

#67

8/24/67

Memorandum 67-64

Subject: Study 67 - Unincorporated Associations

We have prepared the attached recommendation to correct what we believe is a serious defect in the legislation enacted in 1967 relating to unincorporated associations. The defect was created by an Assembly amendment made late in the session.

The defect is identified and the solution explained in the attached recommendation.

The Commission should consider whether this defect is serious enough to justify including an urgency clause in the bill so that it will take effect immediately upon passage. If an urgency clause is desired, we suggest that the following revisions be made in the proposed bill:

(1) Add to the title: ", and declaring the urgency thereof, to take effect immediately."

(2) Add a new section to read:

SEC. 2. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In 1967, subdivision 2.1 was added to Section 411 of the Code of Civil Procedure to prescribe the manner of service of process on unincorporated associations. As added, the subdivision requires that, if an agent for service of process has been designated by the association, service may be made only upon the agent designated. Hence, if an agent has been

designated, service upon the association is not effected by serving the president, vice president, secretary, manager, or general partner of the association. As the purpose of the change made in 1967 was only to preclude service on a mere member of the association if an agent had been designated, there was no need to preclude service upon a responsible officer even though an agent had been designated. The effect of this feature of the change has been to require attorneys to ascertain whether an agent has been designated in every case, including those in which the attorney is well aware of the identity of the responsible officers. This change in long-standing practice (e.g., effecting service on a partnership by serving a general partner) may also cause some attorneys inadvertently to fail to perfect service. To overcome these problems by permitting service to be made upon a responsible officer, as well as the designated agent, it is necessary that this act take effect immediately.

If this recommendation is approved for printing, we plan to include it as an appendix to our Annual Report for 1967.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Service of Process on Unincorporated Associations

September 1967

**CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305**

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Service of Process on Unincorporated Associations

In 1967, subdivision 2.1 was added to Section 411 of the Code of Civil Procedure to prescribe the manner of service on an unincorporated association. This amendment to Section 411 was included in legislation enacted upon recommendation of the Law Revision Commission to make a number of procedural changes in the law relating to suits by and against incorporated associations.¹

Prior to the enactment of subdivision 2.1, service of process could be made upon an unincorporated association by serving any member of the association.² There was no requirement that the plaintiff notify any responsible officer of the association of the commencement or pendency of the action. A plaintiff could, therefore, serve a member who had only a marginal interest in the association or whose interests were actually more closely identified with those of the plaintiff than with those of the association. To remedy this situation, the Commission recommended in substance that the plaintiff be permitted to serve a member of the association only if (1) none of the responsible officers of the association could be found in this state after diligent search and (2) the agent for service of process, if one had been designated by the association, could not be found at the address indicated in the index maintained by the Secretary of State.

¹ See Recommendation and Study Relating to Suit By or Against An Unincorporated Association, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 901 (1967). See also Cal. Stats. 1967, Ch. 0000.

² See Comment to Section 411 in Report of Assembly Committee on Judiciary on Senate Bill No. 251, ASSEMBLY J. (July 6, 1967), p. 4998.

The Commission's recommendation was unacceptable to the Legislature because it imposed an undue procedural burden on the plaintiff; in cases in which no agent had been designated, it would have required the plaintiff to establish that he could not find any of the responsible officers of the association before he was permitted to serve a member of the association. Although Code of Civil Procedure Section 411 imposes a similar requirement for service on a domestic corporation, Corporations Code Section 3301 requires that a domestic corporation file with the Secretary of State a statement of the names of the principal officers of the corporation and the address of its principal office. No equivalent record is available for an unincorporated association.

Under subdivision 2.1 as enacted, if the unincorporated association has designated an agent for service of process (as permitted by Section 24003 of the Corporations Code), process must be served on the agent. If no agent has been designated, or if the agent cannot be found at his address as specified in the index maintained by the Secretary of State, service may be made by delivering a copy of the document to a member of the association and mailing a copy to the association at its last known mailing address.

Subdivision 2.1 thus precludes service on a responsible officer of the association if the association has designated an agent for service of process. The plaintiff may safely serve an officer (or other member) only after he has been advised by the office of the Secretary of State that the association has not designated an agent for service of process. In its present form, subdivision 2.1 thus imposes a significant procedural burden on the plaintiff. It also

may operate as a trap for the unwary. For example, service on a partner may not be effective service on the partnership if the partnership has designated another person as its agent for service of process. In such a case, service on the partner is effective service on the partnership only if it is established that the designated agent cannot be found at his address as shown in the index maintained by the Secretary of State.

To eliminate this technical defect, the Commission recommends that subdivision 2.1 be revised to permit service on either the designated agent or a responsible officer in any case where the association has designated an agent. This would permit a plaintiff who knows the identity of a partner or responsible officer to serve such partner or officer without first checking with the Secretary of State to determine whether the association has designated an agent for service of process. No change is recommended in the existing law insofar as it permits service on any member of the association in any case where the association has not designated an agent or where the designated agent cannot be found at his address as shown in the index maintained by the Secretary of State. The recommended revision of subdivision 2.1 would not defeat the objective of the 1967 legislation; the association can assure that its agent for service of process or a responsible officer of the association will obtain notice of any action against it merely by designating an agent for service of process as permitted by Corporations Code Section 24003.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 411 of the Code of Civil Procedure, relating
to manner of service of summons.

The people of the State of California do enact as follows:

Section 1. Section 411 of the Code of Civil Procedure is amended to read:

411. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. If such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof. If no such officer or agent of the corporation can be found within the state after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code, unless the corporation be of a class expressly excepted from the operation of those sections.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code.

2.1. If the suit is against an unincorporated association (not including a foreign partnership covered by Section 15700

of the Corporations Code): if the unincorporated association has designated an agent for service of process as provided in Section 24003 of the Corporations Code, to the person so designated ~~as agent for service of process~~ or to the president or other head of the association, a vice president, secretary, general manager, or general partner. If no person has been designated as agent for service of process as provided in Section 24003 of the Corporations Code, or if the person so designated cannot be found at his address as specified in the index referred to in Section 24004 of the Corporations Code, then to any one or more of the association's members and by mailing a copy thereof to the association at its last known mailing address.

2.2. If the suit is against a foreign partnership covered by Section 15700 of the Corporations Code: in the manner provided by Section 15700 of the Corporations Code.

3. If the suit is against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If the suit is against a person residing within this state and for whom a guardian or conservator has been appointed: to such person, and also to his guardian or conservator.

5. Except as otherwise specifically provided by statute, in an action or proceeding against a local or state public agency, to the clerk, secretary, president, presiding officer or other

head thereof or of the governing body of such public agency. "Public agency" includes (1) every city, county, and city and county; (2) every public agency, authority, board, bureau, commission, corporation, district and every other political subdivision; and (3) every department and division of the state.

6. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members; or, in a proper case, as provided in Sections 3305 and 3306 of the Corporations Code.

7. If the suit is one brought against a candidate for public office and arises out of or in connection with any matter concerning his candidacy or the election laws and said candidate cannot be found within the state after diligent search, then as provided for in Section 54 of the Elections Code.

8. In all other cases to the defendant personally.

Comment. Subdivision 2.1 was added to Section 411 in 1967 to prescribe the manner of service of process on an unincorporated association. Under the subdivision as originally added, if an agent for service of process had been designated by the association, service could only be made on the person designated. The subdivision is amended to provide that service may be made on the association by delivering a copy of the process to one of the responsible officers referred to in the subdivision, whether or not the association has designated an agent for service of process. No change is made in the provision that if the association has not designated an agent, or if the agent designated cannot be found at the address set forth in the index in the office of the Secretary of State, service may be effected by delivering a copy of the process to any member of the association and mailing a copy to its last known address. Accordingly, the plaintiff should determine whether an agent for process has been designated before he makes service on a member who is not one of the officers referred to in the subdivision.