing documents which address the matters on which we comment below or has a sufficiently established practice as to them, we believe that, to the extent lawful, those provisions and practices should be respected by any general law regulating associations." We would extend that comment to any determination whether an association even existed.

Such a provision would correct the Barr rule which created a Methodist structure that was alien to Methodists, without respect either to the internal law of the denomination or to the nature of the injury. Such a provision respects the polity, the religiously motivated structural choices and allocations of risk, and minimizes the potential for unconnected and subjective creativity on the part of courts. Barr was not constitutionally required; it was unconstitutional. It should not be used as a basis for imposing further regulatory burdens on religion.

Respectfully submitted,

Most Reverend Sylvester D. Ryan, President
California Catholic Conference

Mr. Edward E. "Ned" Dolejsi, Executive Director
California Catholic Conference

Richard Land, D.Phil., President
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August 15, 2003

Mr. Brian Hebert
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Unincorporated Associations

Dear Mr. Hebert:

We are such an Association with our principal office located at 5450 East Lamona Avenue, Fresno, California. We have reviewed the proposed recommendations for change and are generally in accord.

We would like to see a strengthening of the language of the personal liability for the obligation of non-profit association. Item two (2), lines 4 through 6, on page 4, could be strengthened by substituting the word "shall" for "would" on line 4. That word substitution could have the effect of eliminating liability in the absence of conduct by the member.

Personally, I am mightily impressed with the work of the Revision and on behalf of the Elks and myself, would appreciate being kept advised of developments in this project.

Very Truly Yours,

Larry D. Morse

Larry D. Morse,
General Counsel

LDM/mlo
C: ED Tim Martin

UNINCORPORATED ASSOCIATIONS

Many private associations are not organized as corporations. An unincorporated association may be a for-profit or nonprofit group, such as a partnership, social club, charitable group, mutual aid society, labor union, political group, or religious society. Some unincorporated associations are legally sophisticated; others are small, informal groups, without legal counsel. It is therefore important that the law governing unincorporated associations be clear and understandable to a layperson.

Historically, an unincorporated association was not considered to be a legal entity separate from its members. Instead, it was treated as an aggregation of individuals.[1] An unincorporated association could not own or transfer property and could not sue or be sued in its own name. In addition, members of an unincorporated association could be held jointly and severally liable for the liabilities of the group.

In 1996, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Unincorporated Nonprofit Association Act ("Uniform Act") to address some of the problems that result from the historical view of unincorporated associations. The Uniform Act is narrow in its scope, focusing on three basic subjects: "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."[2]

The Law Revision Commission has conducted a study to determine whether the Uniform Act should be adopted in California.[3] The Commission recommends against adoption of the Uniform Act. Most of the issues that are addressed in the Uniform Act have already been addressed by statute in California.[4] Adopting the Uniform Act in California would unsettle existing law without providing any significant offsetting benefit.

However, California law governing unincorporated associations could be substantively improved in a number of areas and could be reorganized to improve its accessibility. The Commission recommends the revisions described below.

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1. "Associations … are not bodies politic or corporations; nor are they recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name." Grand Grove of United Ancient Order of Druids of California v. Garibaldi Grove, 130 Cal. 116, 119, 62 P. 486 (1900).

2. Unif. Unincorporated Nonprofit Ass'n Act (1996) (prefatory note).

3. See 2002 Cal. Stat. res. ch. 166.

4. Many of these prior reforms were enacted on the recommendation of the Law Revision Commission, after careful study. See *Suit by or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n 901 (1966); *Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n 1403 (1967); *Service of Process on Unincorporated Associations*, 13 Cal. L. Revision Comm'n 1657 (1976).

ORGANIZATION OF EXISTING LAW

The proposed law would recast existing law to improve its accessibility. Sections would be organized into a logical order, with appropriate headings, to better reflect the legal principles they address. Important terms would be defined and those definitions would be applied consistently.[5]

RELATION TO OTHER LAW

The proposed law includes provisions detailing its relation to other law. Corporations, government entities, partnerships, joint ventures, and limited liability companies are expressly excluded from application of the proposed law.[6] Those entities are subject to comprehensive regulation by other statutes. The proposed law also includes a provision subordinating it to any inconsistent statute governing a specific type of association.[7] Thus, the proposed law is a default that applies to the extent an association is not governed by other law.

PROPERTY POWERS

Under existing law, an unincorporated association can own and transfer property in its own name.[8] The proposed law would simplify the existing provisions relating to property ownership and transfer, by eliminating antiquated distinctions that developed as application of the law was incrementally extended to the various types of unincorporated association.[9]

The proposed law would add a provision governing the disposition of an unincorporated association's assets on dissolution of the association. Under the proposed law, property would first be disposed of pursuant to any applicable trust. Assets that aren't subject to trust would be distributed according to the association's own governing principles. If there are no relevant governing

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5. Under existing law there are gaps and inconsistencies in the application of defined terms. For example, Corporations Code Section 24000 defines "unincorporated association" but that definition does not apply to other sections that use the same term (such as Corporations Code Section 20001).

6. See proposed Corp. Code § 18055 *infra*.

7. See proposed Corp. Code § 18060 *infra*.

8. See Corp. Code § 20001.

9. See proposed Corp. Code §§ 18105, 18115, 18120 *infra*.

principles, the assets would be divided pro rata among the existing members.[10] This is consistent with case law[11] and is similar to the Uniform Act.[12]

Under the proposed law, a creditor of a dissolved unincorporated association could recover assets distributed to a member within four years after distribution.[13] That is analogous to the right of a creditor of a dissolved nonprofit corporation to recover assets distributed on dissolution.[14]

PERSONAL LIABILITY FOR OBLIGATION OF NONPROFIT ASSOCIATION

Contract Liability

In *Security First National Bank of Los Angeles v. Cooper*,[15] the court held that a person is not liable for a contractual obligation of an unincorporated association merely because the person is a member of the association. However, a member is liable if the member "expressly or impliedly authorizes or ratifies the contract." In that case, authorization of a lease was inferred from the fact that members had signed the association's bylaws.

In response to that decision, the Legislature enacted three rules that limit the liability of a member of a nonprofit association. Under these rules: (1) a member is not individually liable for an association debt or obligation relating to real property,[16] (2) no presumption or inference of consent or agreement to a nonprofit association incurring an obligation may be drawn from the fact that a person is a member of the association or has signed its bylaws,[17] and (3) a member can only assume responsibility for an association obligation in a signed writing that identifies the specific contract for which responsibility is assumed.[18]

These rules are both too broad and too narrow — too broad because they seem to preclude member liability on a real property contract even where liability should properly be imposed (e.g., where the member has expressly assumed responsibility for the contract); too narrow because the principal limit on liability only applies to

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10. See proposed Corp. Code § 18130 *infra*.

11. See Holt v. Santa Clara County Sheriff's Benefit Ass'n, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180 (1967) ("It is the general rule that upon the dissolution of a voluntary association its property should be distributed pro-rata among its members unless otherwise provided by its constitution or by-laws.") (citations omitted). See also Lynch v. Spilman, 67 Cal. 2d 251, 260, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) ("property transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it 'in trust to carry out the objects for which the organization was created.'") (citations omitted).

12. Unif. Unincorporated Nonprofit Ass'n Act § 9 (1996).

13. See proposed Corp. Code § 18135 *infra*.

14. See Corp. Code § 8723.

15. 62 Cal. App. 2d 653, 145 P.2d 722 (1944).

16. See Corp. Code § 21100.

17. See Corp. Code § 21102.

18. See Corp. Code § 21101.

a limited class of contracts (e.g., a member would not be shielded from personal liability for a contract to purchase a vehicle).

The proposed law would replace existing statutory limits on contract liability with a more comprehensive and generally applicable set of rules:

(1) A judgment against a nonprofit association would be enforced first against the assets of the association, before the assets of an individual member, director, officer, or agent could be reached.[19]

(2) A member, director, officer, or agent of a nonprofit association would not be liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent.[20]

(3) A member of a nonprofit association could be held liable if the member expressly assumes liability, expressly authorizes or ratifies the contract, or with knowledge of the contract, receives benefits under the contract. Liability on the basis of a received benefit would be limited to the value of the benefit received.[21]

(4) A director, officer, or agent of a nonprofit association could be held liable if the director, officer, or agent expressly assumes liability, executes the contract without disclosing that the director, officer, or agent is acting as an agent of the association, or executes the contract without authority to do so.[22] The latter two grounds for liability are specific applications of general agency law.[23]

In addition, the proposed law expressly applies the alter ego doctrine to nonprofit associations, to prevent fraudulent use of the nonprofit association form as a shield against personal liability.[24]

Under these rules, the association itself would be primarily responsible for its own contractual obligations. However, if the association lacks the resources to satisfy its obligations under the contract, responsibility would fall on those members who approved the contract.

Tort Liability

In *Orser v. George*,[25] the court considered whether the members of an unincorporated hunting club were liable for one member's accidental shooting of a non-member. The court noted:

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19. See proposed Corp. Code § 18635 *infra*.

20. See proposed Corp. Code § 18605 *infra*.

21. See proposed Corp. Code § 18610 *infra*.

22. See proposed Corp. Code § 18615 *infra*.

23. See Civ. Code §§ 2342 (warranty of authority), 2343(2) (bad faith representation of authority); 2 B. Witkin, Summary of California Law *Agency* §§ 144-48, at 141-44 (9th ed. 1987).

24. See proposed Corp. Code § 18630 *infra*.

25. 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967).

> 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. Vicarious liability may exist, however, based upon … personal participation in an unlawful activity or setting it in motion.[26]

In *Steuer v. Phelps*,[27] the court considered whether the members of a small church group, with no officers or management, were liable for one member's negligence while driving on group business. The court noted:

> There is evidence that each individual member, rather than an officer, manager, or committee, participated directly in entrusting the car to Mrs. Henry 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. … Mere authorization to Mrs. Henry to operate the car fastens liability upon the individual members who gave that authorization.[28]

Thus, under existing law, it appears that a member of a nonprofit association may be vicariously liable for the tortious conduct of an agent or other member of the association, if the member personally participates in the tort (in which case the member is probably liable for the member's own conduct, rather than vicariously liable for the agent's conduct), or authorizes or "sets in motion" the agent's actions.

Generally, the law does not hold a person liable for the wrongs of another. However, vicarious liability has been justified as a deliberate allocation of risk to the party best able to bear it:

> Although earlier authorities sought to justify the respondeat superior doctrine on such theories as "control" by the master of the servant, the master's "privilege" in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's "deep pocket" to pay for the loss, "the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large."[29]

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26. *Id*. at 670-71.

27. 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974).

28. *Id*. at 472.

29. Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 959-60, 471 P.2d 988, 88 Cal. Rptr. 188 (1970) (quoting Prosser, Law of Torts (3d. ed. 1964) p. 471).

This rationale is less persuasive when the principal is a nonprofit group, which does not "profit" by its activity and has little opportunity to spread risk to society at large by raising prices on goods or services. Extending vicarious liability to individual members of the group would be even harder to justify.

The proposed law would preclude personal liability of a member, director, officer, or agent of a nonprofit association for the torts of an agent or member of the association unless (1) the member, director, officer, or agent expressly assumes liability for any injury caused by the activity, or (2) the tortious conduct of the member, director, officer, or agent causes the injury.[30] In other words, a member, director, officer, or agent of a nonprofit association would not be vicariously liable for the torts of the association.

Note that the proposed application of the alter ego doctrine to nonprofit associations would extend to tort liability as well as contract liability.[31]

30. See proposed Corp. Code § 18620 *infra*.

31. See proposed Corp. Code § 18630 *infra*.

Contents

PROPOSED LEGISLATION

Corp. Code §§ 18000-18980 (added). Unincorporated associations

SEC. ___. Title 3 (commencing with Section 18000) is added to the Corporations Code, to read:

TITLE 3. UNINCORPORATED ASSOCIATIONS

PART 1. GENERAL PROVISIONS

CHAPTER 1. DEFINITIONS

§ 18000. Application of definitions

18000. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 18000 is new.

§ 18005. Governing principles

18005. "Governing principles" means the principles stated in the constitution, articles of association, bylaws, regulations or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its members. In the absence of a relevant writing, an association's governing principles may be inferred from its established practices.

Comment. Section 18005 is new.

See also Sections 8 ("writing" defined), 18010 ("member" defined), 18025 ("unincorporated association" defined).

§ 18010. Member

18010. (a) If the governing principles of an unincorporated association define the membership of the association, "member" has the meaning provided by the governing principles.

(b) If the governing principles of an unincorporated association do not define the membership of the association, "member" means a person who, pursuant to the governing principles of the unincorporated association, has a right to participate in the selection of persons authorized to manage the affairs of the unincorporated association or in the development of policy of the unincorporated association, but does not include a person who participates solely as an agent of the association.

Comment. Section 18010 is new. Subdivision (a) recognizes the authority of an unincorporated association to determine its own membership requirements. Nothing in this subdivision is intended to authorize unlawful discrimination by an unincorporated association in its membership policy.

Subdivision (b) is similar to Section 1(1) of the Uniform Unincorporated Nonprofit Association Act (1996). However, subdivision (b) adds an exception for a person who participates in association decisionmaking solely as an agent of the association. This does not preclude an agent

from being a member, if the agent qualifies as a member for other reasons. For example, if an association's employee assists in developing association policy, that participation does not make the employee a member of the association. However, the fact that the employee serves as an agent of the association does not preclude the employee from being a member under subdivision (a).

See also Sections 18005 ("governing principles" defined), 18020 ("person" defined), 18025 ("unincorporated association" defined).

☞ **Staff Note.** Two technical changes have been made to Section 18010: (1) The phrase "may participate" in subdivision (b) was replaced with "has a right to participate." This avoids any ambiguity that might arise from use of the word "may" in that context. (2) The example in the Comment's discussion of subdivision (b) was changed to refer to an employee rather than a consultant. Consultants may be independent contractors rather than agents.

The two changes are based on suggestions of the Nonprofit Organizations Committee. See Exhibit p. 2.

§ 18015. Nonprofit association

18015. (a) "Nonprofit association" means an unincorporated association with a primary common purpose other than operating a business for profit.

(b) A nonprofit association may carry on a business for profit and apply any profit that results from the business activity to any activity in which it may lawfully engage.

Comment. Subdivision (a) of Section 18015 defines "nonprofit association" for the purpose of this title. See Section 18025 ("unincorporated association" defined). *Cf*. Sections 16101(7), 16202 ("partnership" defined). Unincorporated associations organized primarily to carry on a business for profit include a business trust, real estate investment trust, and joint stock association.

Subdivision (b) recognizes that a nonprofit entity may carry on some for-profit business activity. See, e.g., Sections 5140(*l*) (powers of nonprofit public benefit corporation), 7140(*l*) (powers of nonprofit mutual benefit corporation).

See also Section 18025 ("unincorporated association" defined).

☞ **Staff Note.** In response to a suggestion of the Nonprofit Organizations Committee, Section 18015(b) has been revised to more closely parallel existing law governing nonprofit corporations. See Exhibit p. 2.

§ 18020. Person

18020. "Person" includes a natural person, corporation, partnership or other unincorporated organization, government or governmental subdivision or agency, or any other entity.

Comment. Section 18020 continues and generalizes former Section 24000(b). See also Section 18 ("person" defined for purposes of code).

§ 18025. Unincorporated association

18025. (a) "Unincorporated association" means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose and operating under a common name.

(b) Joint tenancy, tenancy in common, community property, or other form of property tenure does not by itself establish an unincorporated association, even if coowners share ownership of the property for a common purpose.

(c) Marriage or creation of a registered domestic partnership does not by itself establish an unincorporated association.

Comment. Section 18025 is similar to Section 1(2) of the Uniform Unincorporated Nonprofit Association Act (1996). The requirement that a group operate under a common name is drawn from Barr v. United Methodist Church, 90 Cal. App. 3d 259, 266, 153 Cal. Rptr. 322 (1979) ("The criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity.").

Subdivision (c) makes clear that marriage or creation of a registered domestic partnership does not by itself create an unincorporated association. This does not prevent spouses or domestic partners from forming an unincorporated association for any purpose beyond the purposes inherent in marriage or registered domestic partnership.

See also Sections 18020 ("person" defined), 18050 (group subject to title for reasons of fairness), 18055 (exempt entities), 18060 (relation to other law).

☞ **Staff Note.** The Nonprofit Organizations Committee objects to use of the term "organization" in the definition of "unincorporated association." See Exhibit p. 2. That term creates an odd implication – that there can be "organizations" that aren't "associations." The staff has substituted the term "group" for "organization." That term does not imply the existence of an entity. A similar change was made, for similar reasons, to Section 18050.

CHAPTER 2. APPLICATION OF TITLE

§ 18050. Group subject to title for reasons of fairness

18050. Where fairness requires, a court may treat an unincorporated group of two or more persons as an unincorporated association under this title.

Comment. Section 18050 recognizes that fairness may require that a group be subject to this title, whether or not it meets the definition of an "unincorporated association." See Barr v. United Methodist Church, 90 Cal. App. 3d 259, 266-67, 153 Cal. Rptr. 322 (1979) ("Fairness includes those situations where persons dealing with the association contend their legal rights have been violated. Formalities of quasi-corporate organization are not required."). Fairness may require providing an unincorporated organization and its members, directors, officers, or agents with the benefits provided by this title, as well as protecting others who deal with or have claims against the organization or its members, directors, officers, or agents.

See also Section 18025 ("unincorporated association" defined).

☞ **Staff Note.** See the Staff Note following Section 18025.

§ 18055. Exempt persons

18055. This title does not apply to any of the following persons:

(a) A corporation.

(b) A government or governmental subdivision or agency.

(c) A partnership or joint venture.

(d) A limited liability company.

Comment. Section 18055 lists entities that are not subject to this title because they are governed by other law. Subdivision (b) is drawn from former Section 24000. Section 18200(g) provides an exception to the general rule provided in this section.

☞ **Staff Note.** The Nonprofit Organizations Committee suggested adding "or joint venture" to subdivision (c). The staff concurs. Joint ventures are generally subject to the same law as partnerships and so should not be governed by this title. See Exhibit p. 3.

The Nonprofit Organizations Committee also suggests that this section be combined with Section 18025(b) and (c), since each of those provisions deals with exclusions. That approach has appeal, but there are also reasons to keep the provisions separate. Section 18025(b) and (c) list relationships that do not by themselves constitute an unincorporated association. However, there is nothing preventing spouses or domestic partners from taking additional steps to form an unincorporated association together. By contrast, Section 18055 lists entities that are categorically exempt from the unincorporated associations law. The staff is inclined against consolidating the two sections, unless the Commission feels otherwise.

The third sentence of the Comment was added in response to a suggestion of the Nonprofit Organizations Committee. See Exhibit p. 3.

§ 18060. Relation to other law

18060. If a statute that is specific to a particular type of unincorporated association is inconsistent with a provision of this title, the specific statute prevails to the extent of the inconsistency.

Comment. Section 18060 is new. It makes clear that the general provisions of this title are subordinate to entity-specific statutes. For example, Section 18105 authorizes an unincorporated association to own property. Insurance Code Section 9089 provides a more restrictive property ownership rule specific to fraternal fire insurers. An unincorporated fraternal fire insurer would be subject to both sections. To the extent they are inconsistent, Insurance Code Section 9089 would prevail.

See also Section 18025 ("unincorporated association" defined).

§ 18065. Relation to law of agency

18065. Except where this title provides a specific rule, the general law of agency, including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of, and Title 9 (commencing with Section 2295) of, Part 4 of Division 3 of the Civil Code, applies to an unincorporated association.

Comment. Section 18065 is new. See also Sections 18025 ("unincorporated association" defined), 18615 (contract liability of agent of nonprofit association), 18620 (tort liability).

CHAPTER 3. PROPERTY

§ 18100. Membership interest is personal property

18100. The interest of a member in an unincorporated association is personal property.

Comment. Section 18100 continues former Section 20000 without substantive change. If an association's assets are dedicated to a public or charitable purpose, members may have no property interest in the association.

See also Sections 18010 ("member" defined), 18025 ("unincorporated association" defined).

☞ **Staff Note.** The second sentence of the Comment was added in response to a suggestion of the Nonprofit Organizations Committee. See Exhibit p. 3. In a purely charitable associations, membership would not provide any member benefits, and assets would not be distributed to members on dissolution of the association. The added comment language avoids any implication that membership in such an association is a property right.

§ 18105. Property powers

18105. An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real or personal property.

Comment. Section 18105 continues the substance of former Section 20001, except that the limitation on the permissible purpose for which property is acquired, held, managed, encumbered, or transferred is not continued. Under this section, an unincorporated association has all of the powers granted under former Section 20001, including the power to purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell property.

See also Section 18025 ("unincorporated association" defined).

§ 18110. Association property

18110. Property acquired by or for an unincorporated association is property of the unincorporated association and not of the members individually, regardless of how title is held.

Comment. Section 18110 is new.

See also Sections 18010 ("member" defined), 18025 ("unincorporated association" defined).

☞ **Staff Note.** The words "or for" were added to avoid any uncertainty regarding application of the section to property acquired on behalf of an unincorporated association. This change is based on a suggestion of the Nonprofit Organizations Committee. See Exhibit p. 3.

§ 18115. Execution of real property acquisition, transfer, or encumbrance

18115. The acquisition, transfer, or encumbrance of an interest in real property by an unincorporated association shall be executed by its president and secretary or other comparable officers, or by a person specifically designated by a resolution adopted by the association or by a committee or other body authorized to act by the governing principles of the association.

Comment. Section 18115 continues the first paragraph of former Section 20002 without substantive change, except that the special, more restrictive, rule for fraternal or benevolent societies and labor organizations has not been continued. These organizations are now subject to the same rule as any other form of unincorporated association.

See also Section 18020 ("person" defined), 18025 ("unincorporated association" defined).

§ 18120. Statement of authority

18120. (a) An unincorporated association may record in any county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire, transfer, or encumber real property owned or held by the association. For the purposes of this section, "statement of authority" includes a certified copy of a statement recorded in another county.

(b) It shall be conclusively presumed in favor of a bona fide purchaser or encumbrancer for value of real property of the association located in the county in which a statement of authority has been recorded pursuant to subdivision (a), that a person designated in the statement is authorized to acquire, transfer, or encumber real property on behalf of the association.

(c) The presumption in subdivision (b) does not apply if any of the following conditions are met, before the transaction at issue occurs:

(1) The unincorporated association records, in the county in which the property is located, a verified and acknowledged document that expressly revokes the statement of authority.

(2) The unincorporated association records, in the county in which the property is located, a new statement of authority that satisfies the requirements of subdivision (a).

(3) A person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized.

Comment. Section 18120 continues the substance of the second paragraph of former Section 20002. Subdivision (c)(1)-(2) is new.

Former Section 20002 incorporated definitions set out in former Section 15010.5. The obsolete definitions have not been continued. See also Sections 18010 ("member" defined), 18020 ("person" defined), 18025 ("unincorporated association" defined).

☞ **Staff Note.** The Nonprofit Organizations Committee suggests that the manner in which a statement of authority is revoked should be spelled out in more detail. See Exhibit p. 4. Section 18120 was rewritten to do so.

§ 18125. Limit on assertion of unauthorized action

18125. No limitation on the power of an unincorporated association to acquire, hold, manage, pledge, encumber, or transfer an interest in real or personal property, or the manner of exercise of those powers, shall be asserted as between the unincorporated association or a member of the unincorporated association and a third person, except in the following proceedings:

(a) A proceeding to enjoin an unauthorized act, or the continuation of an unauthorized act, where a third person has not yet acquired rights that would be adversely affected by the injunction, or where, at the time of the unauthorized act, the third person had actual knowledge that the act was unauthorized.

(b) A proceeding to dissolve the unincorporated association.

(c) A proceeding against an director, officer, or agent of the unincorporated association for violation of that person's authority.

Comment. Section 18125 is drawn from Section 208(a). It protects third parties from claims that an action of an unincorporated association is unauthorized or improperly executed.

See also Sections 18010 ("member" defined), 18025 ("unincorporated association" defined).

§ 18130. Disposition of assets of dissolved association

18130. After all of the known debts and liabilities of an unincorporated association in the process of winding up its affairs have been paid or adequately provided for, the assets of the association may be distributed as follows:

(a) Assets that are held in trust shall be distributed in accordance with the trust.

(b) Assets that are not held in trust shall be distributed in accordance with the governing principles of the association. If the governing principles do not provide the manner of distribution of the assets, the assets shall be distributed pro rata to the current members of the association.

Comment. Section 18130 is new. It provides rules for distribution of assets of a dissolving unincorporated association that remain after the association has satisfied its known debts and liabilities.

Subdivision (a) governs distribution of assets held in trust. See Lynch v. Spilman, 67 Cal. 2d 251, 260, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) ("property transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it 'in trust to carry out the objects for which the organization was created.'") (citations omitted).

Subdivision (b) governs assets that are not subject to a trust. It is consistent with the holding in Holt v. Santa Clara County Sheriff's Benefit Ass'n, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180 (1967) ("It is the general rule that upon the dissolution of a voluntary association its property should be distributed pro-rata among its members unless otherwise provided by its constitution or by-laws.") (citations omitted).

Section 18060 provides that a statute specific to a particular type of unincorporated association prevails over a provision of this title, to the extent of any inconsistency. For example, a statutory rule governing disposition of the property of a dissolved cemetery association would prevail over provisions of this section, to the extent of any inconsistency. See Health & Safety Code §§ 7925 (limitation on proceeds of sale of cemetery land), 8825-8829 (dedication of pioneer memorial park).

See also Sections 18005 ("governing principles" defined), 18010 ("member" defined), 18025 ("unincorporated association" defined).

☞ **Staff Note.** In response to a suggestion of the Nonprofit Organizations Committee, the Comment to Section 18130 was revised to remove language implying that subdivision (a) only governs charitable trusts. See Exhibit p. 5.

§ 18135. Recovery of distributed assets

18135. (a) Notwithstanding Section 18635, a cause of action against an unincorporated association may be enforced against a person who received assets distributed under Section 18130. Liability under this section shall be limited to the value of the assets distributed to the person or the person's pro rata share of the claim against the unincorporated association, whichever is less.

(b) To enforce a cause of action under this section, a claimant must commence a proceeding to enforce the cause of action before expiration of the statute of limitations applicable to the cause of action and within four years after dissolution of the unincorporated association.

Comment. Section 18135 is new.

See also Sections 18010 ("member" defined), 18020 ("person" defined), 18025 ("unincorporated association" defined).

CHAPTER 4. DESIGNATION OF AGENT FOR SERVICE OF PROCESS

§ 18200. Statement of unincorporated association

18200. (a) An unincorporated association may file with the Secretary of State on a form prescribed by the Secretary of State a statement containing either of the following:

(1) A statement designating the location and complete address of the association's principal office in this state. Only one such place may be designated.

(2) A statement (i) designating the location and complete address of the association's principal office in this state in accordance with paragraph (1) or, if the association does not have an office in this state, designating the complete address of the association to which the Secretary of State shall send any notices required to be sent to the association under Sections 18210 and 18215, and (ii) designating as agent of the association for service of process any natural person residing in this state or any corporation that has complied with Section 1505 and whose capacity to act as an agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall set forth the person's complete business or residence address. If a corporate agent is designated, no address for it shall be set forth.

(c) Presentation for filing of a statement and one copy, tender of the filing fee, and acceptance of the statement by the office of the Secretary of State constitutes filing under this section. The Secretary of State shall note upon the copy of the statement the file number and the date of filing the original and deliver or send the copy to the unincorporated association filing the statement.

(d) At any time, an unincorporated association that has filed a statement under this section may file a new statement superseding the last previously filed statement. If the new statement does not designate an agent for service of process, the filing of the new statement shall be deemed to revoke the designation of an agent previously designated. A statement filed under this section expires five years from December 31 following the date it was filed in the office of the Secretary of State, unless previously superseded by the filing of a new statement.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, to any person named in the last certificate of the corporate agent filed pursuant to Section 1505 at the office of the corporate agent shall constitute valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed in paragraph (1) of subdivision (b) of Section 12191 of the Government Code for filing a designation of agent.

(g) Notwithstanding Section 18055, a statement filed by a partnership under former Section 24003 is subject to this chapter until the statement is revoked or expires.

Comment. Section 18200 continues former Section 24003 without substantive change. Subdivision (g) is added as a transitional provision to make clear that this chapter applies to a statement filed by a partnership under former Section 24003, despite language in Section 18055 providing that this title does not apply to a partnership. See Sections 16309-16310 (partnership's designation of agent for service of process).

See also Section 18025 ("unincorporated association" defined).

§ 18205. Numbering, filing, and indexing of statements

18205. (a) The Secretary of State shall mark each statement filed under Section 18200 with a consecutive file number and the date of filing. The Secretary of State may destroy or otherwise dispose of any such statement four years after the statement expires. In lieu of retaining the original statement, the Secretary of State may retain a copy thereof in accordance with Section 14756 of the Government Code.

(b) The Secretary of State shall index each statement filed under Section 18200 according to the name of the unincorporated association as set out in the statement and shall enter in the index the file number and the address of the association as set out in the statement and, if an agent for service of process is designated in the statement, the name of the agent and, if a natural person is designated as the agent, the address of that person.

(c) Upon request of any person, the Secretary of State shall issue a certificate showing whether, according to the records of the office of the Secretary of State, there is on file on the date and hour stated therein, any presently effective statement filed under Section 18200 for an unincorporated association using a specific name designated by the person making the request. If such a statement is on file, the certificate shall include the information required by subdivision (b) to be included in the index. The fee for the certificate is as set forth in Section 12183 of the Government Code.

(d) When a statement has expired under subdivision (d) of Section 18200, the Secretary of State shall enter that fact in the index together with the date of the expiration.

(e) Four years after a statement has expired, the Secretary of State may delete the information concerning that statement from the index.

Comment. Section 18205 continues former Section 24004 without substantive change.

See also Section 18020 ("person" defined), 18025 ("unincorporated association" defined).

§ 18210. Revocation or resignation of agency

18210. (a) An agent designated by an unincorporated association for the service of process may file with the Secretary of State a written statement of resignation as agent which shall be signed and execution thereof shall be duly acknowledged by the agent. Thereupon the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement by mail to the unincorporated association at its address as set out in the statement filed by the association.

(b) Any unincorporated association may at any time file with the Secretary of State a revocation of a designation of an agent for service of process. The revocation is effective when filed.

(c) Notwithstanding subdivisions (a) and (b), service made on an agent designated by an unincorporated association for service of process in the manner provided in subdivision (e) of Section 18200 is effective if made within 30 days after the statement of resignation or the revocation is filed in the office of the Secretary of State.

Comment. Section 18210 continues former Section 24005 without substantive change. See also Section 18025 ("unincorporated association" defined).

§ 18215. Notice of expiration

18215. Between the first day of October and the first day of December immediately preceding the expiration date of a statement filed under Section 18200, the Secretary of State shall send by first class mail a notice, indicating the date on which the statement will expire and the file number assigned to the statement, to the unincorporated association at its address as set out in the statement. Neither the failure of the Secretary of State to mail the notice as provided in this section nor the failure of the notice to reach the unincorporated association shall continue the statement in effect after the date of its expiration. Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section.

Comment. Section 18215 continues former Section 24006 without substantive change. See also Section 18025 ("unincorporated association" defined).

§ 18220. Service of process on unincorporated associations in certain cases

18220. If designation of an agent for the purpose of service of process has not been made as provided in Section 18200, or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 18205 for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against an unincorporated association cannot be served with reasonable diligence upon the designated agent by hand or the unincorporated association in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure, the court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to any one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address. Service in this manner constitutes personal service upon the unincorporated association.

Comment. Section 18220 continues former Section 24007 without substantive change. See also Sections 18010 ("member" defined), 18025 ("unincorporated association" defined).

CHAPTER 5. LIABILITY

§ 18250. Liability of unincorporated association

18250. Except as otherwise provided by law, an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person.

Comment. Section 18250 continues the substance of former Section 24001, with two exceptions:

(1) Language providing that former Section 24001 did not affect the liability of an association to a member of the association has not been continued. It is now clear that an unincorporated association may be liable to a member of the association. See Marshall v. ILWU, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962) (member can sue labor union for negligent acts which member neither participated in nor authorized), White v. Cox, 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259 (1971) ("unincorporated associations are now entitled to general recognition as separate legal entities and … as a consequence a member of an unincorporated association may maintain a tort action against his association.").

(2) The phrase "except as otherwise provided by statute" has been broadened. Both statutory and common law limitations on the liability of an unincorporated association should govern. For example, in Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 21 Cal. 4th 249, 253, 980 P.2d 940, 87 Cal. Rptr. 237 (1999), the court held that courts should defer to a decision of a duly-constituted community association board, where the board, "upon reasonable investigation, 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…." Section 18250 does not override the rule stated in that case.

CHAPTER 6. GOVERNANCE [RESERVED]

PART 2. NONPROFIT ASSOCIATIONS

CHAPTER 1. LIABILITY

§ 18605. No liability based solely on membership or agency

18605. A member, director, officer, or agent of a nonprofit association is not liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent.

Comment. Section 18605 codifies the general rule that a member of an unincorporated nonprofit association is not liable for the association's debts, obligations, or liabilities solely by reason of membership. See Security First National Bank of Los Angeles v. Cooper, 62 Cal. App. 2d 653, 667, 145 P.2d 722 (1944) ("Membership, as such, imposes no personal liability for the debts of the association") (quoting 7 C.J.S. 78); Orser v. George, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) ("mere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval.").

The general rule is extended to directors, officers, and agents of an association. This is consistent with existing law providing that an agent is not liable for obligations of a disclosed principal or for torts of the principal, where the agent is personally innocent of wrongdoing. See 2 B. Witkin, Summary of California Law *Agency* § 145, at 141, § 151, at 145 (9th ed. 1987).

See also Sections 18010 ("member" defined), 18015 ("nonprofit association" defined).

§ 18610. Contract liability of member of nonprofit association

18610. A member of a nonprofit association is subject to liability for a contractual obligation of the association in any of the following circumstances:

(a) The member expressly assumes personal responsibility for the obligation.

(b) The member expressly authorizes or ratifies the specific contract. This subdivision does not apply if the member authorizes or ratifies a contract solely in the member's capacity as a director, officer, or agent of the association.

(c) With notice of the contract, the member receives a benefit under the contract. Liability under this subdivision is limited to the value of the benefit received.

Comment. Section 18610 is new. It specifies the scope of personal liability of a member of a nonprofit association for a contractual obligation of the association.

Subdivision (a) provides that a member is subject to liability where the member has personally guaranteed a debt or otherwise assumed responsibility for a contract. A promise to answer for the debt of another is subject to the statute of frauds. Civ. Code § 1624(a)(2).

Subdivision (b) is consistent with the common law rule that a member of a nonprofit association is subject to liability for a contractual obligation that the member has expressly authorized or ratified. See Security First National Bank of Los Angeles v. Cooper, 62 Cal. App. 2d 653, 145 P.2d 722 (1944). Subdivision (b) does not continue the common law rule that a member is subject to liability for a contract that the member has impliedly authorized or ratified. Authorization and ratification may not be inferred from mere participation in the governance of the association — express approval of the contract is required. For example, approval of by-laws, election of officers, or participation in a vote in which the member votes against authorization or ratification of a contract would not constitute express authorization or ratification of a contract.

See also Sections 18010 ("member" defined), 18015 ("nonprofit association" defined).

☞ **Staff Note.** The introductory lead-in to this section and to Sections 18615 and 18620 have been recast. The previous version restated the general rule of nonliability provided in Section 18605. As drafted now, the lead-in does not reiterate the general rule. It simply states the bases on which a member, director, officer, or agent can be held liable for an obligation or liability of a nonprofit association. The staff believes that this is the clearest way to present the liability rules.

§ 18615. Contract liability of director, officer, or agent of nonprofit association

18615. A director, officer, or agent of a nonprofit association is subject to liability for a contractual obligation of the association in any of the following circumstances:

(a) The director, officer, or agent expressly assumes responsibility for the obligation.

(b) The director, officer, or agent executes the contract without disclosing that the director, officer, or agent is acting on behalf of the association.

(c) The director, officer, or agent executes the contract without authority to execute the contract.

Comment. Section 18615 is new. It specifies the scope of liability of a director, officer, or agent of a nonprofit association for a contractual obligation of the association.

Subdivision (a) provides that a director, officer, or agent is subject to liability where the director, officer, or agent has guaranteed a debt or otherwise assumed responsibility for a contract. A promise to answer for the debt of another is subject to the statute of frauds. Civ. Code § 1624(a)(2).

Subdivision (b) is consistent with existing law providing that an agent is not liable for a contract entered into on behalf of a disclosed principal. See 2 B. Witkin, Summary of California Law *Agency* §§ 144-48, at 141-44 (9th ed. 1987).

Subdivision (c) provides that a director, officer, or agent is subject to liability for a contract executed on behalf of an association if the director, officer, or agent lacks authority to execute the contract. See Civ. Code §§ 2342 (warranty of authority), 2343(2) (bad faith representation of authority); 2 B. Witkin, Summary of California Law *Agency* §§ 144-45, at 141-42 (9th ed. 1987).

See also Section 18015 ("nonprofit association" defined).

§ 18620. Tort liability

18620. A member, director, officer, or agent of a nonprofit association is subject to liability for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, in any of the following circumstances:

(a) The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes injury, damage, or harm.

(b) The tortious conduct of the member, director, officer, or agent causes injury, damage, or harm.

Comment. Section 18620 is new. It specifies the scope of liability of a member, director, officer, or agent of a nonprofit association for a tort of the association or of an officer or agent of the association.

See also Sections 18010 ("member" defined), 18015 ("nonprofit association" defined).

☞ **Staff Note.** The Nonprofit Organizations Committee suggests that the term "injury" be supplemented with the words "damage or harm." See Exhibit p. 6. The apparent concern is that "injury" will be construed too narrowly, perhaps as meaning only physical injuries. The staff is unsure that the additional words add much, but the change is harmless and may be helpful.

§ 18630. Alter ego liability of member of nonprofit association

18630. Notwithstanding any other provision of this chapter, a member of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account differences in form between a nonprofit association and a corporation.

Comment. Section 18630 is new. It provides that the common law alter ego doctrine applicable to corporations may also be applied to nonprofit associations. The alter ego doctrine is summarized in Communist Party of the United States v. 522 Valencia, Inc., 35 Cal. App. 4th 980, 993, 41 Cal. Rptr. 2d 618 (1995) ("In general, the two requirements for applying the alter ego doctrine are that (1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist, and (2) failure to disregard the corporate entity would sanction a fraud or promote injustice.").

In applying the alter ego doctrine to unincorporated associations, a court should take into account differences in form between a corporation and a nonprofit association. For example, failure to observe corporate formalities may be a factor in a decision to impose alter ego liability on shareholders of a corporation. Although it would be unreasonable to expect a nonprofit association to observe the governance formalities required of a corporation, it might be reasonable to expect that a nonprofit association will follow the governance formalities it has

established for itself. Failure to do so may indicate that the personality of a nonprofit association and its members are not truly separate.

Failure to provide a corporation with reasonably adequate assets to cover its prospective liabilities may also justify imposing alter ego liability on shareholders of a corporation. In Automotriz del Golfo de California v. Resnick, 47 Cal. 2d 792, 797, 306 P.2d 1 (1957), the court relied in part on inadequate capitalization to justify imposing alter ego liability (quoting Ballantine on Corporations (1946)):

> If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.

This principle could also be applied to a nonprofit association. However, it would be necessary to carefully consider the nature of the association to determine what level of unencumbered capital would be reasonably adequate for the association's prospective liabilities. For example, a small historical society, operating a museum that is open to the public, should probably insure against liability for any injuries suffered by the public while in the museum. Such insurance might reasonably be considered adequate capitalization. On the other hand, an association that publishes controversial and potentially defamatory commentaries about public figures might reasonably anticipate greater risk of liability. If the association fails to insure against that risk or maintain a cash reserve to satisfy any judgment against it, a court might conclude that the association is inadequately capitalized.

If, as an incident to its nonprofit purpose, a nonprofit association conducts for-profit business activity, the appropriate levels of capitalization and insurance for that activity would be analogous to the capitalization and insurance that a for-profit entity should carry when conducting similar business activity.

See also Sections 18010 ("member" defined), 18015 ("nonprofit association" defined).

☞ **Staff Note.** The next to last paragraph in the Comment was added in response to a suggestion of the Nonprofit Organizations Committee. The Committee believes it would be helpful to make clear that the alter ego liability of a nonprofit association that is involved in incidental business activity would not be greater than that of a for profit association involved in the same type of business activity. See Exhibit pp. 6-7.

§ 18635. Enforcement of judgment against nonprofit association

18635. (a) A judgment against a nonprofit association is not by itself a judgment against a member, director, officer, or agent of the association. A judgment against a nonprofit association may not be satisfied from the assets of a member, director, officer, or agent of the association unless there is also a judgment against that person, the judgment against that person is based on the same claim as the judgment against the nonprofit association, and any of the following conditions is satisfied:

(1) A writ of execution on the judgment against the nonprofit association is returned unsatisfied in whole or in part.

(2) The nonprofit association is a debtor in bankruptcy.

(3) The member, director, officer, or agent agrees that the creditor need not exhaust the assets of the nonprofit association.

(4) A court grants permission to the judgment creditor to levy execution against the assets of a member, director officer, or agent based on a finding that the assets of the nonprofit association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the nonprofit association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

(b) Nothing in this section affects the right of a judgment creditor to levy execution against the assets of a member, director, officer, or agent of a nonprofit association to satisfy a judgment that is not based on a claim against the nonprofit association.

Comment. The first sentence of subdivision (a) of Section 18635 continues the substance of former Section 24002. The remainder of the section is drawn from Section 16307(d).

See also Sections 18010 ("member" defined), 18015 ("nonprofit association" defined).

§ 18640. Fraudulent transfers

18640. Nothing in this chapter limits application of the Uniform Fraudulent Transfer Act.

Comment. Section 18640 is new. It makes clear that limits on liability provided in this chapter do not affect the application of the Uniform Fraudulent Transfer Act. See Civ. Code §§ 3439-3439.12. Thus, if an insolvent association transfers assets to a member (e.g., through a general distribution or redemption of membership), those assets may recoverable by a creditor, regardless of whether the member is liable for the debt.

CHAPTER 2. INSIGNIA

§ 18700. "Insignia" defined

18700. As used in this chapter, "insignia" includes a badge, motto, button, decoration, charm, emblem, or rosette.

Comment. Section 18700 continues former Section 21300(b) without substantive change.

§ 18705. Registration of name or insignia

18705. (a) Any nonprofit association, the principles and activities of which are not repugnant to the Constitution or laws of the United States or of this State, may register in the office of the Secretary of State a facsimile or description of its name or insignia and may by reregistration alter or cancel it.

(b) A nonprofit association may not register any name or insignia that is so similar to another registered name or insignia that it is likely to deceive.

Comment. Subdivision (a) of Section 18705 continues former Section 21301 without substantive change.

Subdivision (b) continues former Section 21302 without substantive change.

Note that the term "association" has been replaced with the term "nonprofit association." See Section 18015 ("nonprofit association" defined).

§ 18715. Application for registration, alteration, or cancellation

18715. (a) The chief officer or officers of a nonprofit association shall apply to register the name or insignia of the association, or alter or cancel a registration, on an application provided by the Secretary of State. The registration shall be for the benefit of the association and its members.

(b) The Secretary of State shall charge and collect a fee as set forth in paragraph (2) of subdivision (b) of Section 12191 of the Government Code for each registration made under this chapter.

Comment. Subdivision (a) of Section 18715 continues former Section 21303 without substantive change.

Subdivision (b) continues former Section 21304 without substantive change.

Note that the term "association" has been replaced with the term "nonprofit association." See Sections Section 18010 ("member" defined), 18015 ("nonprofit association" defined).

§ 18725. Certificate of registration

18725. (a) Upon registration of a nonprofit association under this chapter, the Secretary of State shall issue a certificate setting forth the fact of the registration.

(b) The Secretary of State shall keep a properly indexed record of the registrations provided for by this chapter. The record shall also show any altered or canceled registration.

Comment. Subdivision (a) of Section 18725 continues former Section 21305 without substantive change.

Subdivision (b) continues former Section 21306 without substantive change.

Note that the term "association" has been replaced with the term "nonprofit association." See Section 18015 ("nonprofit association" defined).

§ 18735. Unauthorized use of registered name or insignia

18735. Any person who willfully wears, exhibits, or uses for any purpose a name or insignia registered under this chapter, who is not entitled to use, wear, or exhibit the name or insignia under the constitution, bylaws, or rules of the nonprofit association that registered it, is guilty of a misdemeanor punishable by fine of not to exceed two hundred dollars ($200) or by imprisonment in the county jail for a period not to exceed 60 days.

Comment. Section 18735 continues former Section 21307 without substantive change. Note that the term "association" has been replaced with the term "nonprofit association." See Section 18015 ("nonprofit association" defined).

§ 18740. Injunction to restrain unauthorized use of name or insignia

18740. (a) The superior court may restrain by injunction:

(1) Wearing or use of the insignia of a nonprofit association, unless the person wearing or using the insignia is entitled to wear or use the insignia under the governing principles of the nonprofit association.

(2) Use of the name of a nonprofit association in a commercial venture, trade, or business, in the solicitation of subscriptions for or advertising in a newspaper or other publication, or in the solicitation of donations by a person representing

directly or indirectly that the commercial venture, trade, or business, newspaper or other publication, or donation or solicitation for donation, is sponsored, endorsed, or being offered by the nonprofit association, unless the person using the name is entitled to do so under the governing principles of the nonprofit association or has the written consent of the nonprofit association.

(b) In an action under this section it is not necessary to allege or prove actual damages, actual injury, or the threat of actual damages or injury. In addition to injunctive relief a plaintiff in an action under this section is entitled to recover the amount of the actual damages, if any, sustained by the plaintiff.

Comment. Subdivision (a) of Section 18740 continues former Section 21308 without substantive change. The phrase "any court of competent jurisdiction" has been replaced with a reference to the superior court, to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution.

Subdivision (b) continues former Section 21309 without substantive change.

Note that the term "association" has been replaced with the term "nonprofit association." See Section 18015 ("nonprofit association" defined). See also Section 18005 ("governing principles" defined).

§ 18750. Evidence of unlawful use of name or insignia

18750. The use of the name or insignia of a nonprofit association by a person not entitled to use the name or insignia under the governing principles of the association or by the written consent of the nonprofit association, is presumptive evidence of the unlawful use of or traffic in the name or insignia.

Comment. Section 18750 continues former Section 21310 without substantive change. Note that the term "association" has been replaced with the term "nonprofit association." See Sections 18015 ("nonprofit association" defined). See also Section 18005 ("governing principles" defined).

CHAPTER 3. DEATH BENEFIT PAYMENTS BY FRATERNAL SOCIETIES

§ 18760. Payment of benefits in excess of burial expenses of member

18760. (a) Whenever a fraternal society or lodge, other than a society subject to supervision by the Insurance Commissioner, pays benefits contingent on the death of a member, beneficiaries shall be paid only the excess of the amount of the benefits over the expense of burial of the member.

(b) This section does not apply to a spouse, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, and parents by legal adoption.

Comment. Section 18760 continues former Section 21400 without substantive change. Subdivision designations have been added for clarity.

See also Section 18010 ("member" defined).

§ 18765. Liability of society for burial expenses

18765. Any fraternal society or lodge which makes any payment in violation of this chapter is liable for the expense of burial of the member to the extent of the amount paid in violation thereof.

Comment. Section 18765 continues former Section 21401 without substantive change. See also Section 18010 ("member" defined).

CHAPTER 4. NONPROFIT MEDICAL ASSOCIATIONS

§ 18800. "Nonprofit medical association" defined

18800. As used in this chapter, "nonprofit medical association" means an unincorporated association that is an organized medical society limiting its membership to licensed physicians and surgeons and that has as members at least 25 percent of the eligible physicians and surgeons residing in the area in which it functions (which must be at least one county). However, if the association has less than 100 members, it shall have as members at least a majority of the eligible persons or licensees in the geographic area served by the particular association.

Comment. Section 18800 continues the definition provisions of former Section 21200 without substantive change. See also Section 18010 ("member" defined).

§ 18805. Liability of member of nonprofit medical association

18805. A member of a nonprofit medical association is not liable for a contractual obligation of the association, except in one of the following circumstances:

(a) The member expressly assumes personal responsibility for the obligation.

(b) With notice of the contract, the member receives a benefit under the contract. Liability under this subdivision is limited to the value of the benefit received.

Comment. Section 18805 is drawn in part from former Section 21200, which provided that a member of a nonprofit medical association is not liable for "debts or liabilities contracted or incurred by the association in the carrying out or performance of any of its purposes…." That exemption from liability has been narrowed slightly to permit member liability where the member has expressly assumed liability for a contract or receives a personal benefit under a contract. A member would also be liable for a tort where the member has expressly assumed liability or where the tort is based on the member's own tortious conduct. See Section 18620. See also Sections 18010 ("member" defined), 18800 ("nonprofit medical association" defined).

§ 18810. Finding and declaration

18810. The Legislature finds and declares that the services of directors or officers of nonprofit medical associations who serve without compensation are critical to the efficient conduct and management of the public service and charitable affairs of the people of California. The willingness of volunteers to offer their services has been deterred by a perception that their personal assets are at risk for these activities. The unavailability and unaffordability of appropriate liability

insurance makes it difficult for these associations to protect the personal assets of their volunteer decisionmakers with adequate insurance. It is the public policy of this state to provide incentive and protection to the individuals who perform these important functions.

Comment. Section 18810 continues former Section 24001.5(a) without substantive change. See Section 18800 ("nonprofit medical association" defined).

§ 18815. Liability of director or officer of nonprofit medical association

18815. (a) Except as provided in this article, no cause of action for monetary damages shall arise against any person serving without compensation as a director or officer of a nonprofit medical association, on account of 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 the person's policymaking judgment.

(b) This section does not apply to any volunteer director or officer who receives compensation from the association in any other capacity, including, but not limited to, as an employee.

(c) For the purpose of this section, the payment of actual expenses incurred in attending meetings or otherwise in the execution of the duties of a director or officer shall not constitute compensation.

(d) This section only applies to a nonprofit organization organized to provide charitable, educational, scientific, social, or other forms of public service that is exempt from federal income taxation under Section 501(c)(3) or 501(c)(6) of the Internal Revenue Code.

(e) This section only applies if the nonprofit medical association maintains a general liability insurance policy with an amount of coverage of at least the following amounts:

(1) If the association's annual budget is less than fifty thousand dollars ($50,000), the minimum required amount is five hundred thousand dollars ($500,000).

(2) If the association's annual budget equals or exceeds fifty thousand dollars ($50,000), the minimum required amount is one million dollars ($1,000,000).

This section applies only if the general liability insurance policy is in force both at the time of injury and at the time that the claim is made, so that the policy is applicable to the claim.

(f) Nothing in this section shall be construed to limit the liability of a nonprofit medical association for any negligent act or omission of a director, officer, agent, or employee occurring within the scope of the duties of the director, officer, agent, or employee.

Comment. Section 18815 continues former Section 24001.5(b), (d)-(g), & (i) without substantive change. See Section 18800 ("nonprofit medical association" defined).

§ 18820. Exceptions

18820. Section 18815 does not limit the liability of a director or officer for any of the following:

(a) Self-dealing transactions, as described in Sections 5233 and 9243.

(b) Conflicts of interest, as described in Section 7233.

(c) Actions described in Sections 5237, 7236, and 9245.

(d) In the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of that trust.

(e) Any action or proceeding brought by the Attorney General.

(f) Intentional, wanton, or reckless acts, gross negligence, or an action based on fraud, oppression, or malice.

(g) Any action brought under Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code.

Comment. Section 18820 continues former Section 24001.5(c) without substantive change. See Section 18800 ("nonprofit medical association" defined).

§ 18825. Nondiscrimination

18825. Section 18815 does not apply to any association that unlawfully restricts membership, services, or benefits conferred on the basis of race, religious creed, color, national origin, ancestry, sex, marital status, disability, political affiliation, or age.

Comment. Section 18825 continues former Section 24001.5(h) without substantive change. See Section 18800 ("nonprofit medical association" defined).

PART 3. BUSINESS ASSOCIATIONS

CHAPTER 1. JOINT STOCK ASSOCIATIONS

§ 18900. Unauthorized use of name in advertising

18900. A person who, without being authorized so to do, subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement, or announcement of a joint stock association, existing or intended to be formed, with intent to permit the document to be published, and thereby to lead persons to believe that the person whose name is so subscribed is a director, officer, agent, member, or promoter of the association, is guilty of a misdemeanor.

Comment. Section 18900 continues former Section 22000 without substantive change. See also Section 18010 ("member" defined).

§ 18905. False statements

18905. A director, officer, or agent of a joint stock association who knowingly concurs in making, publishing, or posting either generally or privately to the stockholders or other persons, any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement that is

false, or any untrue or willfully or fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in the association a greater value or a less apparent or market value than they really possess, is guilty of a felony.

Comment. Section 18905 continues former Section 22001 without substantive change.

§ 18910. Fraudulent documents and accounts

18910. (a) A director, officer, or agent of a joint stock association, who knowingly receives or possesses himself or herself of property of the association, otherwise than in payment of a just demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of the association, is guilty of a public offense.

(b) A director, officer, agent, or member of a joint stock association who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the association, or makes or concurs in making false entries, or omits or concurs in omitting to make a material entry in a book of accounts or other record or document kept by the association, is guilty of a public offense.

(c) Each public offense specified in this section is punishable by imprisonment in a state prison, or by imprisonment in a county jail not exceeding one year, or a fine not exceeding one thousand dollars ($1,000), or by both fine and imprisonment.

Comment. Section 18910 continues former Section 22002 without substantive change. See also Section 18010 ("member" defined).

§ 18915. Presumption of directors' knowledge of association affairs

18915. For the purposes of this chapter every director of a joint stock association is deemed to possess such knowledge of the affairs of the association as to enable the director to determine whether any act, proceeding, or omission of its directors is a violation of this chapter.

Comment. Section 18915 continues former Section 22003 without substantive change.

CHAPTER 2. REAL ESTATE INVESTMENT TRUSTS

§ 18950. "Real estate investment trust" defined

18950. (a) "Real estate investment trust" as used in this chapter means any unincorporated association or trust formed to engage in business and managed by, or under the direction of, one or more trustees for the benefit of the holders or owners of transferable shares of beneficial interest in the trust estate and which meets one of the following two tests:

(1) It received, prior to August 28, 1976, an order, permit, or qualification from the Commissioner of Corporations pursuant to the provisions of the Corporate Securities Law of 1968 or any predecessor statute finding that it was a real estate investment trust, notwithstanding the subsequent amendment, suspension, or revocation of any such finding, order, permit, or qualification, and it has for one or more or of the three fiscal years immediately prior to August 28, 1976 complied with, or in good faith filed a federal income tax return on the basis that it has complied with the requirements for real estate investment trusts set forth in Section 856 of the Federal Internal Revenue Code.

(2) It is formed for the purpose of engaging in business as a real estate investment trust under Part II of Subchapter M of Chapter 1 of Subtitle A of the Federal Internal Revenue Code of 1954, as amended from time to time, the sale of its shares has been qualified at any time by the Commissioner of Corporations pursuant to the Corporate Securities Law of 1968, and it has commenced business as a real estate investment trust in good faith.

(b) An unincorporated association or trust which otherwise meets the requirements of this section shall not be affected in its status as a real estate investment trust whether or not it is in fact taxable for any year or years under Part II of Subchapter M of Chapter 1 of Subtitle A of the Federal Internal Revenue Code of 1954, as amended from time to time.

Comment. Section 18950 continues former Section 23000 without substantive change. Subdivision and paragraph designations have been revised for clarity.

§ 18955. Nonliability of shareowners

18955. No holder or owner of transferable shares of beneficial interest in the trust estate of a real estate investment trust is personally liable as such for any liabilities, debts or obligations of, or claims against, the real estate investment trust, whether arising before or after the shareowner became the owner or holder of the shares.

Comment. Section 18955 continues former Section 23001 without substantive change.

§ 18960. Claims

18960. Section 18955 shall apply to any real estate investment trust organized under the laws of this state with respect to liabilities, debts, obligations, and claims wherever arising, and to any real estate investment trust organized under the laws of a foreign jurisdiction with respect to liabilities, debts, obligations and claims arising in this state.

Comment. Section 18960 continues former Section 23002 without change.

§ 18965. Prohibition against issuance of security redeemable at holder's option

18965. A real estate investment trust shall not issue any security redeemable at the option of the holder of the security.

Comment. Section 18965 continues former Section 23003 without change.

§ 18970. Application of Section 18955

18970. Section 18955 shall apply with respect to all liabilities, debts, obligations of, and claims against, a real estate investment trust arising after August 28, 1976, and prior law shall continue to govern with respect to liabilities, debts, obligations, and claims existing on August 28, 1976. No implication shall be created by the adoption of this chapter or the adoption of former Part 5 (commencing with Section 23000) of this title, which this chapter continues, that the holders or owners of shares of beneficial interest in business trusts which do not meet the definition of real estate investment trust in Section 18950 are, or are not, as such, personally liable for the liabilities, debts or obligations of, or claims against, any such trust.

Comment. Section 18970 continues former Section 23004 without substantive change. To avoid ambiguity, the date August 28, 1976, has been substituted for references to "the effective date of this part" as it was originally enacted. A reference to "adoption of this part" has been expanded to make clear that the reference includes adoption of this chapter as well as adoption of the former part that it continues.

§ 18975. Bankruptcy

18975. The provisions of Sections 1400 and 1402 governing bankruptcy reorganizations and arrangements for corporations also apply to real estate investment trusts. Where the term "corporation" is used in those sections it shall also include the term "real estate investment trust", the terms "director" or "board of directors" shall include "trustee" or "board of trustees", the term "articles" shall include "declaration of trust" and the term "capital stock" shall include "shares of beneficial interest."

Comment. Section 18975 continues former Section 23005 without substantive change.

§ 18980. Merger

18980. (a) The following entities may be merged pursuant to this article:

(1) Any two or more real estate investment trusts into one real estate investment trust, provided that the merger is specifically permitted by the declarations of trust, and that procedure is detailed in those declarations.

(2) One or more real estate investment trusts with one or more limited partnerships into one limited partnership, provided that the merger is specifically permitted by the declarations of trust, and that procedure is detailed in those declarations.

(3) One or more real estate investment trusts with one or more limited partnerships into one real estate investment trust, provided that the merger is specifically permitted by the declarations of trust, and that procedure is detailed in those declarations.

(b) Any merger under this section shall only be effective upon the approval of the holders of a majority of the shares of beneficial interest of the real estate investment trust.

Comment. Section 18980 continues former Section 23006 without change.

REPEALS AND CONFORMING REVISIONS

Bus. & Prof. Code § 17912 (amended). Real estate investment trusts

SEC. ___. Section 17912 of the Business and Professions Code is amended to read:

17912. This chapter does not apply to a real estate investment trust as defined in Section ~~23000~~ 18950 of the Corporations Code ~~and~~ that has a statement on file, pursuant to Section ~~24003~~ 18200 of the Corporations Code, designating an agent for service of process or has qualified to do business under Chapter 21 (commencing with Section 2100) of the Corporations Code.

Comment. Section 17912 is amended to correct cross-references to former Corporations Code Sections 23000 and 24003 and to correct a grammatical error.

Code Civ. Proc. § 395.2 (amended). Place of trial in action against unincorporated association

SEC. ___. Section 395.2 of the Code of Civil Procedure is amended to read:

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

Comment. Section 395.2 is amended to reflect the fact that an unincorporated association may file a statement designating its principal office under sections other than former Corporations Code Section 24003 (continued without substantive change in Corporations Code Section 18200). See, e.g., Corp. Code §§ 15621(a)(4) (limited partnership), 16309 (general partnership), 16953(a)(3) (limited liability partnership), 17051(a)(4) & 17060(a)(2) (limited liability company).

Code Civ. Proc. § 416.40 (amended). Service on unincorporated association

SEC. ___. Section 416.40 of the Code of Civil Procedure is amended to read:

416.40. A summons may be served on an unincorporated association (including a partnership) by delivering a copy of the summons and of the complaint:

(a) If the association is a general or limited partnership to the person designated as agent for service of process ~~as provided in Section 24003 of the Corporations Code~~ or to a general partner or the general manager of the partnership;

(b) If the association is not a general or limited partnership, to the person designated as agent for service of process ~~as provided in Section 24003 of the Corporations Code~~ or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process;

(c) When authorized by Section ~~15700 or 24007~~ 18220 of the Corporations Code, as provided by ~~the applicable~~ that section.

Comment. Section 416.40 is amended to reflect the fact that an unincorporated association may designate an agent for service of process under sections other than former Corporations Code Section 24003 (continued without substantive change in Corporations Code Section 18200). See, e.g., Corp. Code §§ 15621(a)(4) (limited partnership), 16309 (general partnership), 16953(a)(3) (limited liability partnership), 17051(a)(4) & 17060(a)(2) (limited liability company).

Corp. Code § 174.5 (amended). "Other business entity" defined

SEC. ___. Section 174.5 of the Corporations Code is amended to read:

174.5. "Other business entity" means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, "general partnership" means a "partnership" as defined in subdivision (7) of Section 16101; "business trust" means a business organization formed as a trust; "real estate investment trust" means a "real estate investment trust" as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and "unincorporated association" has the meaning set forth in Section ~~24000~~ 18025.

Comment. Section 174.5 is amended to correct a cross-reference to former Corporations Code Section 24000.

Corp. Code § 5063.5 (amended). "Other business entity" defined

SEC. ___. Section 5063.5 of the Corporations Code is amended to read:

5063.5. "Other business entity" means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, "general partnership" means a "partnership" as defined in subdivision (7) of Section 16101; "business trust" means a business organization formed as a trust; "real estate investment trust" means a "real estate investment trust" as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and "unincorporated association" has the meaning set forth in Section ~~24000~~ 18025.

Comment. Section 5063.5 is amended to correct a cross-reference to former Corporations Code Section 24000.

Corp. Code § 12242.5 (amended). "Other business entity" defined

SEC. ___. Section 12242.5 of the Corporations Code is amended to read:

12242.5. "Other business entity" means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance as set forth in Article 16 (commencing with Section 1550) of Chapter 3 of Part 2 of Division 1 of the Insurance Code. As used herein, "general partnership" means a "partnership" as defined in subdivision (7) of Section 16101; "business trust" means a business organization formed as a trust; "real estate investment trust" means a "real estate investment trust" as defined in subsection (a) of Section 856 of the Internal Revenue Code of 1986, as amended; and "unincorporated association" has the meaning set forth in Section ~~24000~~ 18025.

Comment. Section 12242.5 is amended to correct a cross-reference to former Corporations Code Section 24000.

Corp. Code § 15800. Designation of agent for service of process

SEC. ___. Section 15800 of the Corporations Code is amended to read:

15800. (a) Every partnership, other than a foreign limited partnership subject to Chapter 3 (commencing with Section 15611) or a commercial or banking partnership established and transacting business in a place without the United States, that is domiciled without this state and has no regular place of business within this state, shall, within 40 days from the time it commences to do business in this state, file a statement in the office of the Secretary of State in accordance with Section ~~24003~~ 16309 designating some natural person or corporation as the agent of the partnership upon whom process issued by authority of or under any law of this state directed against the partnership may be served. A copy of the designation, duly certified by the Secretary of State, is sufficient evidence of the appointment.

(b) The process may be served in the manner provided in subdivision ~~(e)~~ (b) of Section ~~24003~~ 16310 on the person so designated, or, in the event that no such person has been designated, or if the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation, or if the agent is a corporation and no person can be found with due diligence to whom the delivery authorized by subdivision ~~(e)~~ (b) of Section ~~24003~~ 16310 may be made for the purpose of delivery to the corporate agent, or if the agent designated is no longer authorized to act, then service may be made by personal delivery to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State of the process, together with a written statement signed by the party to the action seeking the service, or by the party's attorney, setting forth the last known address of the partnership and a service fee as set forth in Section 12197 of the Government Code. The Secretary of State shall immediately give notice of the service to the partnership by forwarding the process to it by

registered mail, return receipt requested, at the address given in the written statement.

(c) Service on the person designated, or personal delivery of the process and statement of address together with a service fee as set forth in Section 12197 of the Government Code to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State, pursuant to this section is a valid service on the partnership. The partnership so served shall appear within 30 days after service on the person designated or within 30 days after delivery of the process to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State.

Comment. Section 15800 is amended to correct cross-references to former Corporations Code Section 24003. Subdivision designations have been added for ease of reference.

Corp. Code § 16202 (amended). Formation of partnership

SEC. ___. Section 16202 of the Corporations Code is amended to read:

16202. (a) Except as otherwise provided in subdivision (b), the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter. An association formed pursuant to case law governing a specific type of association is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the coowners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received for any of the following reasons:

(A) In payment of a debt by installments or otherwise.

(B) In payment for services as an independent contractor or of wages or other compensation to an employee.

(C) In payment of rent.

(D) In payment of an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner.

(E) In payment of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral.

(F) In payment for the sale of the goodwill of a business or other property by installments or otherwise.

Comment. Section 16202 is amended to make clear that an unincorporated business association formed pursuant to case law authority is not a partnership. For example, a business trust is not a partnership. See Goldwater v. Oltman, 210 Cal. 408, 292 P. 624 (1930).

Corp. Code § 16309 (added). Designation of agent for service of process

SEC. ___. Section 16309 is added to the Corporations Code, to read:

16309. (a) The statement of partnership authority may designate an agent for service of process. The agent may be an individual residing in this state or a corporation that has complied with Section 1505 and whose capacity to act as an agent has not terminated. If an individual is designated, the statement shall include that person's complete business or residence address in this state.

(b) An agent designated for service of process may file with the Secretary of State a signed and acknowledged written statement of resignation as an agent. On filing of the statement of resignation, the authority of the agent to act in that capacity shall cease and the Secretary of State shall give written notice of the filing of the statement of resignation by mail to the partnership, addressed to its principal executive office.

(c) If an individual who has been designated agent for service of process dies or resigns or no longer resides in the state, or if the corporate agent for that purpose resigns, dissolves, withdraws from the state, forfeits its right to transact intrastate business, has its corporate rights, powers, and privileges suspended, or ceases to exist, the partnership or foreign partnership shall promptly file an amended statement of partnership authority, designating a new agent.

Comment. Section 16309 is new. Similar provisions govern designation of an agent for service of process by other types of unincorporated business entities. See Sections 15627(d) (limited partnership), 16962(a) (limited liability partnership), 17061(d) (limited liability company).

Corp. Code § 16310 (added). Service of process on designated agent

SEC. ___. Section 16310 is added to the Corporations Code, to read:

16310. (a) If a partnership has designated an agent for service of process, process may be served on the partnership as provided in this section and in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(b) Personal service of a copy of any process against the partnership by delivery to an individual designated by it as agent, or if the designated agent is a corporation, to a person named in the latest certificate of the corporate agent filed pursuant to Section 1505 at the office of the corporate agent, shall constitute valid service on the partnership.

(c) No change in the address of the agent for service of process or appointment of a new agent for service of process shall be effective until an amendment to the statement of partnership authority is filed.

(d)(1) If an agent for service of process has resigned and has not been replaced, or if the designated agent cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the

satisfaction of the court that process against a partnership cannot be served with reasonable diligence upon the designated agent by hand in the manner provided in Section 415.10, subdivision (a) of Section 415.20, or subdivision (a) of Section 415.30 of the Code of Civil Procedure, the court may make an order that the service shall be made on a partnership by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing the service. Service in this manner shall be deemed complete on the 10th day after delivery of the process to the Secretary of State.

(2) Upon receipt of the copy of process and the fee for service, the Secretary of State shall give notice of the service of the process to the partnership, at its principal executive office, by forwarding to that office, by registered mail with request for return receipt, the copy of the process.

(3) The Secretary of State shall keep a record of all process served on the Secretary of State under this section and shall record therein the time of service and the action taken by the Secretary of State. A certificate under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice to the partnership, and the forwarding of the process pursuant to this section, shall be competent and prima facie evidence of the service of process.

Comment. Section 16310 is new. Similar provisions govern service of process on other types of unincorporated business entities. See Sections 15627(a)-(b) (limited partnership), 16962(b)-(f) (limited liability partnership), 17061(a)-(c) (limited liability company).

Corp. Code §§ 20000-24007 (repealed). Unincorporated associations

SEC. ___. Title 3 (commencing with Section 20000) of the Corporations Code is repealed.

☞ **Staff Note.** The final recommendation will include a table of disposition indicating where the repealed provisions have been continued.

Gov't Code § 50089 (amended). Service of process on designated agent

SEC. ___. Section 50089 is added to the Government Code, to read:

50089. (a) Any employee organization primarily comprised of peace officers, as described by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, that is a chapter of, or affiliated directly or indirectly in any manner with, a general nonprofit corporation formed for the specific and primary purpose to act as an employee organization for peace officers in this state that directly or indirectly represents less than 7,000 retired or active peace officers, that has not filed with the Secretary of State an agent of the employee organization who has been designated for purposes of service of process as described in Section 1701, 6410, 8210, 9670, 12610, ~~24003~~ 18200, or 25550 of the Corporations Code by the effective date of this section, shall not be qualified to be the exclusive or

majority bargaining agent, as described in subdivision (a) of Section 3502.5, until January 1, 2007.

(b) Any general nonprofit corporation formed for the specific and primary purpose to act as a recognized employee organization, as defined in subdivision (b) of Section 3501, for peace officers in this state that directly or indirectly represents less than 7,000 retired or active peace officers, that has any affiliate, chapter, or member that has failed to file with the Secretary of State an agent who has been designated for purposes of service of process by the effective date of this section, shall be prohibited from establishing or recognizing any member, affiliate, or chapter that was not a bona fide member, affiliate, or chapter of the nonprofit corporation as of January 1, 2003, until January 1, 2007.

(c) This section shall not apply to any national organization that directly or indirectly represents retired or active peace officers.

Comment. Section 50089 is amended to correct a cross-reference to former Corporations Code Section 24003.
