FRATERNAL LAW™

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COMPREHENSIVE PARTY PLANNING

With the beginning of a new school year, students' thoughts not only turn to classes and books but also to social events and parties, with old and new friends. Often these social events involve alcohol. Therefore, with the advent of each new school year, fraternity members should be re-educated on the responsible and legal use of alcohol at parties. The well-publicized, tragic death of a Sigma Alpha Epsilon pledge at LSU last month all too dramatically underscores this fact.

While alcohol certainly is not a necessity for any party, many chapter parties do involve alcohol. (In contrast, Sigma Nu and Phi Delta Theta Fraternities have resolved to discontinue the consumption of alcohol in chapter houses effective the 1st of July, 2000. Please see March 1997, *Fraternal Law* #60.) Because of the potential for harm historically associated with the provision of alcohol at fraternity parties, certain steps should be taken to lessen the risk of injury or tragedy and the potential for liability if injuries do occur.

Legal Age

The fact is, if an individual is not 21 they may not be provided alcohol and they should not be allowed to drink at fraternity events. Taking this obligation seriously is the single best protection against injury and liability.

Dram Shop Liability

Many states use statutes or common law to impose liability on the owner of or a bartender in a restaurant or bar for serving alcohol to an already intoxicated patron who then injures himself or another party. In some states, the same type of liability applies to a social host provider of alcohol, including a fraternity. This exposes a fraternity to potential legal responsibility from a fraternity member, a guest, or even an unknown third party who crashes a fraternity event, who becomes intoxicated and then is involved in an accident in which someone is killed or injured. Further, individual members of the fraternity who provided the alcohol could find themselves personally liable, or, in some circumstance even subject to criminal charges.

There Are No Tricks

Fraternity members should be aware of the fact that short of banning alcohol, there is little they can do to fully insulate themselves from liability in such circumstances. A "BYOB" party in many instances does not immunize a fraternity from such liability. If minors are allowed to bring alcohol or consume someone else's alcohol or if members or guests are permitted to drink to excess, there can be liability even though the guest, and not the fraternity, has purchased and brought his or her own liquor. Further, posting signs regarding liquor consumption may help as educational tools but will likely not relieve a fraternity and its members from liability if the warnings on the signs are ignored. Releases signed by guests indicating that the provider of alcohol or the sponsor of a party are not responsible for injuries may not be enforced by courts and, further, can in no way release the fraternity from liability to a third party who has not signed the release and is injured by such a guest.

Rush Events

Most, if not all fraternities, prohibit alcohol at rush events. Considering the likelihood that most rushees are underage, that is as it should be. From a risk management standpoint, dry rush should be the only option.

1998 FRATERNAL LAW CONFERENCE

Start planning now to attend the 1998 Fraternal Law Conference in Cincinnati, OH! The ninth national Fraternal Law Conference is scheduled for November 6-7, 1998. The conference will begin on the morning of Friday, November 6, and continue through noon on Saturday, November 7.

More information will be forthcoming as conference time draws closer. If you are not a subscriber and wish to receive all conference announcements, please send your name and address to Fraternal Law, 225 West Court St., Cincinnati, OH 45202. For further information contact Jana Hitt, Managing Editor of Fraternal Law, at (513) 721-5525.

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Risk Management and Party Planning

If alcoholic beverages will be available at a party, the following represents a brief overview of steps that can be taken to help reduce the possibility of injury and exposure to liability. These provisions should be reviewed with all fraternity members.

- **Obtain Appropriate Permits**

Check with the local police departments to be sure that you comply with all permit requirements for the provision of alcoholic beverages.

- **Identification Check**

No one under the age of 21 should be served alcohol or permitted to consume it. Someone should be assigned to check ID's. A professional bartender can be hired to do this. He or she would be in a position to check ID's without the social pressures and awkward circumstances of a "brother" not permitting a younger "brother" to be provided with alcohol. The bartender can also manage the bar and monitor the consumption of alcohol. A professional bartender is likely to have the experience to cut off someone who has over-indulged without causing a scene.

- **No Open Or Block Parties**

As in any party situation, there must be a mechanism to control the number of guests to the party. Limit parties to a select list of guests. Know your guests and have a guest list handy. Having an open party conveys a free-for-all attitude and results in attendance by anyone and everyone, likely including minors. Overcrowding creates additional problems with which even the best preplanning may be unable to cope.

- **Do Not Advertise Alcohol**

In any advertisements or posters announcing your event or party, do not emphasize alcohol. Alcohol should never be a theme of an event and should not be the first thing a guest sees when arriving at a party. Should there be an injury that results in a lawsuit, an invitation or poster advertising a 'drink and drown' would likely be Exhibit A for the plaintiff and will stand in sharp contrast to any explanations made by a fraternity that it took sufficient steps to guard against such an injury.

- **Limit The Hours Of Dispensing Alcohol**

Cut off the serving of alcohol at a reasonable predesignated hour. This will provide an excuse to clear out the crowd and avoid the problems associated with people who crash the party after local bars have closed. Post those times in a visible place so as to not surprise guests and create resentment when they attempt to get one last drink and are denied.

- **Never Serve An Intoxicated Guest**

Serious liability can result from serving alcohol to an intoxicated guest. If someone is noticeably intoxicated, find a designated driver or make alternative arrangements for him or her to get home safely.

- **Provisions For Nonalcoholic Beverages and Food**

A sufficient quantity and variety of nonalcoholic beverages should be readily available to all fraternity members and guests. These drinks should be as easily accessible as the alcohol.

Food or snacks in sufficient quantity should be provided throughout the party location. This should not be limited to chips and pretzels which are often used by bars to cause thirst, and therefore more drinking. While the consumption of food does not induce sobriety, having it available may limit the amount of alcohol consumed and may take some of the attention away from alcohol.

- **Designated Driver/Shuttle Service**

One or more members should be designated as drivers who will not consume alcohol during a social event and who will be available to drive guests home. Drivers should make sure that their insurance covers them in this situation. If an event is off campus, the fraternity may consider hiring a shuttle service for members and guests.

These are just guidelines which are provided as points that should be considered if the fraternity decides to have a party in which alcohol is served. Most national organizations provide detailed information to assist with party planning. Such guidelines should be followed closely. This article is intended to supplement that information.

Be prudent in planning for the provision of alcoholic beverages at your next event, plan in advance to obey the law and use common sense. A safe party is certainly a more enjoyable party.

- **Matthew W. Fellerhoff**

SAY UNTO OTHERS...

A recent decision by an Indiana Court of Appeals underscores the rights of students to be free from defamation by their fellow students. [1]

After his proposal of marriage was rejected, Angus Owens, a member of Tau Kappa Epsilon at Wabash College, sent a letter to all fraternity presidents on campus suggesting that the former object of his affection may have given him and perhaps others a sexually transmitted disease. Angus was specific in identifying by name his former girlfriend and one of her close friends when he suggested that the two of them "may have created an epidemic." The letter urged the fraternity presidents to call a meeting and "warn your brothers."

When Angus was sued for defamation, he claimed the defense of qualified privilege arguing that he was simply trying to warn fraternity presidents of a potential health risk to fraternity members.

The court noted that "The essential elements of the defense of qualified privilege are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner to the appropriate parties only." The court had little difficulty given the nasty tone of Angus' letter finding that it was not written in good faith. The court also noted that when Angus' deposition was taken prior to trial and again during his testimony at trial, he admitted he had no good faith basis to believe that the woman who sued him had given him an STD, had an STD herself, or that he was, in fact, treated as he had claimed in his letter, for an STD by a campus doctor.

Not surprisingly, the jury found for the woman and awarded $2,700.00 in punitive damages. The trial judge also ultimately awarded her attorney's fees of $16,000.00.

The point of this case is twofold. First, there can be a qualified privilege for a member of the fraternity to report facts to others which he or she in good faith believes about another student. For example, a member of a sorority may have a qualified privilege to stand in front of her chapter and recite facts which she in good faith believes to be true that suggest that another member of her chapter has been engaged in the illegal sale or use of drugs in the sorority house. That qualified privilege may extend to communications to appropriate other officials, for example, a national officer, college disciplinary board, or law enforcement officials.

Secondly, a qualified privilege may be lost when the information is not reported in good faith, or is passed along to those people who may simply have idle curiosity and have no need to know or power to act upon the information provided. That is why, for example, when an individual is expelled from a fraternity for breaking fraternity rules, information about the dismissal and the conduct which led to it should not be widely discussed. In short, fraternity disciplinary matters should certainly be kept private and not be the subject of idle gossip around campus. Doing so serves no good purpose and creates the possibility of a defamation or breach of privacy lawsuit.

● **Timothy M. Burke**

1 **Owens v. Schoenberger** (June 25, 1997), Ind. App. LEXIS 773.

UNPOPULAR STUDENT GROUP PREVAILS IN ALABAMA

The Student Government Association of Auburn University voted to deny the Auburn Gay and Lesbian Association permanent status as an officially recognized campus organization in the fall of 1991. From this decision flowed a furious constitutional controversy.

The campus administration overruled the Student Government Association and recognized the Auburn Gay and Lesbian Association. People connected with the Auburn University lobbied the State Legislature. The State Legislature passed a resolution denouncing the University's official recognition of this unpopular student group. The resolution stated: "That the House of Representatives of Alabama does not condone violations of the laws of the State of Alabama, nor does it recognize a homosexual lifestyle as an acceptable or legal alternative lifestyle, but rather acknowledges that the State of Alabama is and resolves that it shall remain historically traditional in its view of the family, and that the State of Alabama is a place where families can live and grow without being debased or immoralized."

The political furor culminated in the adoption of Alabama Code Section 16-1-28 (1995), which prohibits the use of public funds or facilities by any college or university to "directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws" of the State of Alabama.

The statute also says that no organization or group "that receives public funds or uses public facilities, directly or indirectly, at any college or university shall permit or encourage its members or encourage other persons to engage in any such unlawful acts or provide information or materials that explain how such acts may be engaged in or performed."

The statute has an express exemption for groups that choose to lobby to amend the Alabama laws dealing with sex crimes.

The University of South Alabama has over one hundred registered student organizations. These student organizations are eligible to receive funding from the University, to receive on-campus banking services and the use of campus meeting rooms.

One such organization is the Gay, Lesbian, Bisexual Alliance (GLBA) that has as its stated purpose: "To provide a foundation for unification for homosexual and non-homosexual people of the student population, in order to draw support to further our efforts in educating all members of the University community on the fears and dangers of homophobia and to provide a support system for the University of South Alabama's homosexual students."

The message of the Alabama cases is that state universities will have a hard time refusing to recognize Greek organizations because of official dislike of the purposes of the Greek organization.

Because of the Alabama statute, the University denied on-campus banking services to the Gay, Lesbian, Bisexual Alliance and also denied funding for the GLBA to bring speakers on campus on two occasions. The Attorney General of the state issued a written opinion that GLBA could receive no support from the University. The opinion did not state how the GLBA violated the Alabama statute.

The United States District Court for the Middle District of Alabama held that the statute was an unconstitutional infringement on the students' First Amendment rights in *Gay, Lesbian, Bisexual Alliance, v. Jeff Sessions*, et al. 917 F. Supp. 1548 (1996) affirmed by the United States Court of Appeals at 110 F.3d 1543 (1997).

The courts relied upon the important decision in which the University of Virginia was found to violate the First Amendment rights of students by refusing to fund a newspaper that had a Christian viewpoint. The reasoning of the Supreme Court was that once the state creates a forum, it cannot discriminate based upon whether the state approves or disapproves of the viewpoint taken by people who are eligible to participate in the forum. *Rosenberger v. Rector and Visitors of the University of Virginia* 115 S.Ct. 2510 (1995). (See January 1997, *Fraternal Law* #59.)

The United States Court of Appeals in the Alabama case relied upon the words of Justice Kennedy in the University of Virginia case: "When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation." (115 S.Ct. at 2516.)

The Court of Appeals found that the University of South Alabama "prohibited funding to the GLBA based on the Attorney General's unsupported assumption that GLBA fosters or promotes a violation of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination."

The older case of *Healy v. James* 408 U.S. 169, 92S.Ct. 2338 (1972) was not cited by the courts in the Alabama decisions, but its fundamental principle that a state university may not refuse to recognize a student organization because of an unwillingness to allow the student organization to express its favored opinions is alive and well. In the *Healy* case, the university refused to recognize the Students For Democratic Society, an activist group in the sixties that was often characterized as being radically anti-government.

The message of the Alabama cases is that state universities will have a hard time refusing to recognize Greek organizations because of official dislike of the purposes of the Greek organization.

In addition, the case shows that a student organization can afford to sue a state university to preserve its recognition status. In a follow-up decision, the trial court awarded the Gay, Lesbian, Bisexual Alliance from South Alabama University attorney fees and litigation expenses of $81,556.21.

A successful plaintiff who prevails in a lawsuit against defendants who use the color of state law to deprive the plaintiff of rights, privileges, or immunities under the constitution and laws of the United States is entitled to recover his attorney fees under the provisions of Title 42, Section 1988 of the United States Code. Not only did the State of Alabama lose the case, its university was required to pay the plaintiff's attorney fees.

● **Robert E. Manley**

VOLUNTEER PROTECTION ACT

The Federal Volunteer Protection Act, 42 U.S.C. § 14501, takes effect in late September, 1997. Its purpose is to protect volunteers from liability for their acts while performing services for nonprofit organizations without compensation. The nonprofit organization must be primarily for charitable, civic, educational, religious, welfare, or health purposes.

Clearly, volunteers for fraternity-related educational foundations are protected by the Volunteer Protection Act. Similarly, people who volunteer on behalf of universities are protected by the new law. There may be circumstances where volunteers for fraternities are also protected.

The status of fraternity volunteers is more complicated than volunteers for the university or volunteers for the foundation. For example, a chapter advisor who is appointed by a college to carry out specified educational functions with a particular fraternity chapter is entitled to protection under the Volunteer Protection Act. The same volunteer appointed by the national fraternity is less likely to be protected. The probabilities of protection are enhanced if the general fraternity appoints the chapter advisor in order to comply with a request or regulation by the college. Similarly, the general fraternity can improve the chances of its chapter advisors being protected by the Volunteer Protection Act if it clearly defines the role of chapter advisors as educational rather than administrative or disciplinary.

While it is true that well-managed fraternities insure all of their volunteers against liability, it also should be true that a fraternity that is able to bring its volunteers under the Volunteer Protection Act may be able to negotiate lower insurance rates in the future.

Interesting aspects of the Volunteer Protection Act include the following:

- The federal law preempts state law to the extent that state law is in conflict with the federal law.
- There is a procedure whereby a state may opt out of the protection of the Volunteer Protection Act with regard to disputes involving only residents of the state.
- The protection is waived by criminal misconduct, gross negligence or reckless misconduct, or a flagrant indifference to the rights or safety of an individual. Thus, an advisor who passively or actively encourages unlawful behavior such as hazing or underage drinking is waiving protection under the Act.
- Injuries caused by a volunteer operating a vehicle are not covered by the Volunteer Protection Act if there is a state law requiring both licensing and insurance.
- There is no protection for harm caused through sexual misconduct.
- There is no protection for harm caused by the violation of federal or state civil rights laws.
- There is no protection if the volunteer was under the influence of intoxicating alcohol or drugs at the time of the injury.

It remains to be seen what the practical effect of the Volunteer Protection Act will be. How it applies to fraternity volunteers can be influenced by the way in which the fraternity defines the role of the volunteer. Any volunteer can waive immunity through participating in or encouraging illegal conduct, through acting under the influence of alcohol or drugs, or through sexual misconduct.

Fraternities, universities and related foundations should examine the way in which they describe the activities of their volunteers. A clear statement of the educational role of the volunteer should help establish immunity. All organizations who hope to have immunity for their volunteers should consider a code of conduct for volunteers.

- **Robert E. Manley**

GOOD NEWS FOR HOUSE CORPORATIONS

Two recent cases underscore the limits on how far courts will go in placing the blame for and financial consequences of a tragedy on fraternities or the colleges with which they are associated.

Jason Rothbard, a member of the Beta Theta Pi Chapter at Colgate University, lived in the chapter house in a room with a window above the portico over the front entrance. He was found early one morning lying near the entrance to the house unconscious and bleeding profusely after apparently falling two stories from the roof. Tests showed his blood-alcohol level was 0.18 percent.

While Rothbard has no memory of the fall, his lawsuit[1] against both Colgate and the fraternity house corporation sought to impose liability on the university because of the university's failure to control the conduct of students in fraternity houses, including the plaintiff himself. Rothbard argued that the University's handbook asserted the ability of the University to control the behavior of students in fraternity houses. Though the University handbook clearly provided that roofs and porticos are off-limits to all students and that no one under the age of twenty-one shall be served or consume alcohol, Rothbard argued that the University

knew or should have known that these provisions were routinely violated in fraternity houses.

In dealing with the claims against the University, the court, relying on prior New York cases, reaffirmed that colleges generally have no legal duty to shield their students from the dangerous conduct of other students. Therefore, according to the court, the college had "no legal duty to shield their students from their own dangerous activity which creates a risk of harm to themselves."

The court, New York's highest, took note that "at the time of his injury, plaintiff was not a young child in need of constant and close supervision; he was an adult, responsible for his own conduct." On that basis, the court found that neither the college nor the house corporation had a legal duty to affirmatively supervise the plaintiff in order to prevent him from engaging in conduct that created a risk of harm to himself.[2]

Just weeks after the *Rothbard* decision, the Court of Appeals of the State of Indiana[3] relieved another entity quite similar to a fraternity house corporation from liability for a sexual assault committed by one house resident on another. The Evans Scholars Foundation, an arm of the Western Golf Association, maintained a house at Purdue University for students in the Evans Scholars Program (scholarships awarded to former golf caddies).

L.W., the plaintiff, had become "very intoxicated" after drinking at a local college bar. She was taken back to her room by several of her friends and left on her bed, fully clothed. Another resident of the house entered her unlocked room and raped her while she was unconscious.

The college had "no legal duty to shield their students from their own dangerous activity which creates a risk of harm to themselves."

The court rejected the argument made by the victim that the house owner should be liable because what happened to her was reasonably foreseeable. The court ruled that the house owner had not undertaken to guarantee the safety of its residents and emphasized that in order for there to be liability, the house owner "must have been alerted to prior actions by the wrongdoer" which would warn of a likelihood of future harm. In this case, the perpetrator had no history suggesting that he would engage in rape. As the court said "a landlord is not required to police the activities of the tenants unless there is something that should alert the landlord to the necessity." Plaintiff tried to argue that the house owner was obligated to provide a house mother. The court dismissed that claim by reaffirming language adopted ten years earlier.

> "College students and fraternity members are not children. Save for a very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. Colleges and fraternities are not expected to assume a role anything akin to *in loco parentis* or a general insurer."[4]

Both the *Rothbard* and *L.W.* cases grew out of tragedies. In *Rothbard*, the reckless act of the plaintiff was directly responsible for his own injuries. In *L.W.*, the plaintiff was a victim of criminal conduct by her rapist. Without excusing unsafe conditions or criminal conduct by a third party, the good news in these two cases is that the courts recognized that responsibility, in the first instance, should be placed on the principal wrongdoers involved. In reaffirming that college students are adults, who make their own decisions and must bear the consequences of those decisions, the courts of New York and Indiana may have provided another argument for fraternities and sororities to use in defending themselves.

In reaffirming that college students are adults, who make their own decisions and must bear the consequences of those decisions, the courts of New York and Indiana may have provided another argument for fraternities and sororities to use in defending themselves.

These decisions provide no help where a chapter has ignored the law with regard to alcohol, ignored an unsafe situation in the house, or deliberately assisted or looked the other way while alcohol was being provided to those who are underage or drugs were being sold in the house. The theory of these cases though, may be of significant assistance in defending cases where the involvement of the chapter, fraternity, or house corporation was only tangentially related to the injury.

● **Timothy M. Burke**

[1] **Rothbard v. Colgate University**, 652, N.Y.S.2d 146 (Jan. 9, 1997).

[2] The court did not entirely relieve the house corporation of potential liability. Rather, it found that the absence of window stops which might have prevented the plaintiff from going in and out of the window raised a question for a jury to resolve as to whether or not that absence was a breach of the owner's duty to maintain the premises in a reasonably safe condition.

[3] **L.W. v. Western Golf Association**, 675 N.E.2d 760 (January 29, 1997).

[4] **Campbell v. Wabash College**, 495 N.E.2d 227 (1986).

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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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