



# FRATERNAL LAW™

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## TWO CASES OF NOTE IN PENNSYLVANIA

The enormous difficulties that drugs in a fraternity house can cause are underscored by recent events at the University of Pittsburgh. In the Spring of 1996, after the close of classes, local police raided the Pi Lambda Phi House to serve an arrest warrant on an individual wanted for drug trafficking. Several individuals, both fraternity members and boarders, ended up being arrested on drug-related charges. The university brought disciplinary action against the fraternity. While the university-appointed hearing panel found no direct relationship between the drug raid and the chapter itself, sanctions were recommended. Though the panel recognized that the fraternity was unaware of the illegal acts, it held that discipline was appropriate based on the actions of individual members and their guests.

The fraternity appealed those sanctions through the university process, which only resulted in the severity of the sanctions being increased. The university ordered that the chapter be considered unrecognized, but provided the opportunity to apply for a probationary status if compliance with other conditions, including adopting substance-free housing, reorganizing the chapter, and hiring a live-in house director were met.

Along with university discipline, the chapter simultaneously faced a challenge from local zoning authorities who, acting on the theory that because the chapter was no longer recognized by the university it was not a fraternity, caused the chapter's zoning permit to be revoked.

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Two lawsuits have grown out of these facts. The first suit challenges the decision by the City of Pittsburgh's Zoning Board of Appeals which ruled that if the fraternity remained unrecognized by the university for more than one year, it will have lost its status as a legal nonconforming use. (A nonconforming use is one that while not in conformance with the current zoning regulation, existed prior to the adoption of those zoning regulations and therefore remains legal. This is frequently referred to as

"grandfathering.") This issue is on appeal to the Pennsylvania trial court. The case has been fully presented to the court on the legal memoranda of the parties and the court is expected to make its decision sometime within the next several months.

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For its part, the university based its sanctions against the chapter, which included a prohibition against recruiting new members, on a university regulation which makes the chapter responsible for the improper conduct of a single individual - a collective responsibility standard.

The university's refusal this spring to lift the nonrecognition status even though the chapter had complied with the university's conditions, led to a lawsuit in United States District Court. The suit argued that, among other things, the conduct of the university violated the freedom of association and equal protection provisions of the United States Constitution. It also claimed that the university had violated the due process rights of the fraternity and its members.

In an effort to recruit new members immediately, the fraternity sought an injunction based on their freedom of association and equal protection rights. The due process claims of the fraternity were not involved in the injunction proceeding and remain pending with the court.

In April following the conclusion of a two-day hearing, United States District Court Judge Donald Ziegler refused to issue the injunction.<sup>1</sup> The court indicated that it did not believe a fraternity could succeed on the merits in the litigation. In *Healy v. James* (1972) 408 U.S. 169, which is frequently cited to compel universities to recognize student groups, Judge Ziegler found legal support for the university's authority to take the action against Pi Lambda Phi based on the conduct of its members.

"We find that, based on the serious drug violations committed by members of Pi Lambda Phi, the University of Pittsburgh was entitled to sanction the fraternity by withdrawing recognition of its official status. It is recognized by the United States Supreme Court in Healy, that a university has broad authority to proscribe and control the conduct of its students."<sup>2</sup>

To the argument that the university was holding fraternities to a standard different than that of other student groups, the court replied:

"The university has many potential reasons to hold fraternities and sororities, which have a far more significant involvement in students' lives than do other student organizations, to a different set of rules for the conduct of their members. Fraternity and sorority members reside in fraternity and sorority houses. They take meals in the residence and engage in a vast array of social activities sponsored by fraternities and sororities and have for decades been in-

volved in these functions, including hazing traditions, which provide a rational basis for the university to hold fraternities and sororities to different standards than the university may apply to other student organizations such as student government or other such clubs."

The court's denial of the fraternity's request for injunctive relief is now on appeal to the Third Circuit United States District Court of Appeals. Argument has yet to be scheduled.

The Pi Lambda Phi case situation presents several thorny legal issues. The ultimate outcome of both the zoning case and the federal court case against the university will bear watching.

● Timothy M. Burke

<sup>1</sup>Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, United States District Court for the Western District of Pennsylvania, Civil Action No. 97-903.

<sup>2</sup>The quotes from the court are taken from a transcript of the court's oral statement of the reasons for declining the request for injunctive relief. Because the court did not formally publish its opinion, the precedential value of the decision is reduced.

## LEGAL SUMMIT INITIATES DIALOGUE

On September 6th and 7th the National Association of Student Personnel Advisors' (NASPA) Fraternity/Sorority Network, chaired by Barbara Hollman, Vice President for Student Affairs at the University of Montana, hosted a National Legal Summit on Fraternity/Sorority life at Texas Christian University.

In attendance were representatives of NASPA, and leaders of the National Interfraternity Conference (NIC) and the National Panhellenic Conference (NPC). Also attending were representatives of the Association of Fraternity Advisors (AFA) and the Association of Student Judicial Affairs (ASJA). The twenty-three participants at the summit included six former national fraternity or sorority presidents and eleven College Student Affairs Vice Presidents.

This legal summit focused on identifying standards and expectations for collegiate chapters of international fraternities and sororities that support the campus educational mission without violating student and organizational constitutional rights.

The lengthy discussions on both the relationships between colleges and fraternities and sororities and risk management issues were facilitated by Harriet B. Harral, Ph.D., the Executive Director of Leadership Fort Worth. Repeatedly during the conference, the need for two-way

communication was recognized on issues as diverse as developing relationship statements and dealing with substance abuse issues. While the participants recognized that diverse cultures and viewpoints exist on the nine hundred plus campuses which host Greek organizations and among the more than eighty fraternal organizations which have chapters on college campuses, the group found a clear consensus on a number of issues. These included a recognition that while education efforts related to substance abuse and risk management must continue, both fraternal groups and the educational institutions must improve the enforcement and where necessary, disciplinary response to violations of the law.

The discussion opened the way to efforts at joint programming on several issues and underscored the need to encourage greater participation by both alumni and faculty as fraternity advisors and highlighted the need for better communication between fraternal groups and college administrators, particularly at the policy-making level.

Follow-up discussions are to take place during both the AFA meeting in San Francisco in December and the NASPA meeting next March.

● Timothy M. Burke

## ANTITRUST CLAIM REINSTATED AT HAMILTON COLLEGE

**F**our fraternities won a day in court in their antitrust lawsuit against Hamilton College.

Hamilton College ruled that all students must live in college housing and sign college dining contracts, effective with the opening of school in the Fall of 1995. Four fraternities sued claiming it was unfair competition under the Sherman Antitrust Act.

Historically, many students at Hamilton College had lived in fraternity houses starting in their sophomore year. Other students lived in private housing off campus.

The four fraternities who sued claim that the purpose of the Hamilton College regulation was not educational but a commercial purpose to eliminate competition in the provision of "residential services" to Hamilton students in order to raise revenues. The fraternities claim that having announced that students would not be allowed to live in the private fraternity houses, the college "has attempted to exercise monopoly power as the sole available buyer by attempting to purchase the fraternity houses at artificially low prices, intending to use them to provide housing for its students."

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**An important lesson of this case is that the courts do not look at the nature of the institution that is accused of restraining trade, but the nature of the conduct.**

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The United States District Court dismissed the case claiming that it lacked jurisdiction because the activity of Hamilton College in this regard was not "trade or commerce" within the meaning of the Sherman Act. In addition, the trial court found that there was an insufficient nexus to interstate commerce. The trial court granted a motion to dismiss the complaint. Under this procedure, it was obligated to assume all facts alleged in the complaint were true.

The fraternities appealed and the United States Court of Appeals for the Second Circuit ruled that the trial court had made a finding of fact against the fraternities without giving the fraternities an opportunity for an evidentiary hearing. The case was reversed and sent back to the trial court for the fraternities to have an opportunity to explore the records of the college, to take depositions of college officials, and to proceed to a trial on the facts and the law.

An important lesson of this case is that the courts do not look at the nature of the institution that is accused of restraining trade, but the nature of the conduct. Many colleges and many fraternities overlook the fact that they can commit offenses under the antitrust laws. The fact that they are not for profit and may have noble motives will not protect them against the harshness of the remedies available under the antitrust laws. The court notes "there is no

blanket exemption from antitrust laws based upon an organization's non-profit status or public service orientation."

The Court of Appeals found facts to support interstate commerce including:

- 51% of the Hamilton College students for a recent year came from states other than the State of New York or from foreign countries.
- Hamilton College had received \$7,000,000.00 in a recent year for residential services (room, board, and related fees) and approximately \$4,000,000.00 of that was collected annually from students who come to live at Hamilton College from outside the State of New York.
- The court observed that the fraternities claim that "as a result of the new residential policies, the fraternities and other private landlords in Clinton, New York, will lose approximately \$1,000,000.00 a year, a substantial portion of which would have been collected from out-of-state residents."

The plaintiffs in the case were Hamilton Chapter of Alpha Delta Phi, Inc.; Alumni Association of Psi Chapter of Psi Upsilon, Inc.; Beta of Sigma Phi Society, Inc.; and Delta Kappa Upsilon Society of Hamilton College. The case was argued in January of 1997 and decided on October 10, 1997, (Lexis 27945).

Unless the case reaches an out-of-court settlement, the plaintiffs will now have the opportunity to proceed towards trial. After the trial, the losing party has the right to appeal back to the United States Court of Appeals for the Second Circuit. The party who loses there would normally have the opportunity to ask the United States Supreme Court to review the Second Circuit decision.

In recent cases, the courts have been applying antitrust laws to non-profit and academic organizations.

If the four fraternities win their case, the court will:

- Determine actual damages suffered by each fraternity;
- Multiply the damages by three and award triple damages to each fraternity;
- Order Hamilton College to stop anti-competitive conduct; and
- Award attorney fees to be paid by Hamilton College to each fraternity.

● **Robert E. Manley**

# JUST WHAT ARE FRATERNAL EDUCATIONAL AND CHARITABLE PURPOSES ANYWAY?

## (Part Two)

### Introduction

This is the second article in a two-part series dealing with the types of programs properly fundable by fraternal foundations and/or a fraternity's set aside funds. Please refer to the prior article appearing in the March, 1997 issue of *Fraternal Law*. In the first article we considered some of the most common types of such programs. This article will deal with some of the less common programs and those which are likely to come under intense Internal Revenue Service scrutiny.

### Fundable Programs

1. Archives and Similar Expenditures -- Most fraternal organizations have accumulated a considerable amount of historic materials relating to the fraternity's history and notable alumni (ae) and their achievements. These materials may consist of documents, badges, photographs and many other items. Expenditures necessary to properly preserve, organize, and exhibit such materials include expenses of an archivist, supplies, upkeep and maintenance of exhibit space and similar expenses. A common question is whether such expenditures are properly fundable by fraternal foundations or a fraternity's set aside funds. Until the recent Internal Revenue Service fraternity tax case, it had been assumed by many advisors that such expenses were always appropriate for such funding since they related to historic preservation matters and education in historic subjects. Because of certain statements that were made at the time of that case, some students of the area have expressed doubt as to whether this is still the case. As of this writing, we feel that such expenditures are defensible as long as the display of artifacts does not relate solely to the history of the particular fraternity but rather includes material dealing with the relationship of the fraternity to societal trends at different stages of its history, and the effect of the fraternity experience on these trends. It also is advisable that the exhibit be open to the public even if it is done by appointment or for limited hours. Because this area is not entirely clear, it is recommended that a written opinion from the organization's advisor be secured and that ad-

visor input be sought as to the proper manner for the establishment of and descriptions involved in the exhibits.

2. Aid to Needy Alumnae (i) -- Another program which is very popular for funding by women's fraternal foundations is aid to needy alumnae. (Men's fraternal groups may become interested in establishing similar programs in the future.) In establishing and maintaining this type of program, fraternal foundations must recognize that the Internal Revenue Service will have an understandable interest in carefully reviewing such a program on audit to make certain that it benefits only the truly needy. This is especially true since such programs are generally limited to members only.

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A fairly recent IRS private letter ruling indicates some appropriate standards for such a program. Although it pertains to an employee fund, the ruling contains many indicia as to the Service's then current position on such funds. It is very important that in maintaining such funds a detailed financial application be used and completed in order to establish the basis of need in an objective, nondiscriminatory manner. There also is a need for follow-up to ensure that the need is actually continuing if the grant is continuing. Obviously, procedures must be established to ensure that no one is in a position to approve a stipend to themselves or a member of their family. It is very important that no earmarked gifts be accepted. These are just a few of the guidelines that need to be followed in managing this type of fund. Any organization considering such a fund or which is unsure whether its current procedures are appropriate, should contact their advisor for assistance as again, this is a sensitive area worthy of substantial attention.

3. **Assistance in Local Chapter Housing** -- Please see Part One for information concerning loans on local chapter housing; this section deals with educational area grants for chapter housing. This is another area where the rules may differ for set aside funds and fraternal foundations, since educational area grants can be made by Code Section 501(c)(3) organizations, but probably not by a fraternity's set aside funds. Such educational area grants have been approved in numerous private letter rulings issued by the Service over the last several years, and cover those areas in a chapter house which are used 100% for educational purposes, such as study rooms, libraries, computer rooms and the like. Furniture and fixtures located in these educational areas may also be so funded. No "mixed use" purpose areas may be the subject of such grants.

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It is very important that such grants be handled strictly according to established procedures and that a written Grant Agreement and legal opinion provide strict guidelines for the use of the grant funds, and the dedication of the funded areas to educational purposes. Some fraternal foundations have obtained IRS private letter rulings which establish an umbrella procedure so that many different local housing projects can be handled under that procedure as long as the particular project meets the established parameters of the procedure.

This continues to be a very important area for many fraternal foundations but we cannot over-emphasize the importance of careful handling of these projects so that the foundation is assured that its grants are being used solely for educational purposes as previously approved by the IRS.

4. **Awards and Other Recognition of Worthy Behavior** -- Many fraternity set aside funds and fraternal foundations maintain award programs of various types to recognize achievements by their members, particular chapters and others. For example, research grants may be awarded in recognition of past achievements in scientific or medical fields, teaching awards may be given to

professors on campuses where a fraternity's chapters are located and awards may be given to members or chapters to recognize achievements in scholarship, leadership, philanthropy and other educational and charitable endeavors. As long as such awards are made pursuant to an objective and nondiscriminatory procedure, are designed in recognition of appropriate educational and charitable achievements and the amounts of the awards are commensurate with the type of award, such programs should be appropriate for foundation and/or set aside funding.

5. **Miscellaneous Educational and Charitable Programs** -- As stated in our earlier article, there can be no completely exhaustive list of such qualifying programs since each organization has its own character and will therefore have some unique educational programs. Fraternal organizations and their foundations in my experience are constantly developing new and innovative educational and leadership programs to meet the needs of their members and the wider society.

## Conclusion

When establishing a new program of this type, it is always wise to seek appropriate professional advice so that your advisor can assist you in developing procedures and guidelines. This should avoid having to dismantle a program after time and money have been devoted to it, or worse yet, having to pay tax in the case of set aside funds, or experiencing a threat to your foundation's tax exempt status.

● Barbara Schwartz Bromberg

### POCKET PAMPHLET PROMOTES PREPAREDNESS

With chapter elections taking place over the next few months, your new chapter officers need factual, clear and concise information regarding their specific duties and responsibilities as newly elected representatives of their fraternities or sororities. The pamphlet "You've Won the Election!" provides just that information. These pocket-sized pamphlets are available for \$1.00 each from Fraternal Law, 225 West Court Street, Cincinnati, Ohio 45202.

## MARCHING AWAY FROM ALCOHOL

Alcohol is in the news everywhere. At the Louisiana State University, Benjamin Wynne apparently celebrated his acceptance into the LSU chapter of Sigma Alpha Epsilon with some of his new brothers at a local bar, ultimately drinking himself to death.

A Kentucky jury ordered two University of Kentucky fraternities to pay 20% of a 1.2 million dollar verdict after a student got drunk at a fraternity party and was killed in an auto accident.

David Reynolds, 24, a civil engineering student at the University of Akron, was lucky. He was merely hospitalized after volunteering to participate in the demonstration of the hazards of overdoing alcohol. Ironically, it was a part of an alcohol awareness week educational program.

The above events may accelerate the march of fraternity chapters away from alcohol that began picking up momentum this past summer.

Thirty-two national fraternities have pledged to cooperate with the National Interfraternity Conference

Select 2000 Program. This is a value-centered program designed to promote academics and leadership among fraternity chapters, an element of which is the removal of alcohol from chapter houses.

The program promoted by the NIC is adopted on a campus-wide basis. The first four campuses to participate are Villanova University, University of Northern Colorado, Southern Illinois University, and Florida Southern College with additional campuses joining during the academic year of 1997-98.

The momentum is building. Serious personal injuries, death by alcohol, and renewed emphasis on academics and leadership are all pushing the Greek movement away from alcohol. Within the next two to three years, fraternity houses across the country will not be alcohol-dominated the way they have been in the last 25 to 30 years.

● Robert E. Manley

## NPC RESOLUTION LENDS SUPPORT TO SUBSTANCE-FREE HOUSING MOVEMENT

The National Panhellenic Conference (NPC) has added its voice to the growing support for substance-free Greek housing. At the National Panhellenic Conference biennial meeting in Norfolk, Virginia, on Saturday, October 18th, NPC unanimously adopted a resolution supporting the effort of several men's groups to adopt substance-free housing provisions. NPC specifically recognized FarmHouse Fraternity for having long operated its houses on a substance-free basis and also applauded the efforts of Phi Delta Theta, Phi Gamma Delta, and Sigma Nu for their recent commitments to ban alcohol from their residences by July 1, 2000. The NPC recognized that "the conduct, scholastic performance, health and welfare of students is being adversely affected by the alcohol-dominated culture of many college campuses." The Resolution went on to find that the efforts to create alcohol-free housing were intended to "provide an atmosphere conducive to the formation of lifetime bonds of brotherhood, grounded in fraternal ideals and values" and "to create a living environment where behavior consistent with fraternity principles can flourish."

The resolution specifically provided that NPC member groups:

"Strongly encourage their collegiate chapters, when co-hosting or selecting for paired events, to give preference to FarmHouse, Phi Delta Theta, Phi Gamma Delta, and Sigma Nu, and any other men's fraternity chapter which embraces the policy of substance-free fraternity housing."

The NPC resolution also made it clear that the conference will seek to disseminate its resolution as widely as possible, both through the news media, to every National Interfraternity Conference (NIC) member fraternity and to the Interfraternity Councils (IFC) of each college or university where there are chapters of NPC member groups.

The 26 member groups of NPC have long had their own provisions against alcohol and illegal drugs in their chapter houses.

● Timothy M. Burke

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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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