NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
UNIFORM LAW CONFERENCE OF CANADA
MEXICAN CENTER ON UNIFORM LAW

JOINT PROJECT TO CREATE A HARMONIZED LEGAL FRAMEWORK FOR UNINCORPORATED NONPROFIT ASSOCIATIONS IN NORTH AMERICA STATEMENT OF PRINCIPLES

A. Preamble.

In 2005 the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Uniform Law Conference of Canada (ULCC), and the Mexican Center on Uniform Law (MCUL) decided to undertake a joint project to create a harmonized legal framework for Unincorporated Nonprofit Associations in their respective countries. The first task was to create a set of basic principles which will then be incorporated into the unincorporated nonprofit association statutes developed by NCCUSL, ULCC and MCUL. After approval, these organizations will seek to have the statutes they promulgate adopted throughout their respective countries.

This joint project is modeled on the European Union (EU) legal harmonization projects which set forth minimum standards and principles that must be incorporated into the statutory and regulatory framework of each of the EU members. This process has been quite successful in creating a harmonized legal structure in the EU, which has both common law and civil law based legal system countries. The leadership in NCCUSL, ULCC and MCUL concluded that the EU model should be applicable to the current NAFTA countries where the United States and Canada (except for Quebec) have common law legal systems, and Mexico and Quebec have civil law legal systems.

Unincorporated nonprofit associations (UNAs) were chosen as the basis of the first NAFTA harmonization project because all three participating organizations had legal reform

projects involving UNAs high on their respective priority lists. In the United States, UNAs are governed by a hodgepodge of common law and state statutes. Traditionally, UNAs have been treated under an aggregate theory of organization rather than as a separate legal entity. In most states statutes have been enacted to ameliorate some of the adverse consequences of the aggregate theory (*e.g.*, allowing a UNA to hold and convey property in its own name and to sue and be sued in its own name), but these statutes are for the most part (California is an exception) not comprehensive or integrated. NCCUSL promulgated the Uniform Unincorporated Nonprofit Association Act (UUNAA) in 1996. UUNAA, which has been adopted in 12 states, deals with only a limited number of issues (tort and contract liability, owning and conveying of property and suits by and against a UNA), and NCCUSL determined in 2005 that it needed to be updated and made more comprehensive.

The current law governing UNAs in Canadian common law provinces is similar in many respects to the laws of United States due in large part to the historical treatment of UNAs under the aggregate theory. Piecemeal reforms have occurred from time to time but no comprehensive, integrated reform of laws governing UNAs has been undertaken.

Quebec and Mexico have similar civil law legal systems and their codes treat UNAs as legal entities rather than as aggregates for most purposes. Their code treatment of UNAs is more complete than in the United States and common law Canada, but significant reforms in both codes are necessary to incorporate the basic general principles set forth in this document.

A UNA is the default form of nonprofit organization; that is, a nonprofit organization is a UNA if no steps have been taken to become another organizational form, for example, a nonprofit corporation or a trust. UNAs may be classified as public benefit, mutual benefit or religious organizations and may or may not be tax exempt. There are hundreds of thousands of

UNAs in North American countries including unincorporated nonprofit philanthropic, educational, scientific and literary clubs, sporting organizations, unions, trade associations, political organizations, churches, hospitals, and condominium and neighborhood associations. Their members may be individuals, corporations, other legal entities or a mix.

This document sets forth the basic principles that the countries engaged in this project will incorporate into their UNA statutory framework governing an unincorporated nonprofit association. These principles deal with the following issues: (1) definition of the types of organizations covered; (2) the relation of the principles to other existing law; (3) the ability of a UNA to own and dispose of property and to sue and be sued in its own name; (4) the contract and tort liability of a UNA and its members, and managers; (5) internal governance, fiduciary duties, and agency authority; and (6) dissolution, merger and conversion (transformation).

The ideal format is to have all of these principles incorporated into a single chapter of the enacting jurisdiction's code of laws in a manner that conforms to the jurisdiction's statutory drafting conventions. The objective is consistency of basic principles governing UNAs between the enacting jurisdictions, not necessarily identity of statutory language. That is why the term "harmonized legal framework" is used rather than uniform act to describe this project. If the enacting jurisdiction already has statutes incorporating some of the basic principles, it may be appropriate under the enacting jurisdiction's drafting conventions to utilize cross-references to these other statutes in the UNA chapter rather than to move these provisions to the UNA chapter. An enacting jurisdiction might also want to cover additional issues in its UNA statute. The Appendix contains a partial list of these issues and, in some instances, examples of statutory language from existing statutes.

B. **Scope.**

Principle #1. A UNA is an unincorporated organization formed pursuant to an agreement, written or oral or inferred by conduct, by two or more persons to pursue one or more common lawful nonprofit purposes that is not organized as a trust, a cooperative, a domestic partnership, or, except as otherwise provided in the Act, formed under any other statute that governs the organization and operation of certain designated unincorporated associations, and that is not merely a means of holding title to property as co-owners. A UNA has members, managers and governing principles.

Comments:

1. *An organization cannot be a UNA if it is organized as a corporation or is a for profit unincorporated entity, e.g., a partnership. On the other hand, not every form of unincorporated nonprofit organization should automatically become a UNA and therefore be able to have limited liability and the other benefits of this statute. That is the reason for the language excluding trusts, domestic partnerships, and agreements merely to hold title to property as co-owners. The laws governing the rights of creditors, trustees and beneficiaries of trusts are well developed and therefore the legal principles in this Act are unnecessary. In some jurisdictions cooperatives are classified as unincorporated associations and may be considered nonprofits if they restrict the distribution of their net proceeds to their members. Since there is extensive existing statutory and common law governing cooperatives, however, they should be excluded from the Act. Domestic partnership statutes provide certain rights to adults co-habiting together who are not legally married. Living together in this manner can probably qualify as an association having a nonprofit purpose, but for public policy reasons a registered domestic partnership should not be able to qualify automatically as a UNA and therefore avoid individual liability for taxes and other liabilities. For similar reasons, mere co-ownership of*

property, even if for nonprofit purposes, should not automatically result in the applicability of this Act. An enacting jurisdiction can choose to expand or reduce the number of types of exclusions consistent with the concept that a UNA is a default form of organization for unincorporated nonprofit entities.

2. *"Agreement" rather than "contract" is the appropriate term because the legal requirements for an agreement are less stringent and less formal than for a contract. The agreement to form a UNA can be in writing, or oral, or inferred by conduct (e.g., course of performance or course of dealing). The term "writing" is to be broadly construed to include any form that constitutes a "writing" under the laws of the enacting jurisdiction, including electronically communicated documents such as e-mail communications. The agreement to form a UNA is part of the UNA's overall "governing principles." See Principle 2. Although it is always preferable to have written agreements, most existing UNAs are quite informal and have few, if any, writings setting forth the agreements governing the purpose and operation of the organization. Moreover, most UNAs are formed and operate without independent legal advice. Imposing a statute of frauds writing requirement would, therefore, have the effect of excluding most existing UNAs from being able to qualify under the Act. The enacting jurisdiction's general rules governing the proof and effect of oral agreements and the priority of written provisions over subsequent inconsistent oral provisions apply to UNA governing principles. See Principle #9 and Comment 2.*

Although the agreement to form a UNA can be quite informal and sketchy, there must be some tangible, objective data such as the use of the organization's name in communications to its member or third parties, or the existence of a bank account or mailing (or internet) address in the name of the UNA indicating that, in fact, there is an actual agreement.

3. *The best reference point for what constitutes a nonprofit purpose is probably the enacting jurisdiction's Nonprofit Corporation Act. The nonprofit purpose requirement carries with it the implicit understanding that the purpose is not a criminal activity and is otherwise lawful. Each enacting jurisdiction needs to determine whether this limitation needs to be set forth explicitly in the Act.*

4. *The two–person requirement for forming a UNA is quite minimal, assuming a standard broad definition of person that includes entities of all kinds as well as natural persons is incorporated into the Act (see Cal. Corp. Code § 18030 – "Person" includes a natural person, corporation, partnership or other unincorporated organization, government or governmental subdivision or agency, or any other entity.") At least two persons are required because that is the minimum number necessary to have an agreement under general legal principles. If one person wants to create a nonprofit organization, it is possible to do so by means of a trust, a nonprofit corporation, or in many jurisdictions, a single member limited liability company.*

5. *The Act shall apply to all UNAs, whether they be classified as religious, public benefit or mutual benefit or whether they are classified as tax-exempt under the laws of the enacting jurisdiction. Therefore, the Act will cover unincorporated philanthropic, educational, scientific, social and literary clubs, unions, trade associations, political organizations, churches, hospitals, neighborhood and property owner associations, and sports organizations such as Little League baseball teams. If the enacting jurisdiction decides to exempt one or more types of UNAs from the Act, it needs to draft specific provisions listing the exemptions.*

6. *The terms "members," "managers" and "governing principles" are defined in Principles 2-4.*

Principle #2. **The agreement forming the UNA becomes part of the UNA's "governing principles," an important term that should be defined in the Act. Governing principles are all the agreements that govern the purpose or operation of a UNA and the rights and obligations of its members and managers. If written, they are usually found in the UNA's constitution, articles of association, bylaws or regulations. If not covered by a writing, they would be established practices, which should also be a defined term (*see* Calif. Corp. Code §18010) ("established practices" means the practices used by an unincorporated association without material change or exception during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.")**

Comments:

1. *Principles #26-37 in particular deal with issues that would normally be dealt with in a UNA's governing principles.*

2. *"Governing principles" can be oral, written or established by conduct. See Comment 2 to Principle #1. The process for amending general principles will often be set forth in writing such as bylaws. In the absence of a written process or well-established oral course of performance, amendments to the governing principles would be determined by majority vote of the members under Principle #26.*

Principle #3. **"Members" of a UNA are the persons who, under the governing principles of a UNA, are entitled to participate in the selection of persons who are authorized to manage the affairs of the UNA or in the development of the UNA's governing principles or policies and have become members pursuant to Principle #35.**

Comments:

1. *The persons organizing a UNA do not have to be members of the UNA after it is formed, although in most cases they will become members.*

2. *Persons who do not have the right to select managers or to approve governing principles or policies are not "members" under this Act, even though they may be called or designated as members by the UNA, e.g., individuals whose only connection with the UNA is a gift of money who are listed as members of a group who have given a similar range of gifts.*

3. *An individual can have policy-making responsibilities in a UNA without necessarily being a member of the UNA. That individual will probably be classified as a manager and managers can, but need not be, members. See Principle #4.*

Principle #4. "Managers" are all those persons who have managerial responsibility within the UNA. **The term includes directors, trustees, administrators and officers and anyone else (*e.g.*, the minister of a church that is a UNA) who has been authorized to exercise governing, managerial or administrative authority. A manager may or may not be a member of a UNA.**

Comments:

An individual is a "manager" of a UNA if the individual fits the definition in Principle #4, even if that person's designation might usually be associated with another type of organization. Many UNAs refer to members of their governing boards as "trustees." That designation does not disqualify the organization from being a UNA even though the term "trustee" is commonly associated with trusts, which cannot be UNAs. See Principle #1. Similarly, referring to members of governing boards as "directors" would not disqualify an

organization from being a UNA even though the term "director" is commonly associated with corporations which cannot be UNAs.

Principle #5. A UNA may engage in profit-making activities but any profits that result from such activities must be used or set aside for the UNA's nonprofit purposes.

Comments:

1. *Many existing unincorporated nonprofit organizations engage in activities that are intended to produce a profit, e.g., a bingo parlor operated by a church where the profits are used to buy food for a homeless shelter. It is easy to understand why this type of profit-making endeavor should not disqualify the organization from being a UNA if it otherwise qualifies. A for profit activity might endanger the tax-exempt status of the organization or may generate taxable income, but, except as set forth in Comment 2, these are separate issues and should not affect the organizational status of a UNA or the rights of its members and managers.*

2. *The fact that some or all of the members receive some direct or indirect benefit from a UNA's profit-making activities will not disqualify an unincorporated nonprofit organization from being a UNA under this Act so long as the benefit is in furtherance of the UNA's nonprofit purposes. The distribution of any profits to the members for the members' own use, e.g., a dividend distribution to members, would, however, disqualify the organization from being a UNA because the distribution is not made in furtherance of the UNA's nonprofit purposes. The organization would be a general partnership, the default organizational form for a for profit organization. An unincorporated investment club that distributes its profits to its members would be a general partnership and not a UNA even though its stated purpose is to educate its members about investments.*

<u>Principle #6.</u> As of the effective date of the Act, all pre-existing organizations formed in the enacting jurisdiction that meet the definitional requirements of a UNA are governed by the Act without the organization having to take any action. The Act also applies to UNAs operating in the enacting jurisdiction and in existence prior to or subsequent to the effective date of the Act under the laws of another jurisdiction except with respect to the relations among the members and managers and between the members, managers and the UNA, which are governed by the jurisdiction designated in the foreign UNA's governing principles, and in the absence of applicable governing principles, by the jurisdiction where the foreign UNA has its main place of activities.

<u>Comments:</u>

1. *The first sentence, providing for automatic applicability to pre-existing UNAs, is a standard approach in statutes governing organizational entities. Exempting various types of existing organizations from the new law is not a desirable practice. Because the existing laws governing UNAs are, for the most part, incomplete and the Act may change some of the common understanding of what the law is, an enacting jurisdiction whose standard rule is to have a new statute effective when signed or at the beginning of the next fiscal year after signing may want to have a delayed effective date of 6 or 12 months to provide time to educate the affected organizations and their advisors about the changes.*

2. *The second sentence covering this Act's effect on UNAs formed in other jurisdictions is necessary because in all other types of entities, the internal affairs rules of the jurisdiction of the entity's formation (e.g., the governance rules and duties and responsibilities of the owners and managers to each other and the entity) control; but it is difficult to determine the jurisdiction of a UNA's formation since it does not, in most jurisdictions, file any public*

document upon its formation. Some mechanism for choosing the internal rules jurisdiction is therefore necessary. The default rule is the jurisdiction in which the UNA's main place of activities are located, which might be defined as the jurisdiction in which the UNA conducts the main part of its operations. A foreign UNA can, however, designate the internal affairs jurisdiction in its governing principles, subject to applicable conflicts of laws substantial contact rules.

3. *Since the laws governing UNAs in the enacting jurisdiction govern UNAs formed in other jurisdictions that are conducting activities (except for internal affairs issues in the enacting jurisdiction), a foreign-formed UNA could not conduct activities in the enacting jurisdiction that a UNA formed in this jurisdiction could not conduct, even if the activity were legal in the foreign jurisdiction in which the UNA was formed or conducts its main activities.*

Principle #7. A UNA is a legal entity separate and apart from its members and managers.

Comments:

1. *The separate legal status of a UNA is a fundamental concept that undergirds all the principles that allow a UNA to hold and dispose of property in its own name and to sue and be sued in its own name and that insulates the assets of the members from claims against the UNA. In civil law countries the separate legal person doctrine for unincorporated entities may not be a radical departure from existing law. In common law countries such as the United States, however, this is a reversal of traditional common law principles that treat partnerships and other unincorporated entities under an aggregate theory.*

2. *See Principles #3 and #4 for definitions of members and managers.*

Principle #8. Once formed, a UNA continues in existence until it is dissolved and its assets have been liquidated.

Comments:

See Principles #38-39 for the rules governing dissolution and liquidation of a UNA.

C. **The Applicability of Other Law.**

Principle #9. Principles of law and equity supplement the Act unless displaced by a particular provision of it.

Comments:

1. *This is a very broad principle and an enacting jurisdiction may decide to include specific provisions of other laws that are applicable, some of which are described in the following comment.*

2. *Examples of other laws that apply are general principles of contracts, agency, fraud, estoppel, the priority of written provisions of an agreement over prior inconsistent oral provisions or subsequent oral amendments (and any exceptions), civil and criminal procedural rules, and rules for enforcing judgments.*

3. *Drafting conventions as to whether these general principles of law are set forth in separate provisions in an act like this one vary greatly. NCCUSL Acts, as a general rule, do not have provisions other than what is stated in Principle 9.*

Principle #10. A provision in a statute in the enacting jurisdiction governing a particular type of UNA prevails over an inconsistent general provision of the Act, to the extent of the inconsistency.

Comments:

Many jurisdictions have existing statutes governing particular types of UNAs, e.g., churches. This principle establishes the rule that in the event of an inconsistency between this

Act and the statute governing a specific type of UNA, the latter will control. Under generally accepted statutory interpretation principles, there is a strong presumption against inconsistency, i.e., the presumption is that the provisions of the two acts are not inconsistent. Therefore, this inconsistency principle will only rarely be applicable.

Principle #11. The Act supplements the enacting jurisdiction's regulatory laws and rules that are applicable to nonprofit organizations. In the event of a conflict, these other laws and rules prevail.

Comments:

1. *Most jurisdictions have statutory provisions giving the chief legal officer of the jurisdiction oversight supervisory powers over nonprofit organizations, including the power to enjoin or prohibit various activities. Most jurisdictions also have statutes that require registration or permits to engage in certain activities, e.g., fundraising from the public, and the filing of reports, e.g., assumed name filings, tax forms, and the like. All of these existing and future statutes, rules and regulations are applicable to UNAs. Whether specific provisions stating this principle need to be included in the Act depends on the enacting jurisdiction's statutory drafting conventions.*

2. *A thorough review of all these other laws should be conducted to be sure they do not need to be amended in order to continue to apply to UNAs after the Act is effective. If amendments to these other laws are necessary, they should be included as trailing amendments in the Bill containing the Act.*

D. **Ownership of Property; Claims by and Against the UNA.**

Principle #12. A UNA in its own name may acquire, hold, encumber and transfer property, may execute contracts in its own name, and may be a beneficiary of a trust, a legatee, or a devisee under a will.

Comments:

1. *This principle applies to all types of and interests in property, real, personal and intangible.*

2. *This principle is consistent with the separate legal entity status of a UNA, but in many jurisdictions it is currently not possible for an unincorporated organization to hold or dispose of property in its own name without specific statutory authority. In these jurisdictions, the general rule is that a conveyance to a UNA in the organization's name is in effect a conveyance to all of the members or managers as tenants-in-common. To avoid this result title to property is usually taken or is deemed to be held in the name of one or more individuals as trustees for the present and future members of the organization. If the current title status of UNA property is a significant problem in the enacting jurisdiction, consideration should be given to adoption of a provision similar to Section 19 of the Uniform Unincorporated Nonprofit Association Act (UUNAA) that vests title that was previously attempted to be conveyed to the UNA in the name of the UNA as of the effective date of this Act.*

3. *Establishing the authority of an individual to sign deeds and other documents conveying interests in real property owned by a UNA in a manner satisfactory to title insurers and attorneys representing buyers or mortgagees has been problematic in many jurisdictions. An enacting jurisdiction where this has been a problem may want to include in the Act a provision similar to Section 5 of UUNAA in the Appendix.*

4. *Principle #12 lists only those powers where case law has raised questions because of the common law aggregate theory of UNAs. There may be other specific powers that an enacting jurisdiction might want to include in the Act (the enacting jurisdiction's Nonprofit Corporation Act general powers provision might be used as a model) or the enacting jurisdiction*

might want to have a broad general powers statement followed by the list of powers in Principle #12, e.g., "A UNA in its own name has the same powers as an individual to do all things necessary or convenient to carry out is affairs including, without limitation, power to acquire…."

Principle #13. A UNA, in its own name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in any arbitration, mediation or other form of alternative dispute resolution.

Principle #14. A claim for relief by or against a UNA does not abate merely because of a change in its members or managers.

Principle #15. The Act does not affect an action or proceeding commenced or right accrued before its effective date.

Comments:

There are two concepts embedded in this Principle: (1) the Act will not adversely affect a cause of action that existed before its enactment; and (2) if the enacting jurisdiction's civil procedure rules require a substitution in the names of parties to a proceeding pending at the time of the effective date of the Act because of the Act's entity theory, the substitution does not have an adverse affect on the rights of the parties to the proceeding.

Principle #16. A judgment or order in an action or proceeding against a UNA is effective only against the UNA and not against any of its members or managers unless the members and managers have been properly named, and served, as parties to the action on proceeding and the judgment or order is issued against them individually based upon a finding of their individual liability as well as against the UNA.

Principle #17. **Provisions for service of pleadings, venue in actions against a UNA and enforcement of judgments or orders against a UNA should be included in the Act, unless they exist in the enacting jurisdiction's other statutes and regulations**.

Comments:

1. *The Appendix contains examples of some of the types of provisions in Principle #17 that have been incorporated in UUNAA Sections 10-12.*

2. *Principles #13-17 set forth the basic framework for claims by and against a UNA. They supplement the enacting jurisdiction's other civil action statutes and regulations. See Principle #9.*

E. **Contract and Tort Liability.**

Principle #18. **A UNA is liable for its acts or omissions and for the acts or omissions of its managers, employees and agents acting within the scope of their office, employment and agency to the same extent as if the UNA were a nonprofit corporation**.

Comments:

1. *The effect of Principles 18-24 is to provide members and managers of a UNA with the same protection against vicarious liability for the debts and obligations of the UNA and tort liability imposed on the UNA as the members and managers of a nonprofit corporation would have under the enacting jurisdiction's laws. These principles, taken together, constitute what is known as the limited liability doctrine under which a member or manager is personally liable for his or her own tortious conduct under all circumstances and is personally liable for contract liabilities incurred on behalf of the UNA if the member or manager guarantees or otherwise assumes personal liability for the contract or fails to disclose that he or she is acting as the agent for the UNA. A member or manager is not otherwise personally liable for the tort or contract liabilities imposed against the UNA; and a creditor with a judgment against the UNA must seek*

to satisfy the judgment out of the UNA's assets but cannot levy execution against the assets of a member or manager. The one exception is the alter ego doctrine (also known as the veil piercing doctrine) set forth in Principle 24. Under this doctrine, the separate entity status of a UNA is disregarded and the assets of the UNA and its members and managers are aggregated and subject to a UNA creditor's claims in the same manner a judgment creditor of a general partnership collects a judgment against the assets of a general partner in a partnership.

2. *The drafting conventions for expressing Principles 18-24 in statutory form will vary from jurisdiction to jurisdiction. In some jurisdictions, it may, because of other statutes or well-established case law, be accomplished in a few sentences. In other enacting jurisdictions, the necessary statutory language may be longer and more complex than stated in the principles.*

Principle #19. Except as otherwise provided in Principle 24, a monetary judgment against a UNA may be enforced only against the property of the UNA.

Principle #20. A member or manager of a UNA is not liable for a debt or liability of the UNA merely by reason of being a member or manager of the UNA.

Principle #21. A member or manager of a UNA is liable for a contractual obligation of the UNA if the member or manager expressly assumes personal liability for the obligations or the member or manager executes a contract on behalf of the UNA without authority to execute the contract or without disclosing that the member or manager is acting as an agent on behalf of the UNA.

Principle #22. Liability for a tortious act or omission for which a UNA is liable is not imputed to a member or manager of the UNA merely by reason of being a member or manager of the UNA.

Principle #23. **Subject to laws other than the Act limiting the liability of volunteers of nonprofit organizations, a member or manager of a UNA is liable for the member's or manager's own tortious acts or omissions**.

Comments:

Many jurisdictions in recent years have enacted statutes that exempt volunteers of nonprofit organizations from liability to third parties for their tortious conduct involving simple negligence. These statutes vary greatly. Some only cover volunteers of nonprofit corporations. Others are applicable only to volunteers acting on behalf of nonprofit organizations that are tax-exempt. These statutes, to the extent they are applicable to UNAs at the time of the Act's effective date, will continue to apply to UNA volunteers. See Principle #9. It may also be advisable to amend the enacting jurisdiction's volunteer liability statutes.

Principle #24. **A member or manager of a UNA may be subject to liability for the debts and other obligations of the UNA under the alter ego liability doctrine that applies to members of a nonprofit corporation, taking into account differences in form between a UNA and a corporation**.

Comments:

Courts have pierced the corporate veil of nonprofit corporations. See Comment, Piercing the Nonprofit Corporate Veil, 66 Marq. L. Rev. 134 (1984); Macaluso v. Jenkins, 95 Ill.App.3d 461, 420 N.E.2d 251 (1981)(President of nonprofit corporation who commingled funds of the nonprofit corporation with funds of a corporation he controlled held personally liable for unpaid debts of the nonprofit corporation under the veil piercing doctrine). The fact that members of nonprofit corporations for the most part do not have an expectation of financial gain, as compared to shareholders of a for profit corporation, should mean that there will be

fewer types of cases than those involving for profit corporations where the veil piecing doctrine will be held to be applicable to UNAs.

Principle #25. A member of a UNA may assert a claim against the UNA; and a UNA may assert a claim against a member.

Comments:

1. *This is another aspect of a UNA under the Act being a separate legal entity. Under the common law aggregate theory, since a UNA was not an entity separate from its members, a member cannot assert a claim against the UNA since there is technically no UNA, only members, and the member would be both a claimant and the defendant and personally liable for any judgment obtained in the action. For the same reason, a UNA could not assert a claim against a member (e.g., for unpaid dues) because the UNA technically does not exist. Stating this principle in the Act may not be necessary in civil law jurisdictions (Mexico and Quebec) because civil law principles treat UNAs as having a separate legal existence.*

2. *This principle only allows a member to assert that member's claim against the UNA. It does not authorize a member to file a derivative action. The enacting jurisdiction's civil procedure law may, however, authorize derivative actions.*

F. **Internal Governance, Fiduciary Duties and Agency Authority.**

Principle #26. In the absence of provisions to the contrary in the UNA's governing principles, members of a UNA have equal governance rights and a majority of votes cast on a matter by members present and voting at a properly called meeting shall govern as to that matter.

Comments:

1. *Principles #26, 28-37 are what are known as internal affairs rules. They apply to UNAs formed in the enacting jurisdiction. The internal rules for UNAs formed in other jurisdictions are determined under Principle #6.*

2. *The three principles set forth in this paragraph (all members have governing rights, members vote on a per capita basis, and majority vote for approval of actions) are all default rules. They apply unless there are different rules in the UNA's governing principles. Thus, if a UNA's bylaws specified that only some members have voting rights, then only those so designated would have voting rights. Similarly, if the bylaws specified that all members are entitled to vote on specific actions (e.g., election of a board of directors), but a subset of members (e.g., the board of directors) is the approving authority for all other matters the bylaws would trump the default rules. In addition, bylaw provisions that provided for a higher (or lower) voting percentage rather than the majority vote required by the statutory default rule would control.*

3. *The enacting jurisdiction may decide to require supermajority voting (e.g., two-thirds majority) for transactions that are not in the ordinary course of business such as dissolution, merger or conversion, or amendment of the UNA's governing principles. The default voting requirements for similar transactions under the enacting jurisdiction's nonprofit corporation law would be an appropriate model for structuring the voting requirements for a UNA.*

Because it is often quite difficult to locate and to get a majority of all members together for voting purposes in a UNA, the requirement of supermajority voting for any issue may not be appropriate.

Principle #27. **Members solely in their capacity as members of a UNA are not agents of the UNA and have no power to bind the UNA**. **Only managers have the power to bind the UNA in accordance with general agency principles.**

Comments:

A member is personally liable for his or her own actions. The UNA, however, is not liable for the actions of a member who is not a manager or authorized agent. An exception would be a case where a member is deemed to be a manager or agent under an estoppel or holding out theory. The enacting jurisdiction will have to determine whether this exception needs to be expressed in the statute.

Principle #28. **A manager becomes a manager in accordance with the UNA's governing principles. If the UNA's governing principles do not provide a method for selecting managers or if they do but no managers have been selected, all the members shall be deemed to be managers.**

Comments:

1. *"Manager" is a defined term. See Principle #4.*

2. *The default rule is all members are managers. In UNAs such as churches with large numbers of members, this default rule will rarely be applicable because the governing principles (see Principle 2) will in most situations provide a selection process for managers.*

3. *The agency authority to convey real estate is a significant issue in many jurisdictions. In order to facilitate transfer of interests in real estate owned by a UNA, an enacting jurisdiction may want to consider adopting a provision similar to Section 5 of the UUNAA in the Appendix.*

4. *The intent is to allow maximum flexibility. The UNA's governing principles can provide for any type of managerial structure the UNA wants to have. Choices range from a traditional board of directors or board of trustees, to third parties who manage the UNA under a contract. The managerial responsibilities can be split between the various managers (e.g., one manager in charge of finances, another in charge of programs). Members who are also managers will have a dual status and their duties and liabilities will be based on the capacity in which they are acting at the time an action (or omission) takes place.*

5. *See Principles #35 and 36 concerning suspension, dismissal, expulsion and resignation of members.*

Principle #29. In the absence of provisions to the contrary in a UNA's governing principles, managers of a UNA have equal rights in the management and conduct of the UNA's activities. A difference arising among the managers may be decided by a majority of the managers, unless otherwise provided in the UNA's governing principles.

Comments:

This is the same set of rules that apply to members' governance rights in Principle #26.

Principle #30. The notice and quorum requirements for meetings of members and managers are determined by the UNA's governing principles.

Comments:

1. *A UNA will undoubtedly have some kind of notice and quorum requirements in its governing principles, which as is pointed out in Principle #2, includes its established practices. If a UNA does not have any such requirements (i.e., it is newly formed and is holding its initial meeting), it can create them at that meeting and those requirements, even if oral, become the established practices and therefore part of the UNA's governing principles.*

2. *The use of proxies in member or manager meetings will be determined by other applicable law. (See Principle #9.) As a general rule directors or other persons performing managerial responsibilities are not authorized to give another person a proxy to vote on a matter.*

Principle #31. Managers of a UNA have the same duties of loyalty, good faith and care that directors and officers of a nonprofit corporation have under the enacting jurisdiction's nonprofit corporation law.

Comments:

1. *Principles #31-33 deal with what are generally referred to as fiduciary duties.*

2. *Only individuals exercising managerial authority have fiduciary duties under business entity laws. Thus, members of a UNA would not have any fiduciary duties to the other members or to the UNA or the managers, unless the member was also a manager. In that event, the individual would have the fiduciary duties of loyalty, good faith and care that other managers have.*

3. *The enacting jurisdiction's nonprofit corporation law is used as the reference point for determining the type and scope of fiduciary duties and the liability for breach of any fiduciary duties.*

Principle #32. Members and managers of a UNA shall have the same rights to inspect and copy the UNA's books and records and to disclosure of information about the UNA's operations as members and directors and officers of nonprofit corporations have under the enacting jurisdiction's nonprofit corporation code. **These rights may be limited or conditioned, if not manifestly unreasonable, but not wholly eliminated by the governing principles of the UNA.**

Comments:

The Act does not require a UNA to keep any books and records, but if it does have them, they must be made available under this Principle. The term "books and records" is intended to cover all types and forms of data, including electronic data. An enacting jurisdiction may want to specifically include this concept in the Act if there is any uncertainty about this in the jurisdiction's laws.

Principle #33. Managers of a UNA are liable for breaches of the duties specified in Principle 31 to the same extent as directors and/or officers of a nonprofit corporation are liable under the enacting jurisdiction's nonprofit corporation law.

Comments:

1. *If an enacting jurisdiction's nonprofit corporation code contains a provision allowing a maximum limit for liability for monetary damages, a similar provision should be included in this Act.*

2. *Members and managers of a UNA should have the same defenses (e.g., the business judgment rule (which is sometimes referred to as the best judgment rule in cases involving nonprofit organizations) to liability as members and managers of nonprofit corporations in the enacting jurisdiction's nonprofit corporation code. Whether those defenses need to be set forth in the Act depends on the clarity of the law on these issues in the enacting jurisdiction.*

3. *This Principle governs the liability of a UNA manager to the UNA and its members. Therefore, the volunteer liability statutes referred to in the Comment to Principle #23 are probably not applicable because they generally apply only to liability to third parties.*

4. *As is pointed out in Comment 1 to Principle #26, this Principle comes within the ambit of what are known as internal affairs rules. Therefore, it only applies to UNAs formed in the enacting jurisdiction. The liability for breach of fiduciary duties of a UNA formed in another jurisdiction is determined under Principle #6.*

Principle #34. A UNA should have the same right to indemnify and advance attorneys' fees and other costs of litigation to its members and managers as a nonprofit corporation has under the enacting jurisdiction's nonprofit corporation law to indemnify and advance costs to its members, directors and officers.

Comments:

The right to indemnification and advancement of costs varies greatly from jurisdiction to jurisdiction. Tying the indemnification and advancement right to the enacting jurisdiction's nonprofit corporation act creates consistency of policy between UNAs and nonprofit corporations in the enacting jurisdiction.

Principle #35. A person becomes a member of a UNA and can be suspended, dismissed or expelled from a UNA in accordance with the UNA's governing principles. In the absence of applicable governing principles, a person can become a member or be suspended, dismissed or expelled from a UNA by majority vote of the members as set forth in Principle #26. A member who is suspended, dismissed or expelled shall remain liable for any damages or obligation the member owes to the UNA.

Comments:

1. *Some jurisdictions have existing statutes governing election and expulsion of a member. If those statutes continue in effect, they would trump this principle. See Principle 11.*

2. *See Sections 18310 and 18320 of the California Corporation Code in the Appendix for examples of statutory provisions that incorporate Principles 33 and 34.*

Principle #36. A member may voluntarily withdraw or resign from membership in a UNA in accordance with the UNA's governing principles. **In the absence of applicable governing principles, a member may withdraw at any time but shall remain liable for any monetary or other obligation the member owes to the UNA at the time of withdrawal.**

Comments:

Preventing someone from voluntarily withdrawing from a UNA would in all probability be void on public policy grounds. A UNA should, however, be able to impose reasonable restrictions on the resignations, for example, requiring 30 days' advance notice.

Principle #37. Unless otherwise provided in the UNA's governing principles, a member cannot transfer any of the member's membership interest in the UNA.

Comments:

This is a basic common sense rule. A member of a church, for example, should not be able to transfer his or her membership to someone else. There may be situations where the UNA might be willing to allow transfers. In those situations, the transfer could be made in accordance with the UNA's governing principles.

G. **Dissolution, Merger or Conversion.**

Principle #38. A UNA may be dissolved by any of the following methods:

(a) **If the governing principles of the association provide a method for dissolution, by that method.**

(b) **If the governing principles of the association do not provide a method for dissolution, by the affirmative vote of a majority of the members.**

(c) **If the UNA's operations have been discontinued for at least three years by the managers or, if the UNA has no incumbent managers, by its last preceding incumbent managers.**

(d) **If the UNA's operations have been discontinued, by court order.**

Comments:

The vote required for dissolution would be a majority vote of the members, unless the governing principles require a higher vote. See Principle #26. Subsections (c) and (d) are only applicable if the UNA is inactive. The derivation for these subsections is Calif. Corp. Code § 18410.

Principle #39. Winding up and termination of a UNA must proceed as follows:

(a) **All known debts and liabilities must be paid or adequately provided for;**

(b) **Any assets subject to a condition requiring return to the person designated by the donor must be transferred to that person;**

(c) **Any assets subject to a trust (*e.g.*, endowment or restricted gifts) must be distributed in accordance with the trust agreement; and**

(d) **Any remaining assets must be distributed as follows:**

(i) **As required by other law that requires assets of a nontaxable UNA to be distributed to another nontaxable UNA with similar purposes;**

(ii) **In accordance with the UNA's governing principles; and in the absence of applicable governing principles, to the current members of the association per capita or as the current members direct; or**

(iii) **If neither (i) nor (ii) apply, the net assets will escheat to the enacting jurisdiction by the means generally provided for escheat of property in the enacting jurisdiction's law.**

Principle #40. Provisions for mergers of UNAs with or into any other type of legal entity, and for conversion (transformation) of a UNA into another type of legal entity, should be specifically authorized by the Act, unless authority for these types of transactions already exists in the enacting jurisdiction's other statutes. The provisions should contain the types and contents of documents (*e.g.*, plan of merger or conversion), the required vote to approve the transaction, and the legal effect of the transaction. *See* Model Entity Transactions Act Articles 2 and 5.

Comments:

1. *These types of transactions are increasingly common. There is no important policy reason for limiting a merger or conversion of a UNA into another UNA or other type of nonprofit organization.*

2. *Any required approval or review of these transactions by various governmental agencies, e.g., the enacting jurisdiction's chief legal officer, or legal restrictions on these types of transactions will continue to apply. See Principles 10 and 11.*

April 16, 2007

APPENDIX

This Appendix contains examples of existing statutes that an enacting jurisdiction might find useful to include in its UNA statute.

SECTIONS FROM THE UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT:

SECTION 5. STATEMENT OF AUTHORITY AS TO REAL PROPERTY.

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

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

(c) A statement of authority must set forth:

(1) the name of the nonprofit association;

(2) the federal tax identification number, if any, of the nonprofit association;

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

(4) that it is an unincorporated nonprofit association; and

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

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

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

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

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is [filed][recorded] in the office of the [county] in which a transfer of real property would be [filed][recorded], the authority of the person named in a statement of authority

to transfer is conclusive in favor of a person who gives value without notice that the person lacks authority.

Comment

1. This section is based on Uniform Partnership Act (1994) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

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

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the officer where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1994) Section 303 provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

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

5. Subsection (c)(2) deals with the problem caused by the similarity of names of small local nonprofit associations. There is no duplication of federal tax identification numbers. Therefore, any confusion of identity is avoided by this requirement.

Subsection (c)(3) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

Subsection (c)(4) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

6. Subsection (c)(5) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must confirm to those of a deed or an affidavit is left for each State to determine.

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

9. Subsection (g) is based on Uniform Partnership Act (1994) Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 5(g). Instead, Section 2 applies and would invoke the other law of the State. In many States the deed would be a nullity. See Boyer, Hovenkamp, and Kurtz, *THE LAW OF PROPERTY*, An Introductory Survey (West Pub. Co. 4th ed. 1991).

SECTION 10. APPOINTMENT OF AGENT TO RECEIVE SERVICE OF PROCESS.

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

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

(1) the name of the nonprofit association;

(2) the federal tax identification number, if any, of the nonprofit association;

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

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

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

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

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

Comment

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing

articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

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

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

[SECTION 12. VENUE. For purposes of venue, a nonprofit association is a resident of the [city or] county in which it has an office.]

Comment

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

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

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

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

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

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

[SECTION 13. SUMMONS AND COMPLAINT; SERVICE ON WHOM. In an action or proceeding against a nonprofit association a summons and complaint must be served on an agent authorized by appointment to receive service of process, an officer, managing or general agent,

or a person authorized to participate in the management of its affairs. If none of them can be served, service may be made on a member.]

Comment

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

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

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

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

[SECTION 19. TRANSITION CONCERNING REAL AND PERSONAL PROPERTY.

Alternative 1

If, before the effective date of this [Act], an estate or interest in real or personal property was by terms of the transfer purportedly transferred to a nonprofit association but under the law the estate or interest did not vest in the nonprofit association, on the effective date of this [Act] the estate or interest vests in the nonprofit association, unless the parties have treated the transfer as ineffective.

Alternative 2

If, before the effective date of this [Act], an estate or interest in real or personal property was by terms of the transfer purportedly transferred to a nonprofit association but under the law the estate or interest was vested in a fiduciary, such as officers of the nonprofit association, to hold the estate or interest for members of the nonprofit association, on or after the effective date of this [Act] the fiduciary may transfer the estate or interest to the nonprofit association in its name, or the nonprofit association may, by appropriate proceedings, require that the estate or interest be transferred to it in its name.]

Comment

1. Two versions of Section 19 are offered. This initial common law rule was that a purported transfer of property to an unincorporated nonprofit association totally failed as the association was not a legal entity. If a State has that rule, it should adopt the first alternative. If, on the other hand, its rule is that title does not pass to the association in its name but passes

instead to a fiduciary, such as its officers, to hold the property for the benefit of the members, a State should adopt the second alternative.

If a State has by statute made transfers effective to some classes of nonprofit associations but not all, it should adopt the appropriate alternative to those not covered. If a State has made all transfers to all unincorporated nonprofit associations effective, it does not need Section 19.

2. Section 19 brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider an unincorporated nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. The first alternative gives effect to the gift. However, if parties were informed about the common law they may have treated the gift as ineffective. In that case, the final clause of Alternative 1 provides that the gift does not become effective when this Act takes effect. The unless clause would apply, for example, if the residual beneficiaries of the donor's will, knowing that the devise of Blackacre to the nonprofit association was ineffective under the law, continued to use Blackacre as their summer home with the approval and acquiescence of members and representatives of the nonprofit association.

3. Section 19 is not a retroactive rule. It applies to the facts existing when this Act takes effect. At that time Alternative 1 applies to a purported transfer of property that under the law of the jurisdiction that could not be given effect at the time it was made. The first alternative belatedly makes it effective – effective when this Act takes effect and not when made. The practical result of this difference is that when the purported transfer is effective, the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, Alternative 1 by its terms does not vest ownership in the nonprofit association.

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

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

SECTIONS FROM THE CALIFORNIA CORPORATION CODE:

§ 18310. Termination of membership

18310.

(a) Unless otherwise provided by an unincorporated association's governing principles, membership in the unincorporated association is terminated by any of the following events:

(1) Resignation of the member.

(2) Expiration of the fixed term of the membership, unless the membership is renewed before its expiration.

(3) Expulsion of the member.

(4) Death of the member.

(5) Termination of the legal existence of a member that is not a natural person.

(b) Termination of membership does not relieve a person from an obligation incurred as a member before termination.

(c) Termination of membership does not affect the right of an unincorporated association to enforce an obligation against a person incurred as a member before termination, or to obtain damages for its breach.

Comment

Section 18310 is new. Subdivision (b) makes clear that termination of membership does not relieve a former member from an obligation incurred before termination of membership. Such an obligation might include an obligation for a charge, assessment, fee, or dues, or an obligation for a service or benefit rendered before termination. See also Sections 18015 ("member" defined), 18035 ("unincorporated association" defined).

§ 18320. Expulsion or suspension of membership

18320.

(a) This section only applies if membership in an unincorporated association includes a property right or if expulsion or suspension of a member would affect an important, substantial economic interest. This section does not apply to an unincorporated association that has a religious purpose.

(b) Expulsion or suspension of a member shall be done in good faith and in a fair and reasonable manner. A procedure that satisfies the requirements of subdivision (c) is fair and

reasonable, but a court may also determine that another procedure is fair and reasonable taking into account the full circumstances of the expulsion or suspension.

(c) A procedure for expulsion or suspension of a member that satisfies the following requirements is fair and reasonable:

(1) The procedure is included in the governing documents of the unincorporated association.

(2) The member to be expelled or suspended is given notice, including a statement of the reasons for the expulsion or suspension. The notice shall be delivered at least 15 days before the effective date of the expulsion or suspension.

(3) The member to be expelled or suspended is given an opportunity to be heard by the person or body deciding the matter, orally or in writing, not less than five days before the effective date of the expulsion or suspension.

(d) A notice pursuant to this section may be delivered by any method reasonably calculated to provide actual notice. A notice delivered by mail shall be sent by first-class, certified, or registered mail to the last address of the member shown on the unincorporated association's records.

(e) A member may commence a proceeding to challenge the expulsion or suspension of the member, including a claim alleging defective notice, within one year after the effective date of the expulsion or suspension. The court may order any relief, including reinstatement, it determines is equitable under the circumstances. A vote of the members or of the board may not be set aside solely because a person was wrongfully excluded from voting by virtue of the challenged expulsion or suspension, unless the court determines that the wrongful expulsion or suspension was in bad faith and for the purpose, and with the effect, of wrongfully excluding the member from the vote or from the meeting at which the vote took place, so as to affect the outcome of the vote.

(f) This section governs only the procedure for expulsion or suspension and not the substantive grounds for expulsion or suspension. An expulsion or suspension based on substantive grounds that violate contractual or other rights of the member or are otherwise unlawful is not made valid by compliance with this section.

Comment

Section 18320 is new. It requires good faith and use of a fair procedure before terminating or suspending membership in an unincorporated association, where membership involves a property right or where expulsion or suspension of a member would affect "an important, substantial economic interest," for example, the right to carry on one's trade or profession. See generally *Potvin v. Metropolitan Life Ins. Co.*, 22 Cal. 4th 1060, 997 P.2d 1153, 95 Cal. Rptr. 2d 496 (2000)(expulsion of doctor from list of insurance company's preferred providers could impair ability of competent physician to practice medicine and affected "important, substantial economic interest"). See also *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (1953)(member may not be expelled from local realty board without fair procedure).

Nothing in this section affects the common law right of fair procedure as it applies to a decision to exclude a person from membership in a private association. See *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253 (1974)("Taken together, these decisions establish the common law principle that whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair."); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495 (1969).

To avoid state interference with the free exercise of religion, this section does not apply to an unincorporated association with a religious purpose. *Cf.* Section 7341 (expulsion, suspension, or termination of membership in nonprofit mutual benefit corporation). See also Sections 18003 ("board" defined), 18008 ("governing documents" defined), 18015 ("member" defined), 18035 ("unincorporated association" defined).