



# FRATERNAL LAW™

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## ALCOHOL-FREE FRATERNITY HOUSES

**S**igma Nu and Phi Delta Theta have both resolved to discontinue the consumption of alcohol in chapter houses effective the 1st of July, 2000. The parallel actions these two strong fraternities have taken is what they expect to be a leadership position.

Both fraternities already have chapter houses that are alcohol-free and they are encouraging chapters to adopt an alcohol-free policy on their own initiative between now and the 2000 deadline.

They adopted a three-year phase-in period in order to provide educational programs for their chapters and the hope that other fraternities would follow in their path with encouragement from college administrations.

In a letter sent to all college presidents where either fraternity has a chapter, the presidents of both fraternities wrote " \* \* \* we are announcing to you that Sigma Nu and Phi Delta Theta have made a joint commitment. By the year 2000, every chapter of these fraternities will have alcohol-free facilities, or they will not continue to exist as a charter group. We are serious about this initiative. Between now and the year 2000, each chapter will be expected to take specific steps to reach this goal."

The letter signed by Dr. Robert B. Deloian, President of Phi Delta Theta and E.G. White, President of Sigma Nu, solicits support from college presidents across the country.

They also wrote to the college presidents the optimistic hope that "by the year 2000, we anticipate the involvement of all college fraternities."

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**Sigma Nu already has 12 chapters which are alcohol-free and Phi Delta Theta has 11 chapters which are alcohol-free.**

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Both fraternities are seeking to stress their fundamental values through a de-emphasis of alcohol in the chapter houses. In the sixties, alcohol became of much greater importance in fraternity houses than it had been previously. This was, in part, a product of the elimination of prior college prohibitions on alcohol in the dormitories. Fraternity houses felt a need to compete with dormitories and perhaps became too effective in their competitive efforts.

"We want to give renewed strength to the core principles of our founders," said Dr. Deloian. "Our objectives are friendship, encouragement of academic achievement and development of leadership and community service. Abuse of alcohol among the college undergraduates endangers these principles."

Sigma Nu already has 12 chapters which are alcohol-free and Phi Delta Theta has 11 chapters which are alcohol-free. There has been a noticeable improvement in academic achievement among the chapters that are now alcohol-free.

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**Both fraternities are giving incentives to chapters that choose to go alcohol-free before the year 2000.**

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A study by the Center on Addiction and Substance Abuse at Columbia University found that alcohol is a factor in 40% of all academic problems and in 28% of college dropouts. The same study reported that 42% of all students surveyed engaged in binge drinking during the two weeks prior to the survey.

Columbia social scientists have been conducting an annual study of incoming freshmen for 25 years at 460 colleges and universities. Among their findings is that the number of college freshmen who do not drink increased to 47% in 1994, from 21% in 1981. A study by the Fund for the Improvement of Post Secondary Education reports that 33% of entering college students would like to live in alcohol-free residential facilities.

Phi Delta Theta has 180 chapters with 7,500 undergraduate members. Sigma Nu has 213 chapters with 8,000 undergraduate members.

Lissa Bradford, Secretary of the National Panhellenic Conference and Co-Chair of the joint NPC-IFC Commission on Substance-Free Housing, cheered the decision of these two fraternities with a pledge that the NPC would urge the chapters of its 26 member groups to give full support to the movement toward substance-free undergraduate housing in fraternity houses. NPC groups have been substance-free for as long as anyone can remember.

To look at the relationship between in-house alcohol consumption and poor academic performance, ungentlemanly behavior, and chapter financial problems, makes this decision inevitable according to Maurice E. Littlefield, Executive Vice President of Sigma Nu.

Chapters may still have events with alcohol, but these events will be away from the fraternity house with an independent contractor providing the space, as well as food and beverages. When fraternities use a third-party vendor for alcoholic beverages, they typically include in the

contract a written requirement that the third-party vendor accept responsibility for checking the ages of those who consume alcohol.

Both fraternities are giving incentives to chapters that choose to go alcohol-free before the year 2000. Both fraternities are developing educational programs to encourage chapters to choose to have alcohol-free chapter houses.

● Robert E. Manley

## JUST WHAT ARE FRATERNAL EDUCATIONAL AND CHARITABLE PURPOSES ANYWAY?

### Introduction

One of the most common fraternal organization client inquiries has always been: "What kind of activity sponsored by the fraternity will the Internal Revenue Service recognize as eligible for charitable foundation funding and/or set aside funding? Is there a difference between these two types of funding?" The frequency and importance of these inquiries has of course increased dramatically since the recent, well-publicized fraternity and fraternal foundation case with the Internal Revenue Service and the subsequent dissemination of certain excerpts of the closing agreements in that case.

In my practice I am often requested to provide a "list" of the types of programs that are considered "safe" by the Internal Revenue Service for this kind of funding. There are certain points that need to be made in this connection. First, there is no completely exhaustive list as such because in my experience, each organization's educational and charitable programs are somewhat unique -- the best way to determine qualifying programs for any particular organization is to review carefully the chart of accounts and other applicable records for that organization. Second, the funding of no program, even the most obviously charitable and educational, is "safe" if the Internal Revenue Service's guidelines as to procedural matters are not followed -- this would include the proper segregation of set aside funds in the case of set aside funding and appropriate grant agreements being executed in the case of foundation funding. With this preamble, there are, however, certain areas which the Internal Revenue Service has either approved in pronouncements in the past or which have been widely accepted by the Internal Revenue Service in the audit process. This column will discuss some of these areas and include some guidelines as to the types of supporting documentation which should be in place.

### Qualifying Programs

1. Chapter Consultants -- This is usually one of the largest programs sponsored by a fraternal organization, both in terms of expense and in time consumed in administering the program. The Service will usually allow both set aside and foundation funding of the educational portion of the expenses of this type of program, provided the chapter consultants keep contemporaneous written time records showing the portion of their time devoted to educational subjects such as leadership, scholarship, health and safety issues and the like. The format of the report used by the chapter consultants will be very important in eliciting responses which reflect the amount of educational time that we know these chapter consultants spend on these matters. Subjects such as ritual, rush, social pursuits and extension are not considered educational under these guidelines and should not be counted in determining the appropriate funding percentage. Some organizations tabulate these reports in-house and some have outside advisors help them with the tabulation process -- in either case it is recommended that a written opinion be secured for all large set aside and foundation funding expenditures.
2. Conventions, Leadership Conferences and Similar Meetings -- The Service has also traditionally allowed such funding of the educational portion of national conventions, leadership conferences and similar gatherings. However, it is important that the educational percentage of the particular meeting involved be established

through a detailed analysis of the agenda and written materials used for each convention or conference. Again, since there is usually a very substantial expenditure involved in the case of conventions and other national and regional meetings, many organizations do ask their counsel to prepare a written allocation opinion; similar topics as described under Number 1 above are considered educational and non-educational, respectively, in nature. Under the recent closing agreement guidelines, the Service has indicated that no educational time shall be allocated for recreational events or events at which a meal is served. While the former rule is certainly understandable, the latter can pose problems in terms of achievement awards, leadership speeches and the like which often take place at these events -- it is recommended, therefore, that the meal at which these events typically occur be separated from the speech, awards presentation or other educational event so that this "educational time" is not lost.

3. Loans on Local Chapter Housing -- This is one of the areas where set aside and foundation funding rules differ. Loans on local chapter housing (not other types of loans) may be made from set aside funds as a qualifying program but are not considered a program expense if made from foundation funds (such loans would be considered investments by the foundation and thus subject to being tested by investment criteria). The good news is that such loans are an ideal way to use up set aside funds since they are usually large and the documentation therefor is totally clear. The bad news is that although the interest on such loans does not in itself have to be set aside because it is considered member income, principal repayments made on such loans must be recycled back into the set aside fund. Nevertheless, I would recommend that most fraternal organizations consider using housing loans as the first qualifying expenditure from set aside funds.
4. Written Materials, Videos and Similar Publications Separate and Apart from Meetings -- Many fraternal organizations would like to fund publications, videos and the like from foundation or set aside funds. Since the decision of the U.S. Tax Court as affirmed by the Sixth Circuit Court of Appeals in the Phi Delta Theta case many years ago, the rule of thumb has generally been that only such materials which qualify as

100% educational in content by Internal Revenue Service standards should be so funded. This should include such items as health and safety manuals, anti-alcohol materials, risk management videos and the like, and would definitely not include a typical pledge manual and similar publications. It is recommended that no educational allocation be attempted in this area such as is generally accepted under Numbers 1 and 2 above. When in doubt in this particular area, it is best to be conservative. This rule should not be confused with the fact that a fraternal foundation is allowed to reimburse its related fraternity for its pages in the fraternity magazine which are used to communicate with existing and potential donors: these are considered in the nature of fund raising and cultivation expenses for the foundation, not program expenses.

5. Charitable Contributions, etc. -- Of course, both set aside funding and foundation funding are available for very straightforward items such as charitable contributions to other recognized charities qualified under Code Section 501(c)(3), scholarships and student loans (both of which may be confined to members of the particular organization as long as they are awarded on an objective and nondiscriminatory basis according to an established procedure). It has been stated that the Service viewed these types of expenditures very favorably in recent audit situations.
6. Administrative Grants -- Many fraternal organizations would like to fund various fraternity overhead and administrative expenses which are allocated to its charitable and educational activities -- for example, the fraternity may employ a person who spends part of his or her time on scholarship matters and would like to seek foundation funding for this position. While this needs to be extremely carefully handled and documented, and the employee must keep contemporaneous written time records to establish the time spent on these matters, this too is usually a permissible qualified expenditure from foundation and set aside funds.

## Conclusion

These are just a few of the most common areas considered for foundation and set aside funding by most or-

ganizations. A future column will discuss some of the more unusual or less well-known funding areas. However, it is generally my recommendation that with respect to both set aside and foundation funding, an effort be made to fund as many larger and well-established programs as possible. This will enable the organizations to handle any possible Internal Revenue Service audit more successfully since they will have fewer programs and financial points of contact for the Service to investigate. Hopefully, the programs will all be of the type that are well-established and qualified within Internal Revenue Service guidelines. This is preferable, in this writer's opinion, to having a myriad of smaller expenditures which require detailed allocation procedures and documentation. I also like to recommend that the boards

of the foundation and fraternity consult with each other to develop a somewhat coordinated educational program and then determine whether foundation funding should be sought for a particular program or if that program will be funded from set aside funds—by doing this, the more conservative, well-established programs can be funded from the foundation, since an honest mistake in funding could conceivably endanger the foundation's tax exempt status, whereas an error in judgment concerning set aside funds simply means some taxes might have to be paid. While the latter is not a pleasant alternative, it is certainly less serious for the organizations on a long-term basis.

● Barbara Schwartz Bromberg

## DRUG RAID RESULTS IN SEIZURE OF FRATERNITY HOUSE

In the early morning hours of February 3, 1997, representatives of the Southeastern Counties of Ohio Narcotics Task Force assisted by the Athens, Ohio Police Department and law enforcement officers from Ohio University raided the Phi Gamma Delta Fraternity House. Seized in the raid were several pounds of marijuana, some hallucinogenic mushrooms, and several dozen pieces of drug paraphernalia, including digital and postal scales, and marijuana pipes. Several students living in the house were cited for misdemeanor violations. At least three members pled guilty to felony drug counts.

**Ohio law permits contraband, including property that may not be in and of itself unlawful but has been used in the furtherance of an unlawful activity, to be seized and sold.**

That, however, was only the beginning of the bad news. Within 72 hours of the raid, a notice of property seizure was served on the president and secretary of the Phi Gamma Delta Chapter. Ohio law (Ohio Revised Code Section 2933.42) permits contraband, including property that may not be in and of itself unlawful but has been used in the furtherance of an unlawful activity, to be seized and sold. The proceeds of the sale are kept by the agencies involved in the seizure to help fund future drug enforcement activities. If the facts justify carrying a seizure to its ultimate conclusion, what it can mean is that the seized property, in this case the fraternity house, is lost to its rightful owner. Obviously, the financial consequences can be stunning.

As draconian as this result sounds, it would not be unprecedented. In 1991, drug enforcement officials of the United States government acting under a federal law quite similar to the state statute the Ohio officials are relying upon, seized three fraternity houses at the University of

Virginia. Those houses actually had to be bought back from the federal government by the fraternities involved. See *Fraternal Law*, Number 37, September 1991 and No. 38, November 1991.

Kevin Conners, the Columbus attorney defending the house corporation, was previously an Assistant United States Attorney who prosecuted forfeitures for the federal government. He reports that most, if not all, states now have similar forfeiture laws.

The law in Ohio does not result in the automatic forfeiture of the house following the issuance of a notice of seizure. The notice of seizure is simply the first step. The local county prosecutor must decide whether or not to proceed further, and should he make that decision, the chapter house corporation will have the ability to present an "innocent" owner defense to the loss of the house. Ohio law provides "no property shall be forfeited pursuant to this provision if the owner of the property establishes, by a preponderance of the evidence, that the owner neither knew, nor should have known after a reasonable inquiry, that the property was used or likely to be used in a crime." While this provision appears to run contrary to the American tradition of innocent until proven guilty, it does afford an opportunity to the property owner to save the property.

Like many fraternity and sorority houses across the county, the Phi Gamma Delta house at Ohio University was owned by a separate house corporation. The house is on private land, close to but not on the Ohio University campus. The fact that the state law enforcement agent served the notice of seizure on chapter officers may be indicative of the fact that he failed to understand who the real owner of the house is. A careful analysis by the county prosecutor should convince him that the house corporation could not be expected to have knowledge of all wrongdoings in the house

and that knowledge by a chapter officer is not knowledge by the house corporation.

The chapter house corporation will likely be aided in its defense by its ability to document steps that it has taken in an attempt to keep the house drug-free. David Slater, the president of the chapter house corporation, reports that the house corporation has insisted on signed contracts with each of its active members living in the house that included a drug-free provision and secured pledges from the chapter officers to enforce those provisions. In fact, the house corporation has a history that it can point to of having evicted individuals found to be violating these commitments in the past.

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**National fraternities, house corporations, and chapter officers must be serious-minded about the obligation to ensure that their houses are drug-free.**

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Whether the county prosecutor and the state law enforcement officials are determined to proceed with forfeiture, and if they do, if they can succeed, remains to be seen. Whether the forfeiture action goes forward or not, this case ought to stand as a bright light warning to fraternities and sororities that a chapter house is not a sanctuary immune from the enforcement of drug laws. National fraternities,

house corporations, and chapter officers must be serious-minded about the obligation to ensure that their houses are drug-free.

Given the pervasiveness of drugs in our society, it is not realistic to assume that the record will be perfect in that regard. A fraternity house corporation which can point to a clear anti-drug policy and a record of enforcement behind it will best be able to defend itself against a forfeiture.

A clearly and consistently articulated anti-drug message ought to be a part of every fraternity's risk management policy. Provisions ought to be made in housing contracts permitting a fraternity to discipline and evict a member from the house for violation of fraternity policy, particularly, those with regard to illegal possession, and especially, sale of drugs. If confronted with a violation, a fraternity must have a consistent policy of dealing with violators. Chapter officers cannot avoid known violations of the policies unless they wish to jeopardize not only the well-being of the chapter but ultimately the ownership of the Chapter House itself.

The bottom line is that a national fraternity, chapter house corporation, chapter officers and chapter members themselves must understand and accept the obligation to obey drug laws.

● Timothy M. Burke

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## ALCOHOL DEATH AT CLARKSON

On Saturday night, February 8, the members of the Theta Chi Chapter at Clarkson University in Potsdam, New York, invited 21 men who were interested in joining the fraternity to their off-campus chapter house. All of the invited men were under the age of 21. Police reports indicate that the 21 guests were given liquor in bottles, along with beer. According to the local police chief, the members' objective was to get the pledges "to throw up and to see who they could make throw up first." At some point in the late evening or early morning hours, 17 year-old Binaya Oja, a freshman at Clarkson, was put to bed on a couch in a third floor room of the chapter house. Oja was found unconscious the next morning by fraternity members who tried unsuccessfully to revive him. He was later declared dead at a local hospital.

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**The charges included hazing and reckless endangerment.**

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On February 13th, following a police investigation into the matter, 12 individuals, including all nine of the undergraduate chapter members and one young alumnus, were charged individually with 43 misdemeanors under New York State law. The charges included hazing and reckless

endangerment. If convicted, each individual could be sentenced to a maximum of two years in jail.

The Grand Chapter of Theta Chi Fraternity revoked the charter of the Clarkson chapter, effective on February 15th. All chapter members had to move out of the house by March 1st, most back into on-campus housing facilities. On February 19th, the large bright red Theta Chi letters and the name on the front of the chapter house were painted over. It is likely that the house will be sold.

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**According to the local police chief, the members' objective was to get the pledges "to throw up and to see who they could make throw up first."**

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In less than one month's time, reckless conduct on the part of chapter members and others resulted in the loss of one young man's life, the issuance of criminal charges against all of the chapter members and the closing of a chapter that was colonized nearly 45 years ago.

● Gary E. Powell

## THE SAGA CONTINUES...

On August 27, 1988, Rueben A. Hernandez was critically injured when his car was hit by a car driven by an individual who had just left a Delta Tau Delta pledge party at the University of Arizona. The driver, a minor, estimated he had "no more than ten" beers that evening. Almost two years after the accident, Hernandez died from his injuries.

During the almost decade-long litigation, the courts have rewritten the law as it relates to fraternity liability in Arizona.

First, in 1994, the Arizona Supreme Court held that fraternities were not entitled to social host immunity from liquor liability when they furnished alcoholic beverages to minors. (See March 1994, *Fraternal Law* #48.) In 1995, the Arizona Court of Appeals specifically held that national fraternities can be liable for the conduct of their chapters even where the chapters violate national policy. That opinion was particularly stinging in referring to fraternity chapters as "a group of local drinking clubs." (See September 1995, *Fraternal Law* #53.) Whether or not Delta Tau Delta will actually be held liable will depend on the specific facts presented at trial.

During the course of litigation, the plaintiffs, the Estate of Mr. Hernandez and his surviving children, settled with the driver, the local chapter and the individual fraternity members who contributed to a "Social Fund" to buy alcohol. By the time the case reached the Arizona Supreme Court for the second time, the only defendants left in the case were the pledges, whose pledgships were being celebrated on the night of August 27, 1988, and the national fraternity. Now the national fraternity stands alone, as the Supreme Court's latest decision held the pledges attending the party free from liability.

The Supreme Court found that the policy of the fraternity was to allow all members who contributed to the "Social Fund" to drink alcohol, regardless of their age. That "Social Fund" was used to buy alcohol. At the party, alcohol was provided freely to all of the attendees, including pledges. The pledges had not, however, contributed to the "Social Fund" nor taken part in adopting the policies regulating the Fund. Thus, the Supreme Court was able to find that the pledges themselves had no personal legal liability to the plaintiffs. Drawing a sharp distinction between the responsibility of the pledges and the fraternity members themselves, the court noted that:

"The fraternity members had control over the management of the fraternity. Each member had the opportunity and the power to vote for the president and two vice presidents, who

appointed the social chairman; each fraternity member could have voted to disapprove any of the social chairman's proposed activities that involved furnishing alcohol to minors; and each member could have run for an officer position or applied for a committee chairmanship."

The pledges, the court wrote, "had no control over the fraternity's actions and they had not contributed to the 'Social Fund.'" As a result, the pledges could neither be regarded as engaged in a joint venture with the members of the fraternity nor in any conspiracy with the members of the fraternity. In short, the actions of the pledges (excluding the driver) did not cause the accident.

While obviously this decision is good news for the pledges involved, the Arizona Supreme Court's decision strongly suggests that individual members of a fraternity who have the power to vote may have liability when the policies or practices of a local chapter permit the distribution of alcohol to minors.

The matter now goes back to the trial court to determine the liability of the national fraternity.

● Timothy M. Burke

*The Estate of Hernandez v. Flavio, et al. v. Supreme Court of Arizona*, 1997 ARIZ Lexis 10; 234 ARIZ Adv. Rep. 37 (January 23, 1997).

### BOWDOIN COLLEGE TO ELIMINATE FRATERNITIES BY 2000

Bowdoin College joins several other small private Eastern colleges in eliminating fraternities from their campuses. Bowdoin's actions will be phased in gradually so that current members can remain active until they graduate, although no new students will be permitted to join the campus' fraternities. About 30 percent of Bowdoin's 1,550 students are members of fraternities.

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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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