Study B-501 July 3, 2002

Memorandum 2002-36

Uniform Unincorporated Nonprofit Association Act: Definitions and Civil Procedure Issues

The Commission has decided to recommend the reorganization and improvement of existing law governing unincorporated associations, rather than adoption of the Uniform Unincorporated Nonprofit Association Act ("Uniform Act"). This project is proceeding incrementally, with the Commission considering different subject areas and tentatively approving proposals before moving on to the next subject area. Once all of the subject areas have been considered, the staff will prepare a draft tentative recommendation reflecting the Commission's decisions.

This memorandum discusses certain necessary definitions and issues relating to civil procedure. The memorandum is organized as follows:

DEFINITION OF "MEMBER"

A number of provisions of existing law refer to a "member" of an unincorporated association. For example, existing law limits a member's personal liability. See Corp. Code §§ 21100-21102. However, the term "member" is not defined. Nor is there any court decision discussing who is a "member" of an unincorporated association.

The lack of a definition doesn't appear to have caused any problems. However, the Commission is proposing to add Corporations Code Section 18125, which governs distribution of the assets of a dissolved association. Under that section, assets may be distributed to members of the association. If considerable

assets are at issue, there may well be disputes over who is and is not a member. The term "member" should be defined.

Governing Documents

As a general proposition, if an association has a governing document that contains a definition of who is a member, the governing document's definition should control. An unincorporated association should be able to set its own standards for what constitutes membership. That said, it might be appropriate to include Comment language making clear that deference to an association's governing documents does not sanction unlawful discrimination.

Another possible exception to the general proposition is suggested by the definition of "member" that applies to nonprofit corporations. See Corp. Code § 5056(a). Under that definition, "member" includes a person designated in a corporation's articles or bylaws as a member, *but only if that person has a right to vote on changes to the articles or bylaws.* This limitation may be based on the idea that a membership that can be redefined without one's consent is illusory.

However, such a rule has the potential to frustrate expectations and may lead to unjust results. A person who joins an organization and is treated as a member in good standing under that organization's rules and practices would expect to be recognized legally as a member of the organization. If the organization dissolves and distributes its assets to its members pro rata, what rationale is there for denying a share to a member who cannot vote on changes to the organization's governing documents? The staff does not see the need for such a limitation in the proposed law.

Default Rule

Some unincorporated associations may not have a governing definition of membership. It would therefore be useful to create a default rule to fill any gaps.

The definition of "member" applicable to nonprofit corporations includes a sensible default:

> "Member" means any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a corporation or on a merger or on a dissolution …

Corp. Code § 5056(a). Under that language, it doesn't matter whether a person is called a member — what matters is whether the person has the powers of a member.

A similar definition is provided in Section 1(1) of the Uniform Unincorporated Nonprofit Association Act. It uses more general language, reflecting the fact that an unincorporated association may not have articles, bylaws, or directors:

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

The Uniform Act language seems to provide a reasonable starting point for development of our default rule.

However, the Commission should consider whether the scope of the Uniform Act language should be broadened. Are there other reasons, besides participation in decisionmaking, for treating a person as a member of an unincorporated association? One possible basis for membership status is entitlement to receive benefits provided by the association. For example, an unincorporated swim club might make its swimming pool available for use by persons who pay an annual fee, but who have no right to participate in club decisionmaking. If the club dissolves, should its "customers" share in the distribution of the club's assets? Would it matter if the right to use the pool for a year was described in promotional materials as an "annual membership?"

Also, the Uniform Act language may be too broad. An unincorporated association may engage consultants or other agents to assist in the development of policy, without any expectation that such persons are members of the association. Under the Uniform Act language, such a person might well be considered a member of the association. The staff recommends that the definition of "member" specifically exclude persons who participate in decisionmaking *solely* as a consequence of their status agents of the association.

Proposed Definition

The staff proposes the following definition of "member:"

Corp. Code § 18010. "Member" defined

18010. (a) If the governing documents of an unincorporated association define who is a member of the association, "member" has the meaning provided in the governing documents.

(b) If the governing documents of an unincorporated association do not define who is a member of the association, "member" means a person who, under the rules or practices of the unincorporated association, may 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. 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 hires a consultant to assist in developing association policy, the consultant's involvement in policy development does not make the consultant a member of the association. The fact that the consultant is serving as an agent of the association does not prevent the consultant from also being a member of the association under the association's general membership rules and practices.

DEFINITION OF "GOVERNING DOCUMENT"

The term "governing document" is used in the proposed definition of "member" as well as in other provisions of the proposed law. The staff recommends that the term be defined.

California has no statutory definition of "governing document" that would apply to all unincorporated associations. However, the Davis-Stirling Common Interest Development Act provides a definition specific to that type of association:

> "Governing documents" means the declaration and any other documents, such as bylaws, operating rules of the association,

> articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Civ. Code § 1351(j). That provision provides a good foundation for a general definition. However, the definition should probably be broadened beyond documents governing "operation" of an unincorporated association. Governing documents may also define the purpose of an association and establish the rights and obligations of its members.

The staff recommends that the following definition be added to the proposed law:

> **Corp. Code § 18007. "Governing document" defined**
>
> 18007. "Governing document" means any 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.
>
> **Comment**. Section 18007 is new. See also Section 8 ("writing" defined).

CAPACITY OF UNINCORPORATED ASSOCIATION TO SUE AND BE SUED

Code of Civil Procedure Section 369.5(a) provides that an unincorporated association may sue and be sued in its name:

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

Language establishing an unincorporated association's capacity to sue and be sued was originally enacted on the Commission's recommendation (as former Section 388). See *Suit By or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1966). The staff is unaware of any problems created by this provision.

Uniform Act Language

Section 7(a) of the Uniform Unincorporated Nonprofit Association Act provides:

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

The Uniform Act provision is different from Code of Civil Procedure Section 369.5, in two ways: (1) it goes into greater detail as to the ways in which an unincorporated association may participate in a proceeding (i.e., "institute, defend, intervene, or participate"), and (2) it provides that an association may participate in administrative proceedings and alternative dispute resolution.

Existing law is probably understood to have the scope specified in the Uniform Act provision. A quick survey of cases revealed instances where an unincorporated association had intervened in a lawsuit or had been a party to arbitration.

Because the law of unincorporated associations affects informally organized groups, whose members may be legally unsophisticated, the Commission has been trying to draft the proposed law to be as understandable to lay persons as possible. In this instance, there might be some advantage to using the Uniform Act language, because it provides more detail as to how an unincorporated association may participate in governmental proceedings and alternative dispute resolution. On the other hand, it isn't clear that "institute a judicial proceeding" will be more understandable to a lay reader than "sue." Also, if a detailed list is used, and it turns out that the list is incomplete, there is an implication that the omitted item was omitted intentionally. General language does not create such an implication. The staff is inclined against adopting the Uniform Act language.

Meaning of "Unincorporated Association"

The meaning of "unincorporated association" in Code of Civil Procedure Section 369.5 was construed by the court in *Barr v. United Methodist Church*, 90 Cal. App. 3d 259 (1979). That interpretation was considered by the Commission in connection with the First Supplement to Memorandum 2002-25. The Commission decided against codifying or abrogating the interpretation. If the Commission decides to recommend amendment of Section 369.5 for other reasons, it would probably be helpful to include a reference to *Barr* in the Commission's Comment.

REPRESENTATIVE ACTION

Because the members of an unincorporated association have common interests, there may be instances where the association wishes to sue on behalf of its members. Section 7(b) of the Uniform Unincorporated Nonprofit Association

Act provides a rule for when an association has standing to bring such a representative action:

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

California does not have a statute specifically authorizing representative action by an unincorporated association. Instead there is a general provision authorizing representative suits. Code of Civil Procedure Section 382 provides in part: "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In *Tenants Ass'n of Park Santa Anita v. Southers,* 222 Cal. App. 3d 1293 (1990), the court reviewed a number of previous decisions on representative action by incorporated and unincorporated associations. The general rule that can be drawn from *Southers* is that an association can sue on behalf of its members if the following standards are met:

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

The Uniform Act language is substantively similar, but different in a number of ways. Enactment of the Uniform Act provision would displace the case law standards that have developed, without any obvious advantage to justify disturbing existing law. The staff recommends against adopting the Uniform Act provision.

There may be some advantage in codifying existing case law, in order to provide guidance to lay members of associations who do not have ready access to the case law. However there are a number of points arguing against codification.

If the law was codified with respect to unincorporated associations, it should probably also be codified with respect to incorporated associations (the case law standards have been applied to both). If that approach is taken, it would not

make sense to locate the codification provision within a body of law governing only unincorporated associations. A more logical location would be in the Code of Civil Procedure, near Section 382 (which authorizes representative action). However, if the provision is not located in the law governing unincorporated associations, it is less likely that a lay member of an association would find it. If lay members cannot find the provision, the "educational" justification for codification is undermined.

Nor is it clear that association members need to understand the law governing representative standing. If association members understand that an unincorporated association may sue, and feel the need to sue, the association will probably obtain counsel. Counsel can then take care of procedural details such as whether the action can or should proceed as a representative suit.

Furthermore, there is still some uncertainty in the case law on the extent to which an association can sue on behalf of its members and how such a suit must proceed. Given that the case law is not entirely settled, codification seems premature.

For these reasons, the staff recommends against codifying the law on representative standing.

Representative Action and Damages

The case law on representative action by an association presents two issues worth noting (though neither requires any Commission action). First, the extent to which an association can sue to recover damages on behalf of its members is uncertain.

In *Southers*, the court introduces its discussion of previous cases by stating that "it is not altogether clear under what circumstances an unincorporated association has standing to sue in a representative capacity." *Id.* at 1299. That uncertainty is echoed in a recent federal case in which the court was called upon to determine whether an association has standing, under California law, to sue on behalf of its members. "The general thrust of the case law is that an association may sue in a representative capacity to assert a 'public interest,' but there is some doubt regarding an association's authority to sue to assert the 'private' interests of its members." *Zee Medical Distributor Ass'n, Inc. v. Zee Medical, Inc.*, 23 F. Supp. 2d 1151, 1154 (1998).

The distinction between public interest and private rights is drawn from the *Southers* court's analysis of prior decisions. In *Southers,* the court notes that

standards for representative standing are relaxed where the issue to be litigated affects the public interest (e.g., a suit to compel a public agency to follow the law). *Southers*, 222 Cal. App. 3d at 1299-1300.

The uncertainty as to the standing of an association to sue to assert its members' private rights seems to derive from the possibility that damages may be sought in a case asserting private rights. If an association is suing for "prospective" relief, such as declaratory or injunctive relief, then the remedy applies to all of its members equally. This is consistent with the "community of interest" that represented parties must share. However, if damages are sought, facts specific to individual members of the association may be at issue, dividing the community of interest and undermining the adequacy of the association's representation.

Thus, in *Southers*, the court recognized an association's standing to pursue "generally applicable" relief on behalf of its members — injunction, abatement of nuisance, legal fees, and statutory fines. It then held that:

> some of the alleged injuries are too intangible and too inherently personal to the individual to reasonably constitute a community of interest. For example, what may have caused emotional distress to one tenant may not have caused emotional distress to another tenant, or may have caused a different degree of distress, as the second tenant may have been less susceptible to emotional distress or may have been treated differently than the first tenant.
>
> Accordingly, we conclude that appellant does not have standing to sue for damages/injuries for anxiety, emotional distress, or personal injuries.

Southers, 222 Cal. App. 3d at 1304.

While there is no bright line rule as to when an association may sue to assert its members' private rights, the staff believes that the uncertainty is inherent in the requirement that there be a community of interest between represented members. To the extent that members of an association have damage claims based on their individualized circumstances, a representative action by the association would probably not be permitted. Existing law appears to handle this issue properly and the staff sees no need to tinker in this area.

Class Action Procedures

The second source of uncertainty in the case law is an apparent division between courts on whether a representative action must proceed as a class action.

In a few cases, courts have observed that representative suits are not necessarily class actions. See, e.g., *Southers,* 222 Cal. App. 3d at 364, n.5 (citations omitted). Other cases have held that a representative action by an association must proceed as a class action. "An association which has not itself been injured has standing to sue on behalf of its members only if it acts as a class representative." *National Solar Equip. Owners' Ass'n, Inc. v. Grumman Corp.*, 235 Cal. App. 3d 1273, 1280 (1991).

The question of whether a representative suit by an association must proceed as a class action is important. However, it does not seem to be a question that depends on whether the association at issue is incorporated or unincorporated. It is more fundamental, relating to the policies involved in class actions and representative suits generally. The staff believes it falls outside the scope of the present study.

ABATEMENT OF ACTION

Section 11 of the Uniform Unincorporated Nonprofit Association Act provides:

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

The official comment to that section explains that, at common law, all partners were required to be joined in an action involving a partnership. If the membership of the partnership changed during the course of the action, a defect in joinder might arise, resulting in abatement of the action.

A provision along the lines of Section 11 is unnecessary in California. As discussed above, California law provides that an unincorporated association can be sued in its own name. Individual members need not be joined, so a change in membership will not result in a failure to join a necessary party.

SERVICE OF PROCESS

The Uniform Unincorporated Nonprofit Association Act has two sections governing service of process on an unincorporated association. Section 10 provides a procedure for appointment of an agent to receive service of process. The appointment papers are filed with the Secretary of State. Section 13 provides that a summons and complaint may be served on either an "agent authorized by

appointment to receive service of process, an officer, managing or general agent, or a person authorized to participate in the management of its affairs. If none of them can be served, service may be made on a member."

California law governing service of process on an unincorporated association is similar to the Uniform Act. Corporations Code Sections 24003 authorizes an unincorporated association to file a statement with the Secretary of State, appointing an agent for service of process. Code of Civil Procedure Section 416.40 then authorizes service as indicated in the statement. Section 416.40 provides as follows:

> 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 of the Corporations Code, as provided by the applicable section.

There is one technical problem with Section 416.40. The reference to Section 15700 in subdivision (c) is obsolete. Subdivision (c) should be revised to eliminate the reference.

A few more significant problems relating to Section 416.40 are discussed below.

Reference to Section 24003

The references to Corporations Code Section 24003 appear to be somewhat outdated. Pursuant to Corporations Code Section 24000, Section 24003 applies to any unincorporated association, whether for profit or not. However, since enactment of Section 24003, rules authorizing specific types of for-profit unincorporated association to designate an agent for service of process have been enacted. See Corp. Code §§ 15621(a)(4) (limited partnership), 16953(a)(3) (limited liability partnership), 17051(a)(4) & 17060(a)(2) (limited liability company).

Code of Civil Procedure Section 416.40 does not provide for service on an agent designated pursuant to one of these entity-specific provisions. However, there are corresponding provisions of the Corporations Code that do provide for service on an agent designated under an entity-specific provision. See Corp. Code §§ 15627 (limited partnership), 16962 (limited liability partnership), 17061 (limited liability company).

In other words, it appears that for-profit associations have circumvented Code of Civil Procedure Section 416.40 and Corporations Code Section 24003. The apparent exception to this is a general partnership. The staff could not find a general partnership provision authorizing designation of an agent for service of process or authorizing service of process on a designated agent. It appears that general partnerships still rely on Corporations Code Section 24003 and Code of Civil Procedure Section 416.40.

Use of these sections by a general partnership will be foreclosed if partnerships are specifically exempted from application of the Corporations Code provisions governing unincorporated associations (as is proposed in proposed Corporations Code Section 18055). That problem can be avoided in one of two ways: (1) expressly provide that Section 24003 continues to apply to a general partnership, or (2) add language authorizing a general partnership to designate an agent for service of process and authorizing service of process on the designated agent.

The second alternative could be implemented by adding the following provisions to partnership law:

> **Corp. Code § 16309 (added). Designation of agent for service of process**
>
> 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 13609 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

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).

The approach set out above would involve substantive change to the law governing general partnerships. The most significant change would be the provision authorizing service on the Secretary of State if a designated agent cannot be served. However, such a change would increase consistency in the law. Each of the major types of unincorporated business entity would have similar entity-specific provisions governing service of process. Corporations Code Section 24003 would only apply to nonprofit unincorporated associations and to the minority of for-profit associations that are not comprehensively regulated by statute (e.g., a business trust). If the approach above is taken, conforming changes should be made to Code of Civil Procedure Section 416.40, as follows:

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 of the Corporations Code, as provided by ~~the applicable~~ that section.

Section 24007 Default Rule

Corporations Code Section 24007 provides a default rule for service where an unincorporated association has not designated an agent or the agent can't be found:

> 24007. If designation of an agent for the purpose of service of process has not been made as provided in Section 24003, or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 24004 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.

Section 24007 is inconsistent with the entity-specific rules governing service of process on a designated agent (which provide for service on the Secretary of State if the designated agent cannot be served). See Corp. Code §§ 15627(c) (limited partnership), 16962(c)-(f) (limited liability partnership), 17061(c) (limited liability company). In all likelihood, the entity-specific service rules would be seen as controlling over the general rule in Section 24007. Still, the existence of inconsistent alternative rules could be confusing.

Fortunately, the problem is easily solved. If partnerships and limited liability companies are not subject to Corporations Code Section 24007, then there is no inconsistency. That is the approach taken under proposed Corporations Code Section 18055.

Transitional Provision

Exempting partnerships and limited liability companies from application of Corporations Code Sections 24003-24006 could create problems with respect to agent designations that were made under Section 24003 prior to enactment of the proposed law. To avoid this problem, a transitional provision could be added to Section 24003, along the following lines:

> (g) Notwithstanding Section 18055, a statement filed under this section before [the operative date of the proposed law] is subject to [this article].

Thus, a statement filed under the former law would continue to be subject to provisions governing revocation, expiration, resignation, etc. See Corp. Code §§ 24003-24006. Note that the reference to "this article" presupposes that Sections 24003-24006 would be added as a separate article in the proposed law.

PLACE OF TRIAL

Code of Civil Procedure Section 395.5 provides the general rule for determining the place of trial in an action against a corporation or an "association":

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

Code of Civil Procedure Section 395.2, enacted on the recommendation of the Law Revision Commission, permits an unincorporated association to "opt in" to the venue rules that govern a corporation, by filing a statement with the Secretary of State:

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

If partnerships and limited liability companies are excluded from application of Corporations Code Section 24003, those entities will lose the option of specifying a principal place of business for the purpose of determining place of trial. That could be avoided by amending Code of Civil Procedure Section 395.2 as follows:

> 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 unincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

Minor revisions would also need to be made to the entity-specific sections governing filing of statements. Those sections provide for identification of a business office, but not necessarily the principal place of business in the state. Changes along the following lines could be made:

> **Code Civ. Proc. § 15621. Formation of limited partnership**
>
> 15621. (a) In order to form a limited partnership the general partners shall execute, acknowledge, and file a certificate of limited partnership and, either before or after the filing of a certificate, the partners shall have entered into a partnership agreement. The certificate shall be filed in the office of, and on a form prescribed by, the Secretary of State and shall set forth all of the following:
>
> …
>
> (2) The street address of the principal executive office and of the principal place of business in this state, if any.
>
> …

> **Code Civ. Proc. § 16303. Statement of partnership authority**
>
> 16303. (a) A partnership may file a statement of partnership authority, which is subject to all of the following:
>
> (1) The statement shall include all of the following:
>
> …
>
> (B) The street address of its chief executive office and of ~~one office~~ its principal place of business in this state, if there is one.

Code Civ. Proc. § 16953. Formation of registered limited liability partnership

16953. (a) To become a registered limited liability partnership, a partnership, other than a limited partnership, shall file with the Secretary of State a registration, executed by one or more partners authorized to execute a registration, stating all of the following:

…

(2) The address of its principal office and its principal place of business in this state, if any.

Code Civ. Proc. § 17060. Articles of organization of limited liability company

17060. (a) Every limited liability company and every foreign limited liability company registered to transact intrastate business in this state shall file within 90 days after the filing of its original articles of organization and biennially thereafter during the applicable filing period, on a form prescribed by the Secretary of State, a statement containing:

…

(3) The street address of its principal executive office, its principal place of business in this state, if any, and, in the case of a domestic limited liability company, of the office required to be maintained pursuant to Section 17057.

The qualification, "if any," is added to recognize the possibility that the entity may not have a "principal place of business" within this state.

ENFORCEMENT OF JUDGMENT

Corporations Code Section 24002 provides that a "money judgment against an unincorporated association may be enforced only against the property of the association." Two questions regarding this section are discussed below: (1) should the language be broadened to govern enforcement of all judgments and orders, and (2) should the section apply to all unincorporated associations? These issues are discussed below.

Judgments and Orders

Section 24002 limits enforcement of a money judgment. Section 8 of the Uniform Unincorporated Nonprofit Association Act is similar, but broader:

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

The official comment to Section 8 notes that it applies to enforcement of orders, including "an award rendered in arbitration or an injunction."

There would probably be no harm if Section 24002 were revised to apply to all judgments and orders, but it isn't clear that such a change is necessary.

An arbitration award is already enforceable as a judgment if it is confirmed by a court. Code Civ. Proc. § 1287.4. So enforcement of a confirmed arbitration award for payment of money is already governed by Section 24002.

With respect to injunctions, it may be that enforcement of an injunction against an unincorporated association necessarily involves enforcement against the members of the association. For example, a court might enjoin picketing by an unincorporated association within a certain distance of a building's entrance. If Section 24002 were revised to provide that the order against the association is not enforceable against the association's members, the members might argue that the order does not restrain picketing by members, *acting as individuals*, within the prohibited distance. Such an argument would undermine the purpose of the court's order.

In the absence of some demonstrated problem with existing Section 24002, the staff is inclined against adopting the Uniform Act language.

Application of Section 24002

Under existing law, Section 24002 applies to all unincorporated associations, whether organized for profit or not. See Corp. Code § 24000. As discussed above, the general approach of the proposed law is to exclude partnerships and limited liability companies from application of the Corporations Code provisions governing unincorporated associations. What would be the effect of exempting partnerships and limited liability companies from Section 24002?

There would be no effect on general partnerships. Corporations Code Section 16307(b) already provides an analogous rule:

> A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

However, the staff could not find any similar provisions governing a limited partnership or a limited liability company. Exempting those entities from Section 24002 would therefore seem to deny them the benefit of that provision, which they presently enjoy.

This could be avoided either by expressly providing that Section 24002 applies to limited partnerships and limited liability companies, or by moving Section 24002 to another location and preserving its present application, thus:

> **Code Civ. Proc. § 695.080 (added). Enforcement against unincorporated association**
>
> 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.
>
> **Comment**. Section 695.080 continues former Corporations Code Section 24002 without substantive change.

The section would then fall within the article on "Property Subject to Enforcement of Money Judgment" in the Enforcement of Judgments Law, a fairly logical location. The staff favors that approach.

WHAT NEXT?

The last general subject to be considered is governance of an unincorporated association. The Business Law Section of the State Bar has suggested that a comprehensive unincorporated associations statute should include some default provisions for governance of an unincorporated association. The staff has requested a more specific proposal from the State Bar.

After consideration of the State Bar's proposal, the staff will prepare a draft tentative recommendation for the Commission's review.

Respectfully submitted,

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