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ABA SECTION OF INTERNATIONAL LAW

Committee on NGOs and Not-for-Profit Organizations

**Report on the Third Drafting Session of the Joint Project to Create a
Harmonized Legal Framework for Unincorporated Nonprofit Associations in
Canada, Mexico, and the United States**

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On February 23rd and 24th, 2007 the Drafting Committee for the Joint Project to Create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in Canada, Mexico, and the United States met at the Hilton Hotel in Portland, Oregon. Eighteen members attended, including four from Canada, one from Mexico, eleven Commissioners of the U.S. National Conference of Commissioners for Uniform State Laws (NCCUSL), and two representatives from the American Bar Association (ABA). The meeting was chaired by Marilyn Phelan from Texas and led by Harry Haynsworth, the Reporter, from Minnesota.

The focus of the meeting was on the effort to reach agreement on basic Principles that will guide subsequent efforts to draft model laws for the U.S., the common law provinces of Canada, and the civil law jurisdictions of Mexico and Quebec. The first draft of the Principles had been completely revised based on the prior meeting, and had grown from ten to twenty pages in length. The Drafting Committee went through the Principles line by line, discussed them in detail, and agreed to make many additional changes.

For example, to avoid imposing legal entity status on casual or informal gatherings, the definition of an unincorporated nonprofit association (UNA) was changed to cover only “unincorporated organizations” formed pursuant to an agreement, written, oral, or by conduct, by two or more persons to pursue one or more common, lawful, nonprofit purposes. Specifically excluded are trusts, cooperatives, domestic partnerships, mere property-holding entities, agreements solely between governments, agencies or subdivisions of governments, or international organizations, or entities formed under other statutes that govern

the organization and operation of certain unincorporated associations. As can be seen, the definition of a UNA has become quite technical, but the resulting definition seems to strike the proper balance between reaching all UNA's that will need the protection of the model law while not casting the net too broadly.

It was agreed that each UNA would operate according to its "governing principles," which may be found in an agreement, written, oral, or by conduct, or in "established practices." The Principles intentionally use the term "person" instead of "individual," and the comments make clear that this term includes legal as well as natural persons. The comments additionally make it clear that the term "agreement" is used instead of "contract" in order to avoid any technical requirements that might have to be met to have a contract. The Principles distinguish between "members," who are the persons entitled to participate in the selection of persons who are authorized to manage or administer the affairs of the UNA or in the development of the governing principles and policies of the UNA, and "managers," who are those persons who have managerial responsibility, including directors, officers, and any other persons authorized to exercise managerial or administrative authority.

The Principles state that a UNA may engage in profit-making activities, but that any profits that result must be used or set aside for the UNA's nonprofit purposes. The Principles apply to UNAs that come into existence prior or subsequent to the effective date of the model Act. Although the law of the jurisdiction where a UNA has activities, contracts, or properties will govern those activities, contracts, or properties, relations among members and among members and managers are governed by the law of the jurisdiction where the UNA has its principal place of activity.

The Principles provide that a UNA continues in existence until its dissolution is completed, but provides that dissolution may occur as the result of total inactivity for a period of years. The principal benefits provided by the Principles are to confer full legal personality on a UNA, limited liability for its members and managers, and the right to hold real and personal property in the name of the UJNA. A member or manager is liable in contract or tort only for his or her own conduct, not the conduct of the UNA. 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.

Under the Principles, members and managers of a UNA 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, directors, or officers have under the enacting jurisdiction's law governing nonprofit corporations. Members and

managers of a UNA have the same duties of loyalty, good faith, and care that members, directors, or shareholders of a nonprofit corporation have under the enacting jurisdiction's law governing nonprofit corporations. Members and managers of a UNA have the same liabilities, defenses, and rights of indemnification for breach of these duties as members, directors, or officers of the enacting jurisdiction's law governing nonprofit corporations.

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. The notice and quorum requirements for meetings of members and managers are determined by the UNA's governing principles. In the absence of different applicable governing principles, a person becomes a member of a UNA or can be suspended, dismissed, or expelled by majority vote of the members.

There are, of course, many other provisions in the Principles as well as extensive comments. At adjournment it was agreed that the Reporter would try to reflect the various changes that were agreed to and send another draft out by the first of April. Members of the Committee will have two weeks to submit any suggestions, questions, or changes in writing to him, with copies to the other members. If there is essential agreement, the Reporter will make appropriate technical and stylistic changes and finalize the Principles. If there are substantial disagreements, they will be resolved through a conference call or, if necessary, another meeting.

Once the Principles are finalized, the Reporter will prepare a draft model Act based on them. This will be circulated by the middle or end of April to members of the Drafting Committee, who will make comments and suggestions by email. The Reporter will make appropriate changes and have the draft ready to go out to all NCCUSL Commissioners by the end of June. It will be presented to them as merely a draft, but it will be considered at the Annual Meeting of NCCUSL, which will be held in Pasadena, CA on July 27th to August 3rd. Under the rules of NCCUSL, a model Act does not become final until it has been considered at two Annual Meetings. If it is appropriate, the Drafting Committee will meet again in the fall of 2007 or the winter of 2008 to agree on final changes to the model Act. The Reporter will reflect agreed upon changes and submit the final model Act for consideration and adoption at the 2008 Annual Meeting.

While the Americans are working on a model Act for the U.S., the Canadian members will prepare common law and civil law drafts for presentation to the Uniform Law Conference of Canada and the Mexican members will prepare draft amendments to the Civil Code for consideration by the Mexican Center of

Uniform Law. The next meeting of the Drafting Committee will be timed, if possible, to let all members comment on the draft Mexican, Canadian, and U.S. model laws. If possible, representatives from Puerto Rico and Louisiana, both civil law jurisdictions, will be invited to join the Drafting Committee to participate in its further deliberations.

Your representative was once again very active in the discussions of the Drafting Committee. And he was again highly impressed by the knowledge and professionalism demonstrated by members of the Committee, and by their ability to reach consensus on a large number of contentious issues. Please let me know if you have any questions or need more.

Respectfully submitted,

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