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Federal Diversity Jurisdiction— Citizenship for Unincorporated Associations

I. INTRODUCTION

In 1889 the United States Supreme Court ruled in *Chapman v. Barney*[1] that a New York joint stock company was not to be considered a "citizen" for purposes of federal diversity jurisdiction. This decision provided the basis for the rule that unincorporated associations are not considered juridical persons, and that the citizenship of their individual members is determinative of federal diversity.[2]

Corporations have been recognized as "citizens" for diversity purposes since 1844,[3] while unincorporated associations, such as partnerships, joint stock companies, and labor unions, have yet to be so recognized. They have been subject to the doctrine of *Chapman v. Barney*, which virtually denies them entrance to the federal courts. Since lack of diversity (*i.e.*, opposing litigants residing in the same state) between plaintiff and defendant prevents federal jurisdiction,[4] unincorporated associations with members from several states can rarely obtain the necessary complete diversity.

Criticism of the distinction has been abundant, both among the legal commentators[5] and in the lower federal courts.[6] Many unincorporated

1. 129 U.S. 677 (1889).

2. Although *Chapman v. Barney* is most often cited for the general rule, its holding was initially ignored by the lower federal courts as resting on bad pleading. See Andrew Bros. Co. v. Youngstown Coke Co., 86 Fed. 585 (6th Cir. 1898). The "true" leading case is Great So. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900). See Note, 66 YALE L.J. 712, 742-44 & n.185 (1957).

3. Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497 (1844). This case recognized corporations as separate entities and deemed them citizens of the state of incorporation. This rule was interpreted as being based upon a "conclusive presumption" that the citizenship of a corporation is that of its members in Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853), which remained the law until 1958. See 28 U.S.C. § 1332 (1964). Prior to *Letson*, corporate citizenship was dependent upon the citizenship of the stockholders. See Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

4. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). See Rosendale v. Phillips, 87 F.2d 454 (2d Cir. 1937); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 32 (1961). The validity of the complete diversity rule has recently been questioned in ALI, STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT, Supporting Memorandum A, at 180 (1965) [hereinafter cited as ALI STUDY].

5. See, *e.g.*, 3 MOORE, FEDERAL PRACTICE ¶ 17.25, at 1413 (2d ed. 1963); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917 (1953).

6. See, *e.g.*, Mason v. American Express Co., 334 F.2d 392, 393 (2d Cir. 1964);

associations today do not differ functionally from corporations, and the structural characteristics of each are becoming increasingly parallel.[7] Furthermore, unincorporated associations seem no less distinct from their members than corporations are from their shareholders.[8] Indeed, "there seems to be no good reason for treating the two differently for purposes of diversity jurisdiction."[9]

Until 1958, corporate citizenship was derived solely from the act of incorporating,[10] so that no legislative guide existed for finding analogous citizenship in organizations having no state of incorporation.[11] The 1958 Congress, however, provided the basis for such an analogy by amending the diversity statute to make corporations citizens of the state of principal place of business as well as of the state of incorporation.[12]

While the legislative history of the 1958 amendment reveals no consideration of a similar extension of diversity jurisdiction to unincorporated associations,[13] the lower federal courts took renewed interest in revision of the 1889 rule. Most were content to recognize its injustice, yet continue to follow the established rule in the absence of any Supreme Court decision to the contrary.[14] Some courts,[15] however, examined a particular 1933 Supreme Court decision[16] as potential justification for a rule change. In that decision, an unincorporated association was recognized as a juridical person for di-

Van Sant v. American Express Co., 169 F.2d 355, 372 (3d Cir. 1948); Busby v. Electric Util. Employees Union, 147 F.2d 865, 868 (D.C. Cir. 1945).

7. United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 149-50 (1965).

8. *Ex parte* Edelstein, 30 F.2d 636, 639 (2d Cir. 1929) (dissenting opinion).

9. Moore & Weckstein, *supra* note 4, at 33.

10. See 28 U.S.C. § 1332(c) (1964) and cases cited in note 3 *supra.*

11. Although not a diversity case, Sperry Prods., Inc. v. Association of Am. R.Rs., 132 F.2d 408 (2d Cir. 1942), *cert. denied,* 319 U.S. 744 (1943), held that an unincorporated association was located "wherever any substantial part of its activities were continuously carried on." *Id.* at 411. Apparently the Second Circuit felt no need for legislative guidance in formulating such a test. While "substantial business" has some support today, see 6 UTAH L. REV. 231, 242-43 (1958), the "principal place of business" test of 28 U.S.C. § 1332(c) (1964) has general approval for determining citizenship of unincorporated associations. See ALI STUDY, *supra* note 4, at § 1301(b)(2).

12. 28 U.S.C. § 1332(c) (1964).

13. See 78 HARV. L. REV. 1661, 1663 (1965). *Cf.* H.R. REP. No. 1706, 85th Cong., 2d Sess. 4 (1958); S. REP. No. 1930, 85th Cong., 2d Sess. (1958); 104 CONG. REC. 1283-90 (1958).

14. See, *e.g.,* Calagaz v. Calhoon, 309 F.2d 248, 251 (5th Cir. 1962); Mason v. American Express Co., 224 F. Supp. 288, 289 (S.D.N.Y. 1963), *rev'd,* 334 F.2d 392 (2d Cir. 1964) ("with great reluctance and equal regret"). *But see* Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 101 (M.D. Tenn. 1960) ("persuasive reasons suggest themselves why the present rule should not be disturbed").

15. Mason v. American Express Co., *supra* note 6; American Fed'n of Musicians v. Stein, 213 F.2d 679, 686 (6th Cir.), *cert. denied,* 348 U.S. 873 (1954) (rule "losing its vitality").

16. Puerto Rico v. Russell & Co., 288 U.S. 476 (1933).

versity purposes, based on the civil law recognition in Puerto Rico of that type of organization as a legal entity.[17] In a 1964 decision, the Court of Appeals for the Second Circuit, convinced that the break with the past was a "clear one," treated a New York joint stock company as a citizen of New York in finding diversity jurisdiction.[18]

The Supreme Court, however, resolved all doubts about the validity of the established rule in a 1965 decision, *United Steelworkers v. R.H. Bouligny, Inc.*[19] Mr. Justice Fortas, speaking for the Court, reaffirmed the validity of *Chapman v. Barney,* distinguishing both the 1933 *Puerto Rico* case[20] and the 1964 Second Circuit decision.[21] The Court was apparently sympathetic with those who would revise the rule, but felt itself incapable of enunciating an alternative.[22]

> Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument—merits stoutly attested by widespread support for the recognition of labor unions as juridical personalities.[23]

The questions left for the legislature, then, are two-fold—should the existing rule be changed, and, if so, what should be the substance of the change? That is, by what test should the state citizenship of unincorporated associations be determined?

II. NECESSITY FOR CHANGE

The case for recognition of unincorporated associations as separate legal entities has been thoroughly and convincingly stated by several authorities.[24] Our concern is but a single aspect of this problem—that is, the recognition of unincorporated associations as legal entities

17. *Id.* at 480-81.

18. Mason v. American Express Co., *supra* note 6, at 397. Describing the general rule as "beginning to show signs of being outmoded," the Third Circuit had reached a similar result for a New York joint stock association in Van Sant v. American Express Co., *supra* note 6, at 372.

19. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7.

20. *Id.* at 151-52. For a criticism of the distinction see 78 HARV. L. REV. 1661, 1662 (1965).

21. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7, at 152 n.10 (noting disagreement, but not disapproval).

22. *Id.* at 152.

23. *Id.* at 153.

24. UMW v. Coronado Coal Co., 259 U.S. 344, 385-86 (1922); Forkosch, *The Legal Status and Suability of Labor Organizations,* 28 TEMP. L.Q. 1,2-5 (1954); Sturges, *Unincorporated Associations as Parties to Actions,* 33 YALE L.J. 383 (1924); Note, *Unions As Juridical Persons,* 66 YALE L.J. 712 (1957).

for federal diversity jurisdiction. Such recognition unfortunately has not been a concomitant of recognition as a juridical person for other purposes, such as the ability to sue or be sued.[25]

The need to change the rule of *Chapman v. Barney* is apparent when the reasons behind the adoption and extension of federal diversity jurisdiction are related to the situation of the unincorporated association. Under the Constitution, "The judicial Power shall extend . . . to controversies . . . between citizens of different states. . . ."[26] Such controveries originally prompted federal jurisdiction for a number of reasons, all of which apply to the unincorporated association.

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[27]

The most frequently asserted reason for federal diversity jurisdiction is the avoidance of local prejudice against out-of-state litigants.[28] A partnership, when involved in foreign litigation, however, would seem to have the same claim to federal jurisdiction as a corporation. Each is subject to the same prejudice toward foreigners that prompted diversity jurisdiction. Nevertheless, for all practical purposes only the corporation has access to the federal courts, because in the case of the partnership, one partner's citizenship in the same state as that of an opposing litigant destroys the required complete diversity of

25. FED. R. CIV. P. 17(b) provides for suability of unincorporated associations in federal courts, although citizenship for diversity purposes is unrecognized.

26. U.S. CONST. art. III, § 2.

27. THE FEDERALIST No. 80, at 114 (Dunne ed. 1901) (Hamilton).

28. Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1448 (1964). "[N]one of the significant prejudices which beset our society today begins or ends when a state line is traversed. On the one hand, there are prejudices on racial, religious, economic, and other grounds which affect the administration of justice between co-citizens as much as in those involving an out-of-stater. On the other hand, the bias which was formerly thought to operate against out-of-staters as such still seems to exist to some degree with respect to persons from a more distant part of the country. . . . It would be hard to justify the creation of diversity jurisdiction on the ground because the state-state relationship is not the reason for the prejudice. At the same time, it would be hard to justify the total abolition of an existing jurisdiction while there remains risk of the very kind of prejudice against which the federal judicial power was originally designed to provide protection, even though more than one state line must be crossed before it is encountered." ALI STUDY, *supra* note 4, commentary at 51-52.

citizenship. Likewise, national labor unions have a special need for protection from local prejudice.[29] Local juries tend to favor local interests at the expense of the non-resident labor union, and may be swayed by a fear of unionization of local industry.[30] Evidence has been introduced to show that the fear of both economic and racial effects of unionization has affected local justice.[31]

A second basis for diversity jurisdiction is the encouragement of commercial investment.[32] By assuring federal justice to out-of-state businessmen, diversity jurisdiction exercises "a great influence in fostering interstate commerce and investment, sustaining the public credit and sanctity of contracts, and welding the states into a single nation."[33] Yet these advantages are unavailable to unincorporated associations, although substantial investment in such associations might be induced with a diminished threat of local litigation.

The procedural advantages of the federal courts provide a most important justification for diversity jurisdiction, and a most cogent argument for its extension to unincorporated associations.[34] Federal jurisdiction assures the non-resident litigant the advantages of modern pleading practice, pretrial and trial procedures.[35] Further, federal judges are less exposed to local pressures than their state counterparts, federal juries are chosen from broader socio-economic strata, and appellate review takes place in courts "reflecting a multistate perspective"[36] Denying unincorporated associations the opportunity to obtain federal jurisdiction would also remove them from the "mainstream of general tort and contract litigation."[37]

A fourth reason for diversity jurisdiction is the desire to achieve uniformity of decision in commercial law, conflicts of law, and international law.[38] Although the decision in *Erie R.R. v. Tompkins*[39] left

29. See Note, *Unions As Juridical Persons, supra* note 24, at 745, noting a congressional study showing the biased use of injunctions against labor unions in the Southeast.

30. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7, at 150.

31. *Ibid.*

32. WRIGHT, FEDERAL COURTS 68-69 (1963); Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483, 495-99 (1928).

33. Moore & Weckstein, *supra* note 28, at 1448-49.

34. The vitality of this justification for diversity jurisdiction has recently been questioned by one source, which finds social and economic incentives for commercial expansion today sufficient to override consideration of local litigation. ALI STUDY, *supra* note 4, commentary at 50-51.

35. Moore & Weckstein, *supra* note 28, at 1449. The delay of justice resulting from congested metropolitan dockets and other state procedural inefficiencies should not be the political responsibility of the out-of-stater. See ALI STUDY, *supra* note 4, commentary at 53. Yet the rule of *Chapman v. Barney* does attach such responsibility to unincorporated associations.

36. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7, at 150.

37. Moore & Weckstein, *supra* note 28, at 1449.

38. *Id.* at 1450.

39. 304 U.S. 64 (1938).

matters of substantive law to the states, federal courts still sit as "another court of the state" and can thus contribute to uniformity.[40] With diversity jurisdiction available to all unincorporated associations, federal courts would have a greater opportunity to construe similarly state statutes concerning such associations.[41]

The bases for federal diversity jurisdiction, therefore, appear applicable to unincorporated associations. The needs that created diversity jurisdiction are the same ones that require its extension; yet the courts persist in distinguishing the incorporated from the unincorporated forms of organization. The primary justification for different treatment has been that the unincorporated association is but an association of individuals, the legal personality of which is too incomplete to merit citizenship for diversity purposes.[42] This argument is maintained despite federal recognition of the unincorporated association's capacity to sue or be sued,[43] and venue provisions recognizing unions as entities under federal labor acts.[44] The courts have bolstered their reasoning by pointing to the administrative difficulty of determining state citizenship.[45] The primary justification for different treatment, however, lacks sound basis today; and without it, the secondary justification cannot stand alone. Its difficulties are not insuperable.

Other than the actual filing of articles of incorporation, the modern unincorporated association may have all or most of the characteristics of a corporation.[46] But disregarding functional similarities, different treatment should not turn on factors such as personal liability of individual members, or transferability of shares. Citizenship for diversity purposes should depend wholly upon the existence of a distinct entity, having an identity separate from that of its members.[47]

40. Moore & Weckstein, *supra* note 28, at 1450.

41. Problems of pre-emption and state court resolution of federal questions illustrate the need for uniformity in the labor law field. See Note, *Unions As Juridical Persons*, *supra* note 24, at 745-48.

42. Puerto Rico v. Russell & Co., *supra* note 16, at 480.

43. FED. R. CIV. P. 17(b); see note 60 *infra*.

44. 20 U.S.C. § 185(c) (1964). See also the arguments for treating a partnership as a legal person in CRANE, PARTNERSHIPS § 3, at 9-21 (2d ed. 1952).

45. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7, at 152 ("difficulties which we could not adequately resolve"); Stein v. American Fed'n of Musicians, *supra* note 14, at 101 ("no satisfactory alternative method of determining the citizenship of such an association").

46. Unincorporated associations generally include partnerships, limited partnerships, joint stock companies, joint ventures, Massachusetts or business trusts, and labor unions. The characteristics said to distinguish the corporate form are creation pursuant to filing of articles of incorporation, transferability of shares, continuity of existence, centralization of management, right to sue or be sued as an entity, and the absence of personal liability of shareholders for the debts of the corporation. See LATTIN, CORPORATIONS 1-72 (1959).

47. See United Steelworkers v. R.H. Bouligny, Inc., *supra* note 7, at 149-50.

Where the real party in interest is an unincorporated association, and the opposing litigant is a citizen of a different state, the conflicting state interests provide the "federal element" basic to diversity jurisdiction.[48]

With the nationwide expansion of unincorporated associations, reasons for treating them as citizens and residents which were nonexistent in 1889 are now apparent.[49] Collective bargaining is now practiced on a national scale,[50] executive governing bodies of many unincorporated associations have the power of corporate boards of directors,[51] and the resulting unity of action of the unincorporated association has become incompatible with the idea of individual association and action. In sustaining diversity treatment for an unincorporated Puerto Rican association, the Supreme Court recognized several corporate-like characteristics as compelling its decision.[52] But the Court of Appeals for the Sixth Circuit termed the attributes of unincorporated labor unions discussed by Chief Justice Taft in *UMW v. Coronado Coal Co.*[53] as "much more impressive to compel recognition . . . as juridical persons" than those cited in the *Puerto Rico* case.[54]

Thus it appears that not only is the basis for federal diversity equally applicable to unincorporated associations, but the functional differences between the incorporated and unincorporated forms of organization are negligible with regard to diversity jurisdiction.

Further justification for changing the rule of *Chapman v. Barney* can be found in the inadequacy of the Court's position in that case. Not only did the Court raise the jurisdictional point on its own motion,[55] but it made no effort "to determine whether the reasons for extending citizenship to a corporation might apply with equal force to a joint stock association."[56] The Court failed to mention a prior

48. Moore & Weckstein, *supra* note 4, at 27.

49. See UMW v. Coronado Coal Co., *supra* note 24, at 385-89.

50. *Ex parte* Edelstein, *supra* note 8, at 639 (dissenting opinion).

51. See UMW v. Coronado Coal Co., *supra* note 24, at 383-84, discussed in American Fed'n of Musicians v. Stein, *supra* note 15, at 688.

52. Some of the attributes of the Puerto Rican association were its right to "contract, own property and transact business, sue and be sued in its own name and right," creation by articles of association on public record, endurance beyond the death of individual members, centralization of management, and absence of personal liability of members for the association's acts and debts. Puerto Rico v. Russell & Co., *supra* note 16, at 481-82.

53. *Supra* note 24, at 383-89.

54. American Fed'n of Musicians v. Stein, *supra* note 15, at 687.

55. Chapman v. Barney, 129 U.S. 677, 682 (1889); see criticism in Note, *Unions As Juridical Persons*, *supra* note 24, at 744 n.185.

56. Mason v. American Express Co., 334 F.2d 392, 395 (2d Cir. 1964).

case[57] permitting an unincorporated association to be recognized as a corporation under the privileges and immunities clause of article IV, section 2.[58] Further, *Chapman v. Barney* was decided in a Congressional climate of jurisdictional limitation, which may have discouraged a vast extension of diversity jurisdiction to unincorporated associations.[59]

One commentator has argued that close reading of Rule 17(b)[60] of the Federal Rules of Civil Procedure further reveals the need to change the rule of *Chapman v. Barney*.[61] The "except" clause of Rule 17(b) gives unincorporated associations the capacity to sue or be sued in their common names where jurisdiction is based upon a federal right. In all other situations, state law as to capacity to sue or be sued is to control. But the courts have held that where jurisdiction is based upon diversity of citizenship, even though capacity to sue or be sued has been accorded the unincorporated association under state law, complete diversity must be found in the citizenship of the individual members of the association.[62]

> In order that the last sentence of Rule 17(b) [the 'except' clause] be generally effective in cases where jurisdiction is founded upon diversity of citizenship the present federal rule on jurisdiction must be changed: the partnership or other unincorporated association which is given capacity to sue or be sued must be endowed with 'citizenship,' for purposes of federal jurisdiction. Such treatment might well be accorded them, and could be worked out along lines developed in the corporate field.[63]

However, Rule 17(b) is generally regarded as having no effect upon the diversity requirement.[64]

Dissatisfaction with the doctrine of *Chapman v. Barney* has led

57. Liverpool Ins. Co. v. Mass., 77 U.S. (10 Wall.) 566 (1870), discussed in Mason v. American Express Co., *supra* note 56, at 396 & n.6.

58. Mason v. American Express Co., *supra* note 56, at 396.

59. See United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148-49 (1965).

60. FED. R. CIV. P. 17(b): "(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States . . . ."

61. 3 MOORE, FEDERAL PRACTICE § 17.25, at 1412-13 (2d ed. 1963).

62. *Id.* at 1412. See discussion of the complete diversity requirement in note 4 *supra*.

63. 3 MOORE, *op. cit. supra* note 61, at 1413.

64. See Mason v. American Express Co., *supra* note 56, at 396 n.7; Brocki v. American Express Co., 279 F.2d 785 (6th Cir. 1960); ALI STUDY, commentary at 61. *Contra*, Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948).

to a general recognition of the class action under Rule 23(a)[65] of the Federal Rules of Civil Procedure as a legitimate means for circumventing the doctrine.[66] In class actions, diversity need be satisfied only as to the representative of the class.[67] Although some defects in the use of the class suit have been noted,[68] its increasing use has demonstrated that the present rule of *Chapman v. Barney* is an unsatisfactory one. The rule is incompatible with the purposes of diversity jurisdiction, it gives credence to an unreasonable jurisdictional distinction between the incorporated and unincorporated forms of organization, and it rests on a precedent of questionable validity. The necessity for change is apparent.

III. SUBSTANCE OF THE CHANGE

Having recognized the injustice of the present rule, it is necessary to revise it to conform with the purposes of diversity jurisdiction, yet ensure that it be administratively feasible. There is general agreement that the proper location for citizenship of unincorporated associations should be the state of "principal place of business."[69] However, little thought seems to have been given to the application of this standard other than that the interpretations of this rule for corporate diversity jurisdiction should be helpful.[70] "Principal place of business," unfortunately, is an unrefined term of art. It has received two widely divergent, but well-organized interpretations,[71] and at least five lesser meanings have found support from either courts

65. FED. R. CIV. P. 23(a): "(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued . . . ."

66. See Mason v. American Express Co., *supra* note 56, at 402; Marydale Prods. Co. v. United Packinghouse Workers, 322 F.2d 224, 227 (5th Cir. 1963); Wright, *op. cit. supra* note 32, at 78-79.

67. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

68. See Note, *The Problem of Capacity in Union Suits: A Potpouri of Erie, Diversity and the Federal Rules of Civil Procedure*, 68 YALE L.J. 1182, 1185 (1959); 78 HARV. L. REV. 1661, 1664 n.19 (1965).

69. In controversies concerning unincorporated associations, "the individual members are only indirectly affected and it is the organization itself, the aggregate of all the members bound together by their economic investment, that is the true party in interest. Thus the principal place of business is an appropriate criterion by which to govern an incorporated or unincorporated association's access to the federal courts . . . ." Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 34 (1964). *Contra*, Stein v. American Fed'n of Musicians, 183 F. Supp. 99, 101 (M.D. Tenn. 1960).

70. 3 MOORE, *op. cit. supra* note 61, at 1413; see 78 HARV. L. REV. 1661, 1664 (1965).

71. These are the so-called "nerve-center" and "place of operations" tests, which are discussed in the text following note 74 *infra*.

or commentators.[72] Rather than select from among these alternative definitions, or extend the vague general corporate standard, the Supreme Court has appealed for legislative assistance.[73] The mandate is for something more than the skeleton formula of "principal place of business."

The two major tests of principal place of business are the "nerve-center" and "place-of-operations" tests.[74] The former finds citizenship in the state where major policy decisions are made and ultimate control is exercised. Normally it is there that administrative and financial offices are located, executive meetings are held, and tax returns are filed.[75] The "nerve-center" test has been held most appropriate for corporations "which are both diversified and decentralized or have subsidiaries in several states."[76] The rule becomes one of convenience, permitting ease of identification of citizenship for widespread corporations.[77] It would be ideal for some national labor unions, whose central decision-making location would be easily identifiable, but whose numerous locals would prohibit determination of a principal place of operations.[78]

The "place-of-operations" test looks to the state of central industrial activity, which is ordinarily the location of most of the organization's tangible assets and employees.[79] It was applied in *Inland Rubber*

72. These are the *Kelly*, "localized business," "substantial business," "gross income," and "state-of-impingement" tests, which are mentioned in the text and footnotes following note 84 *infra*. "Principal place of business" has also been defined by decisions interpreting the Bankruptcy Act, 76 Stat. 570 (1962), 11 U.S.C. § 11(a)(1) (1964), which contains the same language. See cases listed in 11 U.S.C.A. § 11, nn.197-202.

73. United Steelworkers v. R.H. Bouligny, Inc., *supra* note 59, at 147, 153; see also text at note 23 *supra*.

74. See Moore & Weckstein, *supra* note 28, at 1439-40.

75. See Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862, 865 (S.D.N.Y. 1959); Moore & Weckstein, *supra* note 28, at 1440.

76. Moore & Weckstein, *supra* note 28, at 1444. See Sabo v. Standard Oil Co., 295 F.2d 893, 894-95 (7th Cir. 1961); Lancer Indus., Inc. v. American Ins. Co., 197 F. Supp. 894, 898-99 (W.D. La. 1961).

The "nerve-center" test is analogous to the test used in state and local taxation in determining "commercial domicile" for allocation of income. See Chicago, Duluth & Georgian Bay Transit Co. v. Michigan Corp. & Sec. Comm'n, 31 Mich. 14, 22, 29 N.W.2d 303, 306 (1947).

77. Even where the "place-of-operations" test has been adopted, it has been acknowledged that the "nerve-center" test would be more convenient if there were no state in which operations predominated. Inland Rubber Corp. v. Triple A Tire Serv. Inc., 220 F. Supp. 490, 496 n.16 (S.D.N.Y. 1963); see Moore & Weckstein, *supra* note 28, at 1442.

78. Local labor organizations would not be recognized as citizens for diversity purposes under such a test. This might be unrealistic, however, because locals are sometimes independent bodies, capable of determining their own policies. The "local establishment" qualification of the American Law Institute proposal (see text accompanying note 108 *infra*) is a possible compromise. See comment by Mr. Justice Fortas in United Steelworkers v. R. H. Bouligny, Inc., *supra* note 58, at 152-53 & n.12.

79. Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdicton: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1439-40 (1964).

Corp. v. Triple A Tire Service, Inc.,[80] in which an Ohio-controlled corporation was deemed a citizen of New York, where most of its employees were located, its sales solicited, and its credit and advertising decisions made. The courts have generally employed this test where control is in one state and physical operations are "wholly or predominantly in another state."[81] This test would appear better suited to partnerships and joint stock companies than to labor unions. No more administrative difficulty would seem apparent for the unincorporated than for the incorporated organization in determining the principal place of operations. Corporate precedents could be accurately applied to the larger unincorporated associations using the "place-of-operations" test for the centralized association and the "nerve-center" test for the diversified association.

In *Kelly v. United States Steel Corp.*,[82] where the court was faced with a far-flung corporation, neither of the traditional tests was accepted as determinative of the principal place of business. Instead the court looked to the location of the "headquarters of day-to-day corporate activity and management."[83] The *Kelly* test emphasizes daily operational control, rather than situs of high-level decision-making.[84] It might provide a precedent allowing recognition of strong local labor organizations as citizens of the state of decision-making. Such union locals, relatively independent from their national organizations, would thus be properly subjected to the risks of local litigation. The *Kelly* test would avoid the impossibility of finding a principal place of operations within the national union, and the unreality of characterizing the national headquarters as the nerve center. Partnerships with local clientele at several branch offices in different states also might lose their diversity citizenship in a court applying the *Kelly* test.

The distinction between the "nerve-center" and "place-of-operations" tests is blurred by *Kelly*, however proper that decision is on its facts. This situation at least suggests that a wholesale transfer of the body of corporate case law under the 1958 amendment to the determination of citizenship of unincorporated associations would spawn divergent results.

80. *Supra* note 77.

81. Moore & Weckstein, *supra* note 79, at 1442. The test has been suggested as peculiarly applicable to corporations engaged in a single operational activity such as transportation. *Id.* at 1444; see Herschel v. Eastern Airlines, Inc., 216 F. Supp. 347 (S.D.N.Y. 1963).

82. 284 F.2d 850 (3d Cir. 1960).

83. *Id.* at 854.

84. Moore & Weckstein, *supra* note 79, at 1444; see United Indus. Corp. v. Gira, 204 F. Supp. 410, 414 (D. Del. 1961) (following the "legal guidelines" of *Kelly*); Textron Electronics, Inc. v. Unholtz-Dickie Corp., 193 F. Supp. 456, 459 (D. Conn. 1961) (unnecessary to distinguish *Kelly* and "nerve-center" tests on facts of case).

Further confusion could result from analogies to the decisions concerning foreign corporations and corporations created by acts of Congress.[85] Foreign corporations, as do unincorporated associations, have no state of incorporation within the United States. A finding of state citizenship, then, might be based upon a test relevant to unincorporated associations, although foreign corporations are probably not included under the principal place of business provisions of the 1958 Amendment.[86] The question remains unsettled, however, and decisions finding American citizenship for foreign corporations in diversity situations would not be unexpected.[87]

Decisions prior to the 1958 amendment dealing with corporations created by acts of Congress might also be applied to unincorporated associations.[88] Such corporations were deemed to be citizens only of the United States, not of particular states, unless their businesses were "localized" within one state.[89] The criteria for determination of localization have not been thoroughly examined, but "several factors seem significant. A corporation restricted by its federal charter to operate in one state only is usually held to be 'localized' in that state. Federal corporations which are authorized to operate in several states may also be 'localized' in one state if, in fact, they operate in that state alone."[90] This body of case law might apply to joint stock companies organized under the laws of one or more states, but localized in only a single state. Similar citizenship might be found for "localized" limited partnerships, which qualify for operations in several states.

Another standard suggested for determination of citizenship is the "substantial business" test.[91] Under this test, small local subdivisions would have federal diversity if their proportion of activity in the total enterprise were not "substantial," whereas the large local subsidiary would be unable to escape the state courts by the fiction of foreign

85. *Cf.* Moore & Weckstein, *supra* note 79, at 1435-37.

86. Eisenberg v. Commercial Union Assur. Co., 189 F. Supp. 500 (S.D.N.Y. 1960).

87. A foreign corporation could have citizenship in the state of its principal place of business in the United States, or alternatively in the state of its worldwide principal place of business. See Moore & Weckstein, *supra* note 79, at 1435. The American Law Institute has suggested dual citizenship of foreign corporations, using the foreign state of incorporation and the worldwide place of principal business. ALI STUDY, *supra* note 64, at 57-58.

88. See, *e.g.*, Orange Nat'l Bank v. Traver, 7 Fed. 146, 149 (9th Cir. 1881) (national bank deemed citizen of state wherein located); Elwert v. Pacific First Fed. Sav. & Loan Ass'n, 138 F. Supp. 395, 402 (D. Ore. 1956) (common law rule of localized federal corporations not abolished). See codification of rule in 28 U.S.C. § 1348 (1964) ("deemed citizens of the States in which they are respectively located").

89. Moore & Weckstein, *supra* note 79, at 1437 & n.67.

90. *Ibid.*

91. *Id.* at 1433; Note, 6 UTAH L. REV. 231, 242-43 (1958).

citizenship. This, along with the *Kelly* test, seems most appropriate for the diversity problems of national labor unions. A necessary corollary of the test is that an unincorporated association could have more than one place of "substantial business."[92] Yet as the corporate precedents indicate, a decentralized association could not avoid federal jurisdiction by a claim that no one of its places of operation did a substantial part of its business.[93]

IV. PROPOSED SOLUTION BY THE AMERICAN LAW INSTITUTE

The one concrete legislative proposal to date is that of the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts.[94] The Official Draft provides for citizenship of unincorporated associations in the state of principal place of business.[95] The Institute justifies its conclusion by noting the effects of the extended jurisdiction.

> One practical effect is not to deprive an out-of-state plaintiff suing such an association in the state of its principal activity from access to the federal court because a member of the association is of the same citizenship as the plaintiff. Also, the association with its principal place of business in another state suing as a plaintiff will not be barred from a federal forum simply because one of its members is of the same citizenship as the defendant.[96]

92. See Sperry Prods., Inc. v. Association of Am. R.Rs., 132 F.2d 408, 412 (2d Cir. 1942) (Frank, J., concurring), *cert. denied*, 319 U.S. 744 (1943). *Contra*, Kaufman v. General Ins. Co. of America, 192 F. Supp. 238 (S.D. Cal. 1961).

93. See Egan v. American Airlines, Inc., 324 F.2d 565, 566 (2d Cir. 1963); Inland Rubber Corp. v. Triple A Tire Serv., Inc., *supra* note 77, at 492-94.

Two other tests deserve mention. The "gross income" test is a variation on the substantial business theme, finding citizenship in the state from which an enterprise derives more than half of its gross income. This test was part of the original proposal to amend diversity requirements in 1958. Its obvious weakness is the danger of no citizenship for a diversified corporation. See discussion in Inland Rubber Corp. v. Triple A Tire Serv., Inc., *supra* note 77, at 492-93. The other test is the "state-of impingement" test. It finds citizenship in the state where the bulk of litigation arises, most customers reside, the greatest gross income is derived, and the organization is "generally considered to be 'at home.' . . . And this state is more likely to be the one where the actual physical operations are carried on and directed than the place where high-level policy decisions are made." Moore & Weckstein, *supra* note 79, at 1444-45. The test, however, appears unworkable. Its combination of tests to find the state most impinged would likely result in a cumulation of the problems of each of the individual tests. See also 72 HARV. L. REV. 391, 394 (1958).

94. ALI STUDY, *supra* note 64.

95. *Id.* at § 1301(b)(2): "(2) A partnership or other unincorporated association capable of suing or being sued as an entity in the State in which an action is brought shall be deemed a citizen of the State or foreign state where it has its principal place of business, whether such action is brought by or against such partnership or other unincorporated association or by or against any person as an agent or representative thereof."

96. *Id.*, commentary at 59.

While the commentary to the Official Draft properly finds "sound reason" for giving an unincorporated association a citizenship separate from that of its members,[97] its conclusion to use the "principal place of business" test for diversity purposes is relatively unsupported. No definition of "principal place of business" is given, so that the appropriateness of the test remains unevaluated. The Institute determined to leave the "sharpening" of the definition "to the decisional processes of the courts rather than to attempt further refinement by statute."[98] While the courts may be better equipped to define "principal place of business," and an *ad hoc* judicial approach may be superior to a legislative decree, the propriety of each of the various interpretations of "principal place of business" to unincorporated associations should have been established. The "never-center,"[99] "place-of-operations,"[100] and *Kelly*[101] tests each have viability in certain corporate situations, but might be found inapplicable for unincorporated associations in similar situations. Consideration should also have been given to the "localized business,"[102] "substantial business,"[103] "gross income,"[104] and "state-of-impingement"[105] tests.

V. Conclusion

Whatever the merits of the broad unsharpened definition of "principal place of business," the Supreme Court had the opportunity to adopt it in 1965, and refused to do so.[106] What the Court apparently desires is a comprehensive definition, with variations particularized for each type of unincorporated association. Congress, of course, could pass the burden of definition back to the courts, either by inaction or passage of a general jurisdictional test; but the plea for legislative guidance should be heeded. The proper course should include full analysis of each suggested test for "principal place of business," and a selection of appropriate standards for each form of unincorporated association. Specifically, the legislature must not avoid the question of citizenship for labor unions with local as well as national organizations, which Mr. Justice Fortas noted as requiring non-judicial reso-

97. *Ibid.*
98. *Id.*, commentary at 57.
99. See text accompanying note 76 *supra.*
100. See text accompanying note 79 *supra.*
101. See text accompanying note 82 *supra.*
102. See text accompanying note 88 *supra.*
103. See text accompanying note 91 *supra.*
104. See discussion at note 93 *supra.*
105. *Ibid.*
106. United Steelworkers v. R. H. Bouligny, Inc., *supra* note 59, at 153.

lution.[107] Partnerships, joint stock companies, and other unincorporated associations with a profit-making purpose must be related to their incorporated counterparts, with a similar selection of jurisdictional tests. Perhaps the American Law Institute's suggestion that "local establishments" for more than two years should disable unincorporated associations from initiating litigation in federal courts of such states[108] is the panacea for federal diversity jurisdiction.[109] What is certain, though, is the need for firm legislative recognition of unincorporated associations as juridical persons for purposes of federal diversity jurisdiction, and selection of an unambiguous means for determining state citizenship of unincorporated associations.

Protecting the Client When His Lawyer Dies

The problems which arise when a practicing attorney suddenly dies take many shapes. Those which face the law firm are of both an ethical nature, involving the continuance or disposition of the lawyer's practice, and a legal nature, concerning the re-organization of the law firm or the termination of the attorney-client relationship.[1] The extent to which a client's interests are affected when his attorney dies depends upon two basic factors: whether he had notice of his lawyer's death; and whether he had time, after receiving notice, to take the necessary steps to protect his interests. It is the purpose of this comment to relate these factors of "notice" and "time to act" to three situations: (1) where the confusion incident to an attorney's death causes the statute of limitations to run before a complaint can be filed for the prospective plaintiff, (2) where the confusion incident to an attorney's death causes the statutory time for perfecting an appeal to elapse before an appeal can be filed for the prospective appellant, and (3) where the attorney's death and consequent failure to appear in court causes a defendant to suffer a default judgment or a plaintiff to suffer a dismissal for failure to prosecute. The granting of continuances will be discussed in connection with the latter situation.

107. *Id.* at 152-53.

108. ALI STUDY, *supra* note 64, at § 1302(b); see also note 95 *supra.*

109. See criticism of ALI proposal in Moore & Weckstein, *supra* note 79, at 1451 ("wholesale emasculation" of diversity jurisdiction).

1. See Note, *The Death of a Lawyer*, 56 COLUM. L. REV. 606 (1956).

I. Statute of Limitations

When an attorney, representing a prospective plaintiff, dies before he has an opportunity to file a complaint, the confusion incident to the death may cause enough delay to allow the statute of limitations to run. Even if the deceased attorney had been a member of a law firm, it is likely that he had begun preparation of the complaint without consultation with his colleagues; thus, they would not be immediately aware of the urgency in commencing judicial proceedings. The professional colleagues of the deceased attorney would first turn their attention to his pending litigation,[2] and it is possible that the statute of limitations could run before they discovered from his files that he was preparing a complaint. Where the deceased attorney had been a single practitioner, the problem is much more acute. The attorney's files are turned over to his executor; but the executor is not permitted to reveal their contents, and he may not give another attorney permission to go through them without the client's consent.[3] If the client is vacationing, or for some other reason cannot be readily reached, the statute of limitations may run and thus bar his cause of action.

Those who argue that legislation with respect to the attorney's death is not needed contend that it is the responsibility of the client, rather than that of the attorney, to commence proceedings before the running of the statute of limitations.[4] Furthermore, they suggest that the attorney's death would rarely result in the running of the statute unless the client had delayed dangerously long before bringing the matter to the attorney.[5] While it may be true that the client has the responsibility for initiating judicial proceedings and that he should not be protected if he delays dangerously long before bringing his problem to the attorney, it does not seem just to penalize the diligent as well as the negligent client because of circumstances over which

2. The client has the option to terminate his contract with the firm when the partner with whom he had consulted dies. Clifton v. Clark, 83 Miss. 446, 36 So. 251 (1903). But where the client does not exercise this option, it is proper for the professional colleagues of the deceased attorney to take such steps as are necessary to protect the immediate interests of his clients. American Bar Association, Opinions of the Committee on Professional Ethics and Grievances, No. 266 (1947).

3. *Ibid.*

4. In the event of the death of the person entitled to sue, most states have statutes which suspend the operation of the statute of limitations, thus giving the prospective plaintiff's representative added time for filing suit. See, *e.g.*, Cal. Code Civ. Proc. § 353 (six month extension); Idaho Code Ann. § 5-231 (1947) (one year extension); Mont. Rev. Codes Ann. § 93-2704 (1947) (one year extension); Utah Code Ann. § 78-12-37 (1953) (one year extension). This type of legislation seems equally applicable to situations in which the prospective client's attorney dies prior to filing of the suit.

5. See Note, *supra* note 1, at 610.

he had no control. The bar which the statute of limitations raises does not discriminate—its arbitrary time limit allows no distinction between the diligent and the non-diligent client. Such an inflexible statute works an injustice where the client was diligent, had no knowledge of the attorney's death, and relied on the attorney's promise to "take care of things."[6]

This injustice could be alleviated by legislation extending the period of the limitation when the attorney for the prospective plaintiff dies. The duty of giving notice must necessarily fall on the executor or professional colleague of the deceased attorney. Because no complaint has yet been filed, the court does not know the identity of the prospective plaintiff. Because no process has been served on the proposed defendant, there is no adverse party yet involved in the case. The executor or professional colleague should be required to give notice to the client within a short period, say thirty days, after the attorney's death. All clients whose addresses are known should be given notice by registered mail. Public notice should then be given through the local newspaper, thus affording constructive notice to those clients whose names are not in the deceased attorney's files or whose addresses are not known.

Notice alone is not sufficient, however, for it is very possible that it will come after the statute of limitations has run. Therefore, legislation is needed to toll the running of the statute upon the death of the attorney, thus giving the prospective plaintiff more time to act. The unexpired period of limitation would not begin to run until the client received notice of the death. However, should that unexpired period be less than a definite statutory time (*e.g.*, six months), then the client would be given a similar period (*i.e.*, six months) from the date of *receipt of notice* in which to file his complaint, irrespective of the length of the unexpired limitation period. This would be called a legislative "extension."

If the executor or professional colleague delays longer than thirty days in giving notice, the extension should nevertheless begin to run from the date on which the client receives notice or from the date of the last required publication—with two exceptions. First, if the defendant can show that the plaintiff had received informal notice of his attorney's death prior to receipt of notice from the executor or professional colleague, the extension should in all fairness begin to run from that earlier date. Our concern is that the client of the

6. When a party must go out of state in order to find a court which has jurisdiction over the persou he wants to sue, he must hire counsel in this out-of-state jurisdiction. Usually, he will not think it necessary to do anything further until the attorney notifies him of the trial date.

deceased attorney receive notice; and whether he receives this notice officially or unofficially, his duty to act should begin as soon as he is put on notice. Second, it should be presumed conclusively in all cases that the client has received notice within a year from the attorney's death, and the extension should begin to run no later than that date. Without such a presumption a client who received no informal notice could take advantage of the executor's negligence and file suit five or ten years after the attorney's death—a situation that would work an injustice on the defendant. The presumption may also be justified on the theory that a reasonable man would not allow an entire year to elapse without contacting his attorney.

The length of the extension could range anywhere from thirty days to a year. In determining the period of the extension, we should not lose sight of the purpose behind the statute of limitations itself, *i.e.*, to avoid unfairness to defendants by requiring actions against them to be brought before they lose their evidence. At the same time, we should make the extension long enough so that the deceased attorney's colleague or executor has a reasonable amount of time to notify the client (assuming that the client does not learn of his attorney's death through other channels), long enough so that the client then has a reasonable amount of time to employ new counsel, and long enough so that the new attorney has a reasonable amount of time to prepare the complaint. In most instances, thirty days would be an insufficient extension; yet an extension of a year might actually encourage delay. Something between ninety days and six months would appear to be a reasonable compromise.

The possibility that such a statute would be subject to abuse by fraud can be easily obviated by placing the burden of proof on the prospective plaintiff. Unless he is able to show by clear and convincing evidence that he did in fact consult the deceased attorney, he would not be entitled to an extension of the statute of limitations. In this connection the records and files of the deceased attorney would be material evidence, but they should not be decisive.

II. Perfecting An Appeal

When the death of a party's attorney occurs after the entry of an adverse judgment but prior to the filing of an appeal, the deadline for perfecting an appeal may be missed. Where the time for filing an appeal has been made absolute by statute, the courts are powerless to grant an extension.[7] Many courts have held that perfection of an

7. See, *e.g.*, Miller v. Buyer, 77 Colo. 329, 236 Pac. 990 (1925); Johnson v. Union Sav. Bank & Trust Co., 193 Minn. 357, 258 N.W. 504 (1935); Higgins v. Educators,

appeal within the time provided by the statute is "jurisdictional"; therefore, they consider themselves to be without jurisdiction to hear an appeal taken after the expiration of the statutory period.[8] Even where the statutes are not mandatory, the courts have granted extensions only for reasons such as fraud,[9] fault of the appellee,[10] and negligence or error of the court or clerk.[11] The illness of an attorney has been held to be an insufficient reason for extending the time for appeal.[12] Under the Federal Rules of Civil Procedure, the district court can extend the time for appeal for thirty days; but this extension is permitted only on a showing that, through excusable neglect, the party failed to learn of the entry of the judgment.[13] Only where a statute specifically allows the courts in their discretion to extend the time for appeal could a party whose attorney dies hope to obtain relief.[14] There is clearly an urgent need for an express statutory extension of the time for appeal when the prospective appellant's attorney dies. At present only one state has such a statute.[15]

Where the deceased attorney had been a member of a law firm, there may never be any need to seek an extension of the time for perfecting an appeal. His professional colleagues would, no doubt, be fully aware of any cases which he had recently lost; and, if for no other reason than a desire to uphold the firm's reputation, they would make diligent and immediate efforts to see that appeals are filed. On the other hand, where the deceased attorney had been a single practitioner, there is an obvious need for an extension of the time for an appeal. As mentioned above in connection with the running of the statute of limitations, a duty to notify the deceased attorney's clients of his death should be imposed upon the executor. A problem arises, however, if the client—because of business trips or

147 Pa. Super. 400, 24 A.2d 19 (1942); Memphis & C.R.R. v. Johnson, 84 Tenn. 387 (1886); see generally 3 WOERNER, AMERICAN LAW OF ADMINISTRATION § 546, at 1863 (3d ed. 1923).

8. See, *e.g.*, People v. Lewis, 219 Cal. 410, 27 P.2d 73 (1933); Chapman v. Boehm, 27 Idaho 150, 147 Pac. 289 (1915); Independent Lubricating Co. v. Good, 135 Neb. 171, 280 N.W. 460 (1938); Sorenson v. Korsgaard, 83 Utah 177, 27 P.2d 439 (1933).

9. U.S. v. Gomez, 70 U.S. (3 Wall.) 752 (1865).

10. Gordon v. Willits, 263 Mass. 516, 161 N.E. 881 (1928).

11. Block v. H. R. Ameling Prospecting Co., 264 S.W. 32 (Mo. App. 1924); People's Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926).

12. State v. Louisiana Debenture Co., 52 La. Ann. 597, 27 So. 88 (1899).

13. FED. R. CIV. P. 73(a); see generally WRIGHT, FEDERAL COURTS § 104, at 406-09 (1963).

14. See, *e.g.*, MASS. STAT. ANN. ch. 231 § 135 (1956); Boston v. Santosuosso, 302 Mass. 169, 18 N.E.2d 1009 (1939).

15. In New York an aggrieved party may take an appeal within sixty days after the death of his attorney, without application to the appellate court. N.Y. CIV. PRAC. LAW § 5514(b).

vacations—does not receive the notice until after the time for filing an appeal has elapsed. Even if he had acquired knowledge of his attorney's death through other channels, he might not be overly concerned. He might not know, for example, that there is a time limit on filing an appeal; or he might be confident that the deceased attorney had already taken the steps necessary to place his case on the appellate docket and might be of the opinion that it will take a year or two before the appellate court will have time to hear it. In either situation he might feel that he has ample time to engage new counsel. Without any allowance for extension of the time for appeal upon the death of an attorney, the party who retains a single practitioner may well lose his chance to obtain appellate review of his case. Such an inequity between the risk taken by the party who retains a member of a law firm and the risk taken by the party who retains a single practitioner should be obviated by legislation.

The extension of the time for appeal could begin at the date of the attorney's death or at the date on which the client receives notice. New York allows an appeal within sixty days from the date of the attorney's death. In the interests of fairness and justice, however, the extension should be measured from the date on which the client receives notice—whether it be actual or constructive, official or unofficial.

As in the statute of limitations situation, the length of the extension could range anywhere from thirty days to a year. It should be long enough to allow the client reasonable opportunity to search for a new attorney and to allow the new attorney to prepare the appeal, yet it should be short enough that it does not cause undue hardship or inconvenience on the appellee. Allowing an appeal within sixty days of receipt of notice would appear to be a reasonable compromise.

III. "Notice To Appoint" Statutes

When the attorney dies after judicial proceedings have been commenced but before trial, his client may suffer an adverse judgment because of the attorney's failure to appear in court on the trial date. If the client is a plaintiff, he could suffer a dismissal for failure to prosecute; if he is a defendant, he could suffer a default judgment. To avoid such an injustice, the client should be given notice of his attorney's death and should have adequate time, after receiving such notice, to act to protect his interests. Statutes which allow continuances "as the interests of justice may require"[16] are of little comfort

16. See, *e.g.*, Md. R. Proc. 527; *cf.* 10 U.S.C. § 840 (1959): "A court-martial may

to a client who had no notice of his attorney's death and who has already suffered an adverse judgment. Likewise of little comfort are statutes allowing a continuance for the illness or absence of an attorney from providential cause. Those who see an adequate remedy in such statutes not only assume that the client will learn of his attorney's death in time to ask for a continuance, but also assume that "absence from providential cause" includes an attorney's death.[17] When such a statute provides that the client swear that he expects his attorney's services at the next term, it is obvious that the attorney's death could not be advanced as a ground for continuance.[18]

Adequate protection of the client's interests when his attorney dies just before trial can be provided only through the enactment of a "notice to appoint" statute.[19] Such a statute would require written notice to be served on the client to appoint another attorney, or to appear in person, before the adverse party can take further proceedings against him.[20] At first glance it might appear that valuable court time could be saved if the adverse party is permitted to serve the notice himself. However, because of the potential for controversy regarding delivery of this type of notice,[21] it is doubtful that court time would really be saved in the long run. Requiring the adverse party to file the notice with the court would appear to be the preferable approach. It would then be served on the client of the deceased attorney by an official of the court.[22] If there are several parties to an action, all represented by the deceased attorney, each party should receive such a notice.[23]

In determining the amount of time the client should have before

for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just."

One court has held it an abuse of discretion to deny a continuance for the death of an attorney even in the absence of a "notice to appoint" statute. Mowat v. Walsh, 254 Mich. 302, 236 N.W. 791 (1931).

17. See Note, *supra* note 1, at 610 n.24 and accompanying text.

18. See, *e.g.*, GA. CODE ANN. § 81-1413 (1935).

19. Nine states have enacted such statutes. CAL. CODE CIV. PROC. § 286; IDAHO CODE ANN. § 3-206 (1947); ILL. ANN. STAT. ch. 38 § 114-4 (Smith-Hurd 1964); MINN. STAT. ANN. § 481.12 (1958); MONT. REV. CODES ANN. § 93-2104 (1947); N.M. STAT. ANN. § 18-1-14 (1953); N.Y. CIV. PRAC. LAW § 321(c); UTAH CODE ANN. § 78-51-36 (1953); WASH. REV. CODE ANN. § 2.44.060 (1961).

Two States have court rules to the same effect. MD. R. PROC. 126 (1963); MICH. GEN. CT. R. 909 (1963).

20. These "notice to appoint" statutes apply not only to the situation where an attorney dies, but also to situations where an attorney becomes physically or mentally incapacitated or is removed or suspended.

21. If this procedure is used, the adverse party should have the burden of proof.

22. One state directs the adverse party to file a motion alleging the fact of the attorney's death; thereupon, the court will give notice to the client to employ new counsel. MD. R. PROC. 126 (1963).

23. See Hickox v. Weaver, 15 Hun. (N.Y.) 375 (1878).

further proceedings are had against him, we must weigh the disadvantage that a short period of delay would work on the client against the inconvenience and expense that a long period of delay would impose on the adverse party.[24] A thirty day delay would appear to be a limitation which would not seriously inconvenience the adverse party, yet it would give the client sufficient time to engage new counsel. A thirty day period serves the additional purpose of insuring that the client will exercise diligence and good faith in his efforts to secure new counsel.

In the event that the client has no known address within the state, it would appear proper to serve the notice on the clerk of courts. The waiting period, however, should be extended to sixty days in this situation in order to give the client a reasonable time to learn of the death of his attorney and a reasonable time to search for a new one.[25]

Rather than limiting the "notice to appoint" procedure to the situation where the sole attorney for a party dies, it would seem preferable to permit its use whenever a party's sole or leading counsel dies. The fact that the deceased attorney had consulted other counsel should not be grounds for denying a continuance unless this other counsel was an associate in the case, and thus was acquainted with most of the deceased attorney's activities therein.[26]

To provide complete protection to the client whose attorney has died, a "notice to appoint" statute should provide for the setting aside of judgments taken in violation of its terms. It is very possible that the adverse party's attorney would not be aware of his opponent's death (especially in a large city); thus, he would take further proceedings without giving the required notice. Unless the court or the court clerk had become aware of the attorney's death from some other source, it is likely that the request for a judgment of dismissal or for a default judgment would be granted. Such a judgment could

24. Michigan and New York allow the client thirty days from the date of notice before any further proceedings may be had against him; Idaho, Minnesota, New Mexico, and Washington allow twenty days. The other states do not impose any particular time limit on the client's efforts to engage new counsel, but it has been held that notice of further proceedings may be served on the client personally if he has unduly delayed after receiving notice to appoint a new attorney. Hoffman v. Rowley, 13 Abb. Pr. (N.Y.) 399 (1862).

25. If the client has no known residence within the state, Minnesota allows the notice to be served on the clerk of courts. There must then be a thirty day wait before the adverse party may take further proceedings in the case. MINN. STAT. ANN. § 481.12 (1958).

26. Two states limit the "notice to appoint" procedure to the situation where the *sole* attorney for a party dies. MD. R. PROC. 126 (1963); MINN. STAT. ANN. § 481.12 (1958). In states where the statute contains no such limitation, the courts have reached a similar result by denying a continuance where the deceased attorney had other counsel working with him on the case. See, *e.g.*, Ostro, Inc. v. Boydston Bros., 323 Ill. App. 137, 54 N.E.2d 742 (1944).

probably be set aside for "unavoidable casualty," "misfortune," or "inadvertance"[27] where such a remedy is available. Unfortunately, not all states provide such a remedy; and, unfortunately, not all courts accept the theory that they have inherent power to give relief from judgments taken through inadvertance.[28] It is therefore apparent that, if the "notice to appoint" statute is to fully protect the interests of the client whose attorney has died, it should require the courts to set aside judgments taken in violation of its terms.

IV. CONCLUSION

As long as the notice procedures are not unduly cumbersome and as long as the time to act is not extended to unreasonable lengths, the adverse party will suffer very little harm. The inconvenience with which he is burdened is indeed slight when compared with the injustice that would befall the deceased attorney's client without such legislative protection.

The practice of law is a vocation to which stringent professional qualifications are attached. The bar examiners and the bar associations take great care to see that only men of exceptional character and ability are admitted to the profession. The purpose for such selectiveness is to assure the public that it will receive the best possible legal services. In light of this great concern over the formation of the attorney-client relationship, it would seem rather incongruous to neglect to provide for the client's protection when the relationship is abruptly terminated by the attorney's death. To deny the client time to employ new counsel to protect his interests is to tell him to maneuver for himself. Such an attitude, with its consequent hardship and injustice, is anathema to our concept of adversarial law. Legislation requiring the executor or professional colleague of the deceased attorney to give notice to his clients is needed so that a client has knowledge of his attoruey's death. And legislation tolling the statute of limitations and extending the time for perfecting an

27. IDAHO CODE ANN. § 5-905 (1947) (mistake, inadvertanee, surprise, or excusable neglect); N.M. STAT. ANN. § 21-1-1 (55)(c) (1953) (for good cause shown); N.Y. CIV. PRAC. LAW § 5015(a) (excusable default, fraud, misrepresentation, or other misconduct of an adverse party); OKLA. STAT. ANN. tit. 12 § 1031 (1961) (unavoidable casualty or misfortune). *Cf.* Rogers v. Sheppard, 200 Okla. 203, 192 P.2d 643 (1948) (where illness of defendant's attorney so severe as to prevent his attending to legal business was shown, "unavoidable casualty or misfortune" was established).

28. The New York Court of Appeals has held that the power of a court to give relief from judgments taken through "mistake, inadvertance, or exeusable neglect" is unlimited—that it has inherent power to open any judgment, upon the showing of sufficient reason, in the furtherance of justice. Ladd v. Stevenson, 112 N.Y. 325, 332, 19 N.E. 842, 844 (1889).

appeal is needed so that the client of the deceased attorney has time to act to protect his interests. "Notice to appoint" legislation is needed so that the client will have notice of his attorney's death and will have time to act before he suffers a default judgment or a dismissal for failure to prosecute.