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Discrimination Concerns at the University of Alabama

When the fall 2013 new member recruitment period at the University of Alabama failed to result in any new member offers being made to African American women who had expressed an interest, it made national news. The timing could not have been worse. It was the 50th anniversary of the March on Washington, the Birmingham church bombing that killed four young girls and George Wallace's stand in the doorway unsuccessfully preventing the integration of the University of Alabama. It was a perfect storm of reminders of past injustices, how far we have come, and unfortunately how far we have yet to go. Previously, only one African American woman had ever joined a traditionally white sorority at University of Alabama.

University of Alabama President Dr. Judy Bonner wasted no time in announcing that was unacceptable, and decreed that the chapters of the 17 National Panhellenic Conference organizations at the University of Alabama should immediately reconsider those minority students who were denied new member status and begin a period of Continuous Open Bidding ("COB") intended to ensure the integration of the Greek system.

Rumors abounded about what happened -- Interference by alumnae? Or by The Machine, a powerful secret society? Concern about how men's groups would react? Did the University President have the right to decree a "do over"? Or impose COB?

Whatever the powers of the President may or may not have been, or the facts that led to her decision, the national and international women's groups involved immediately recognized the situation was unacceptable. All of their national and international organizations have anti-discrimination policies specifically prohibiting membership discrimination on the basis of race. Many sent national representatives to Tuscaloosa and all cooperated with the President's decision. Within a week, eleven bids were extended to minorities, four accepted, and some of the Alabama chapters had their first ever African American members.

Questions remain about how far a university can go in mandating membership in a private social organization. Recall the controversy at Hastings Law School that resulted in the Supreme Court decision in *Christian Legal Society v. Martinez*[1] or the bitter debate caused by the imposition of an "all comers" membership policy at Vanderbilt.[2]

Suffice it to say that in this day and age, it cannot successfully be argued that a private social organization at a university could justify a whites only membership policy or practice. If such a practice could be proven, no court would have difficulty in finding that it was a violation of law.

Frequently, fraternities and sorority houses offer some of the best housing on campus. Any chapter that discriminates on the basis of race could find itself in violation of the law.

Federal law prohibits discrimination based on race, color, religion, or national origin in public accommodation. (42 U.S.C. § 2000a-1). States have adopted similar anti-discrimination provisions. Federal courts long ago put to rest any challenges to the right of the federal government to prohibit such discrimination when it involved protecting interstate commerce. There can be little doubt that colleges and universities and fraternities and sororities in their recruitment of students across state lines are engaged in interstate

Note on "The Machine"

The Machine is a secret society that has long been influential on the University of Alabama campus and in Alabama politics. A current controversy, which has resulted in the filing of a contest of election lawsuit, attacks conduct apparently related to The Machine in a Tuscaloosa City Board of Education election. In that case, the allegations are that votes cast by fraternity members in the Board of Education election may have made the difference, and are claimed to have been influenced by "offers to bribe, bribery, intimidation or other misconduct calculated to prevent a fair, free and full exercise of the elected franchise." Among other allegations are that newly registered fraternity and sorority members were transported to polling places by limousine and were promised free drinks in a local bar if they wore their "I Voted" sticker.[1]

• Timothy M. Burke

1 *Horwitz v. Kirby*, Cir. Ct., Tuscaloosa Cty., Alabama, Case No. CV-13-901093.00.

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commerce.[3] A fraternity or sorority, albeit a private social organization, if found to have engaged in illegal discrimination, can end up not only facing a court order to cease such conduct, but potentially could be called upon to pay damages and the attorney's fees of the plaintiff.

While federal law does prohibit discrimination on the basis of gender, a specific provision of the federal law exempts social fraternities and sororities from that prohibition and permits them to continue to exist as single gender organizations. However, that exception only applies to gender. Similarly, a college or university, particularly a public one, which extends recognition and the use of its facilities to private social organizations, like fraternities and sororities, or leases land for a chapter house or reserves exclusive wings in a dormitory for chapter members to live together, cannot allow discriminatory member practices that violate state or federal law to continue.

Given the First Amendment, a public university may not be able to expel a student for advocating racially restrictive policies or engaging in racist speech, but it is unlikely that any court would require the university to extend the benefits of recognition to a student club that imposed racially restrictive membership.

The reality is that diversity of American college and university campuses is only going to continue to grow. Studies indicate that the percentage of white high school graduates will actually decline over the next decade. At the same time, the percentage of Hispanic, Asian and Asian Pacific students will soar. As a result, those fraternity and sorority chapters that embrace diversity in their membership selection are likely to be the most successful on the college campuses of the future.

There is nothing wrong with making membership selection based on the high moral and ethical standards espoused in the governing documents of each organization or on the commitment of potential new members to the community service and philanthropic projects the chapter promotes. But there is no reason to believe that such standards and causes are not shared across racial, ethnic, religious and sexual orientation boundaries. A chapter that welcomes the diversity of the campus in its membership will enhance the educational experience of its members by better preparing them for success in an increasingly diverse world away from campus. The situation at Alabama is a tremendous reminder that instead of merely having anti-discrimination policies on record, fraternities and sororities should actively embrace diversity in their recruitment processes.

• Timothy M. Burke

1 *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 319 Fed. Appx. 645 (2010).
2 "Vanderbilt 'All Comers' Policy and its Implications for Greek Organizations," Timothy M. Burke, *Fraternal Law*, March 2012.
3 See *Hamilton Chapter of Alpha Delta Phi v. Hamilton College*, 128 F.3d 59 (2nd Cir. 1997).

Legal Writer

Writing in plain English is difficult for lawyers. We started in law school being brainwashed by legalese. One problem was that we read cases by old dead judges, who learned by reading cases written by older, deader judges. All weren't Holmes or Cardozo. Most were atrocious writers.

William Howard Taft (who believed he was a good writer!) once started a Supreme Court opinion with a 356-word sentence. In one 6th Circuit opinion, Judge Taft wrote a 10-page paragraph. It contained 1,947 words and 66 sentences.

But lawyers—and everyone else—should write in plain language.

Plain English is simply this: write in the most readable manner for your audience to understand. Make it easy on the reader. That doesn't sound difficult, but as lawyers, we have fallen into bad habits. Foolish habits are often hard to break. At minimum, you can improve your writing by making some elementary changes:

Shorter sentence length. Sentence length is the first major element of readability. Sentences should average no more than 18 words, and never go over 35. One exception to the 35-word limit: lists, if done correctly.

Fewer passive sentences. Active voice is another element of readability. We talk in the active voice. Sometimes passive is unavoidable, but usually not. Write *the court reversed the judgment*, rather than *the judgment was reversed.* When you use passive, do so for a reason. State your bad facts in passive, your good facts in active. It will make a big difference.

Fewer verbs turned into nouns. Question words ending in *-tion* or *-ment*. Some simply cover up perfectly good verbs. How about Smith Company *determined*, rather than *made a determination*? The plan *improved* the roadway, rather than *resulted in an improvement to* the roadway? Or you *moved* for summary judgment, not *filed a motion* for summary judgment? Putting nominalizations

back into verbs greatly improves your writing—saving not only words, but also awkward constructions.

Shorter paragraphs. We tend to run on and on. There is no specific rule, but don't ever go more than a half page—the reader has to see when it's safe to take a break.

More headings. Headings are signposts for the reader. And we should use them for the same reason we try writing shorter sentences and shorter paragraphs—*to communicate quickly and clearly to our readers*. Instead of *Facts* or *Argument*, write *The Fire and the Aftermath* or *No Miranda Violation*.

Easily readable typefaces. Stop using Times New Roman. It was designed for newsprint, where the ink expands. But our laser printers don't bleed, and print TNR too small, especially the periods and commas. Always use a serif font for long text. Never use `Courier unless you are attempting a joke`—it's the most unreadable typeface. Use Georgia, Palatino, or Garamond. Those are the best that we all have free on our WPs. There are many other good fonts you can buy; but don't do that without expert help. Use a san serif font—Arial, Helvetica, or Verdana—for headings, but not text. The serifs direct the readers' eyes rightward, the direction we read.

One word, not three. The goofy couplets, *null and void, fit and proper, will and testament, sell and convey, due and payable*, haven't been necessary for almost a thousand years, but we forgot to change. Using both gives your opponent, or a court, the chance to contend that they must mean two different things. But they mean exactly the same thing—they were originally English and French versions of the same word. See *Kohlbrand v. Ranieri*, 823 N.E.2d 76 (2005).

No lawspeak. *Hereinafter, Aforesaid, Thereinafter, Whereas*, and the like are banned, unless you are trying to be funny.

These are just a few quick ways to make your writing better. You can find a more in-depth discussion of all the above, plus more, in *The Legal Writer: 40 Rules for the Art of Legal Writing*.

Readability

I always show the readability scores for the column. Statistics for this column: 11 words per sentence, 3% passive voice, and grade level 6.8.

• Mark P. Painter

Mark Painter served as a judge for exactly 30 years (Ides March 1982 to Ides March 2012), including the Ohio Court of Appeals for 14 years, 13 years on the Hamilton County Municipal Court, and the last three on the United Nations Appeals Tribunal. He now is Of Counsel with Manley Burke LPA in Cincinnati. He is the author of more than 400 nationally published decisions, 145 legal articles, and 6 books, including The Legal Writer: 40 Rules for the Art of Legal Writing, which is available at http://store.cincybooks.com, or amazon.com. A shorter version of this article appeared in the Cincinnati Bar Association Report in November 2013.

No Greek Letters Allowed on One Public Campus

A student group at a public university in Utah has been told that it may not use Greek letters in its name. Why? Because the university believes that Greek letters will give the public the impression that it is a "party school" and, according to a lawyer for the university, the school has a "compelling interest" in avoiding that perception.

But, as Dixie State University student and founder of Phi Beta Pi, Indigo Klabanoff points out, the school has already chosen to recognize "The Organization of Good Parties" and other student organizations that explicitly promote partying in their listings on the school's website.

So, there seems to be a little bit of a disconnect here.

As my colleague at the Foundation for Individual Rights in Education (FIRE), Susan Kruth, wrote in the waning days of summer:

For nearly a year, Dixie State University senior Indigo Klabanoff has been working to start a local sorority at her public Utah university that would be dedicated to providing services for the community and learning opportunities for its members. Dixie State administrators have flatly stated that Klabanoff's sorority, Phi Beta Pi, will not be approved as an officially recognized student group as long as it has Greek letters in its name. The university went so far as to retroactively amend its student club bylaws to prohibit such groups from recognition.

FIRE wrote to the university in August:

FIRE recognizes Dixie State University's desire not to be seen as a "party" school, and the principles by which it declines at this time to establish chapters of national fraternities and sororities. The maintenance of this image, however, must be balanced with its students' rights to freedom

> of expression and association in accordance with Dixie State's legal and moral obligations under the First Amendment. FIRE asks that Dixie State promptly reject this unconstitutional restriction on the rights of its students to form clubs using Greek letters and to assemble in exercise of their First Amendment right to freedom of association. Dixie State must amend the ICC bylaws in accordance with the First Amendment and, if Phi Beta Pi meets all requirements for recognition, it must recognize the organization.

Even after FIRE became involved in the case, Dixie State has still refused to budge and Indigo, a senior, is running out of time to make a university-recognized Phi Beta Pi a reality. The unrecognized group has a Women's Career Conference planned for next month and they would love to host the event with the school's support. For the conference, that support would mean a waiver of the $225 fee to reserve a room on campus.

Dixie State's creative approach to keeping Greek organizations off campus is not surprising to those of us who work in student rights. Earlier this year, FIRE became involved at Trinity College in Connecticut after the administration instituted a new social code that requires opposite sex membership quotas for all campus groups and prohibits selective membership. Since most national fraternities and sororities are single-sex by charter and selective by nature, this effectively expels such organizations from campus. Trinity's approach is one of the sneakier ways I've seen a college to try to placate former-Greek donors but at the same time undo the college's Greek system. In contrast, Dixie State's war on an entire ancient alphabet is remarkably direct.

As FIRE's Peter Bonilla said in a press release on October 30, 2013:

> In this instance, Dixie State students seek only to establish a normal student club with a Greek letter name. But administrative hostility towards students interested in Greek life is becoming a disturbing trend nationwide. Trinity College prohibits students from participating in unrecognized social organizations. Wesleyan University tried to ban students from "taking meals" in houses owned by unrecognized groups. And the University of North Carolina at Wilmington's kangaroo-court treatment of a fraternity sparked the legislature to pass a bill guaranteeing students the right to counsel in campus hearings. While people may object to aspects of Greek life on many campuses, sacrificing freedom of association and expression is not the answer.

• Greg Lukianoff

Greg Lukianoff is the president of the Foundation for Individual Rights in Education (FIRE) and the author of Unlearning Liberty: Campus Censorship and the End of American Debate. Follow him on Twitter @glukianoff.

Transgender Membership and Title IX

Many fraternal organizations have encountered the situation where a chapter wishes to extend membership to a transgender student. Others have had alumni who notified the national organization of a legal gender change. What should an organization do? And will this decision affect its single-sex status?

Some organizations have interpreted Title IX of the Education Amendments of 1972 ("Title IX")'s language as a requirement that they remain single-sex and that they take a strong stance against inclusion of anyone who may potentially violate their single-sex status, especially transgender members. This interpretation is incorrect and is preventing these organizations from benefiting from potential new members, current members, and alumni who are transgender.

What is Title IX?

Congress enacted Title IX to achieve sex equality in educational institutions that receive federal funding. Title IX requires these institutions to provide equal opportunities to both male and female students within its education programs and activities.

How Does Title IX Affect Fraternities and Sororities?

In short, Title IX does not affect fraternities and sororities. Rather, it regulates the university. In 1974, the Department of Health, Education, and Welfare tried to apply Title IX to fraternities. In response, Indiana Senator Birch Bayh proposed an amendment to Title IX, exempting the membership practices of fraternal organizations from the statute's reach. He made expressly clear that "[f]raternities and sororities have been a tradition in the country for over 200 years . . . [and] must not be destroyed in misdirected effort to apply Title IX."[1]

The amendment states in relevant part: "[Title IX] shall not apply to membership practices--(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education . . . ."[2] If the amendment did not exist, would a university lose federal funding if it recognized a "social fraternity?" The question is unanswered, and it may remain that way. Because of Senator Bayh and the amendment, the Department of Health, Education, and Welfare was never able to deter-

mine whether or not university-recognized social fraternities and sororities violated Title IX.

What Does the Amendment Do?

The amendment permits a university to recognize social fraternities and sororities without the risk of losing its federal funding. Without it, a college could only safely recognize professional and honorary fraternities.

Congress specifically designed Title IX to bind the university, not the fraternal organization. Under the language of Title IX, to retain federal funding, a university must recognize only social fraternities and sororities that have a membership primarily of students attending an "institution of higher education." Title IX's language says nothing about fraternal organizations and their single-sex status. Importantly, it does not impose any requirement on fraternities and sororities to remain single-sex to benefit under Title IX's amendment. It simply permits a university to recognize single-sex fraternities and sororities without violating Title IX and goes no further than that. *All* aspects of membership decisions, then—including whether or not to admit transgender students—remain solely with the organization.

What Should Fraternities and Sororities Do?

Because Title IX preserves their ability to define their membership, fraternal organizations are empowered to address the inclusion of transgender members. For most, membership in a fraternity or sorority begins at initiation, the requirements of which are set forth in an organization's inter/national bylaws and governing documents. These documents also control an organization's single-sex status. Fraternal organizations should use these governing documents to clarify how transgender persons may participate in all levels of membership.

Alumni Members

Title IX does not reach a fraternal organization's alumni because it covers only the programs and activities on college campuses. Therefore, anything after graduation, including the relationships of alumni members with chapters and with national organizations, is not affected by Title IX. Fraternities and sororities should make clear that alumni members who identify as transgender do not lose their membership rights.

Current Members

Inter/national bylaws and governing documents are generally silent as to whether or not an initiated member must maintain his or her identity as "male" or "female" to remain a member. Many documents, though, provide a basis for member removal "for cause" or for "conduct unbecoming a member." Fraternities and sororities should determine that an initiated member who transitions does not violate the governing documents that are silent on this issue.[3] This is important not only because transgender persons should retain their membership rights, but also because a member who identifies as transgender has not engaged in unbecoming conduct.

Potential New Members

Most organizations do not define the terms "male," "man," "female," or "woman" in their documents. This creates confusion for potential new members who are transgender. Fraternal organizations should define what these terms mean within their bylaws and governing documents so that transgender individuals can understand if they are permitted to become members.

Other Considerations

Can fraternal organizations say no to transgender members, then? Under the language of Title IX, fraternal organizations have full latitude to say yes or no to transgender members. Constitutionally speaking, however, the answer becomes less clear.

A fraternal organization has a First Amendment right to determine who is and is not a member. In the same way that a fraternity can say "no women" and a sorority can say "no men," both organizations may also say, "No men/women means no transgender members." An organization may therefore decide that its history and its governing documents strongly oppose the idea of transgender membership on any level. If your organization does take this approach, you should keep a few things in mind.

First, the current constitutional test—for better or for worse—is extremely difficult to satisfy. In other words, you can always argue your constitutional right; you just may not win. As past authors in *Fraternal Law* have noted, fraternities must truly "stand for something" if they wish to successfully assert a First Amendment right to association.[4] Further, when it comes to transgender members, fraternal organizations must also

Side Note by Timothy M. Burke

The issue of transgender rights is receiving increasing attention. The October 2013 *ABA Journal* carries an article focusing on the rights of transgender children and how local school districts are dealing with the issue. As *Fraternal Law* goes to press, the United States Senate is actively considering a bill that would ban employment discrimination on the basis of sexual preference or gender identity. More than a dozen states already have laws in place prohibiting discrimination on the basis of gender identity. This remains a developing area of the law and its impact on single sex fraternities and sororities is not yet clear.

be aware of the non-discrimination policies that affect the specific chapter wishing to offer membership to a transgender student.

Some states and cities and many universities have enacted laws and regulations prohibiting discrimination on the basis of "gender identity and expression." Denying membership to a transgender student, therefore, may possibly violate one of these laws or regulations. In fact, many states and universities have challenged various organizations and their membership practices as violating their non-discrimination policies. In their defense, these organizations argued that they had a constitutional right to determine their membership, and most of them failed to pass constitutional muster.[5]

Second, just because some universities and some states may not prohibit discrimination on the basis of "gender identity and expression" is not a strong basis to deny membership to a transgender student. Taking a state-by-state, university-by-university approach to transgender membership will create inconsistent results—opening up a fraternal organization to potential liability and arguably weakening its First Amendment associational claim. A fraternal organization's governing documents should not be that malleable, with differing meanings from campus to campus and state to state.

Finally, just because you *can* do something does not mean you *should* do something. The Boy Scouts of America are a good example.[6] They were one of the few organizations that was able to withstand a constitutional challenge and prevent gay individuals from becoming members. Although they may have had the constitutional right to make that decision, public opinion has not treated them well.

Tim Burke advised nearly two decades ago that membership decisions should be made "on the basis of the criteria contained in [an] organization's governing documents" and that denying membership based on broad categories "into which an individual is pigeonholed . . . is an invitation to legal trouble."[7] This advice is particularly relevant to the issue of transgender membership. Because transgender issues are relatively new to most people, fraternal organizations may be able to successfully prohibit transgender members without resistance for the time being. As transgender people continue to gain acceptance, however, it is unlikely that their exclusion from fraternal organizations will continue to go unnoticed.

Conclusion

As a matter of policy, transgender students should not have to guess and hope their way into fair consideration for membership in a fraternal organization. Fraternities and sororities should make clear what is required for transgender people to become members and to maintain membership as current members and alumni.

• Stevie Tran

Stevie Tran is a 2013 graduate of Hofstra University School of Law. Her note *Embracing Our Values: Title IX, the "Single-Sex Exemption," and Fraternities' Inclusion of Transgender Members* was published in the Winter 2012 issue of the Hofstra Law Review. She recently passed the July 2013 New York bar exam.

1 120 CONG. REC. 39,993 (1974).
2 20 U.S.C. § 1681(a)(6) (2006).
3 David L. Westol, *Gender Then and Gender Now: What Happens if*, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Jan. 2009, at 4, 4, *available at* http://www.manleyburke.com/wp-content/themes/manleyburke/inc/107---January-2009.pdf.
4 Greg Lukianoff, *To Survive, Fraternities Need to Stand for Something, Anything*, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Sept. 2011, at 1, 1-2, *available at* http://fraternallaw.com/wp-content/uploads/2012/01/september-2011-issue-117.pdf.
5 See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984); Pi Lambda Phi Fraternity v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000); Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007)
6 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000).
7 Timothy M. Burke, *Editor's Note*, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Sept. 2000, at 3, 3 *available at* http://www.manleyburke.com/ wp-content/themes/manleyburke/inc/073---September-2000.pdf.

Paddletramps Case Ends

It's over. At long last, the Paddletramps case is done. The trademark rights of fraternities and sororities have been tested in a long and complicated litigation but they have been vindicated and strengthened.

The United States District Court's decision reaffirmed the trademark ownership rights of Greek organizations, expanded the traditional definition of trademark to include nicknames or symbols that Greek organizations use in trade and successfully challenged a long-time violator of Greek trademark rights resulting in a court order prohibiting continued violations.

The trial court's decision was affirmed last December by the 5th Circuit United States Court of Appeals. On October 7, 2013, the opening day of the new Supreme Court term, the United States Supreme Court denied certiorari, meaning, the Supreme Court will not hear the Paddletramps appeal. The victory by national fraternities and sororities over the trademark infringer is now final.

• Timothy M. Burke

The Goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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