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ALCOHOL-FREE HOUSING WORKS

In 1997, Phi Delta Theta announced its intention to have all of its houses alcohol-free effective July 1, 2000. Naysayers predicted a parade of horrors: shrinking chapters, recruitment problems, loss of chapters, and general shrinkage. None of the parade of horrors has occurred. On the contrary, the Fraternity goals are being met. These goals were:

- Improve academic standing
- Increase recruitment numbers
- Reinvolve alumni
- Stabilize insurance costs
- Meet the needs of today's college students

A recent examination of the results by Dr. Edward G. Whipple,¹ Vice President for Student Affairs, Bowling Green State University, shows success on all counts.

Improved academic performance shows up in the numbers. In 2004, the average chapter grade point average was 2.93 on a 4.0 scale. This is compared to 2.73 in the fall of 2000. For the past three semesters, the average chapter grade point average has been above 2.9.

The predicted decline in membership did not arrive. Dr. Whipple finds, "While the membership trends for all fraternities continue to indicate a decline, Phi Delta Theta has continued to be well above the average of all fraternities in initiates, new members, and total chapter size. Statistically, Phi Delta Theta has held steady against the trend since the implementation of alcohol-free housing."

Dr. Whipple finds that the average Phi Delta Theta chapter is larger than the average chapter size of all other fraternities. "In 1990, Phi Delta Theta chapters were 18% larger than the average fraternity chapter, and in 2004 they were 30% larger."

In 2004, Dr. Whipple reports Phi Delta Theta was one of only 13 national and international fraternities to enjoy an increase in total undergraduate membership from the previous year. Phi Delta Theta had a 4.2% increase.

Dr. Whipple also concludes that, "Since the implementation of alcohol-free housing, Phi Delta Theta has un-

dergone one of its largest 'growth spurts' in the history of the modern fraternity."

One of the economic indicators that alerted the General Council of Phi Delta Theta that there was a problem was the rapidly rising premiums for liability insurance. After the fraternity adopted a nationwide policy of alcohol-free housing, claims, including lawsuits, went down. In 1997, the year the policy was announced, there were 12 claims. The first year of alcohol-free housing had 12 claims. 2003 and 2004 each had one minor claim. Dr. Whipple concludes, "The decrease in the number of claims and lawsuits shows a correlation with the implementation of alcohol-free housing policy." It has also led to the stabilization of the per man liability insurance costs.

Anecdotally, he reports that alumni volunteers are now more willing to get involved in chapter affairs. The alcohol-free housing makes it easier to pursue the founding principles of Greek-letter organizations, "including fellowship, academic excellence, leadership, high standards of conduct, and service."

The alcohol-free housing makes it easier to pursue the founding principles of Greek-letter organizations.

The entire Greek world will watch the outcome at Phi Delta Theta in the next five years. If the results continue in this positive manner, perhaps more groups will adopt similar policies.

The fact that all sororities and some fraternities are now alcohol-free does not alter the fact that on our campuses there is a strong alcohol culture. At least those fraternities and sororities that have dry houses are not forcing their members to live and sleep in "a would-be neighborhood saloon." Even the most avid enthusiasts for neighborhood saloons would never want to live and sleep in one.

- Robert E. Manley

¹ Mr. Edward G. Whipple's report can be found at <http://www.phideltatheta.org/pdf/white%20paper%20AFH.pdf>

U.S. NEWS & WORLD REPORT ATTACKS GREEKS

The November 28, 2005, issue of *U.S. News & World Report* carries on its march away from news reporting into feature writing with a two-page spread on the evils of the Greek system at Colgate called, "Say it Ain't So: Frats Gone Mild." It is a propaganda piece to praise Colgate for seizing all but one of the houses by involuntary transfer.

In fact, the Greek system at Colgate was in good health; the houses were well-maintained; and the chapters were functioning in a constructive way.

The following is a letter to the Editor of *U.S. News & World Report* sent by the Chairman of Manley Burke.

Dear Editor:

Your two-page feature on fraternities (November 28, 2005) was an unfair hatchet job. Colleges have the ability to regulate student activities through regulation without draconian confiscation of the Greek real estate. Most national Greek organizations have an effective educational program to teach chapter leaders on how to manage their chapters in a safe and responsible manner.

Prior to the 1960s, when colleges began to allow alcohol in the dormitories, fraternities did not have alcohol and sororities have never had alcohol in their houses. Voluntarily, all of the sororities ban alcohol from their houses and an increasing number

of fraternities do not allow alcohol in their houses. This has resulted in:

- Improved academic standings;
- Increased recruitment numbers;
- Re-involving alumni;
- Stabilizing insurance costs; and
- Better servicing the needs of college students.

For Colgate, or any other university, to act like it is governed by a monarch sends the wrong message. Fraternities develop leadership ability and fraternity alumni tend to be larger contributors to their alma maters. Greeks also have a higher graduation rate than non-Greeks.

Hamilton College went down the same path. After Hamilton College secured a monopoly on room and board, the charges for this service were increased \$2,310.00 per year per student.

Dr. Edward G. Whipple, Vice President for Student Affairs at Bowling Green State University, did research that proved the benefits when Greeks voluntarily remove alcohol from their houses.

- Robert E. Manley

"YOU KILLED MATTHEW WILLIAM CARRINGTON"

According to published reports, that is what the father of the deceased pledge of the Chi Tau Fraternity at California State University said in court at the time four members of the Fraternity were sentenced to jail after a hazing incident ended in a tragic death.

In a courtroom packed with national media and friends and relatives of Matt Carrington, the four members of the now defunct fraternity chapter expressed their regret, "I will live with the consequences of this hazing for the rest of my life." Those expressions of regret did not change the fact that, "my son is just gone and there's nothing that will ever bring him back," as Matthew's father said.

On February 2, 2005, in the basement of the fraternity house with fans blowing to intensify the chill, Carrington and another pledge were ordered to chug from a five gallon jug of water and pour water over themselves. According to published reports, the bizarre water torture had become a tradition of the fraternity chapter that had been going on for 20 years.

Under the prodding, Carrington drank too much. Twenty-one years old at the time, he died of cardiac dysrhythmia caused by water intoxication.

On October 28, 2005, four members of the Fraternity who had pled guilty for their role in Carrington's death were sentenced to jail and long periods of probation after that. One of those students, Gabriel Maestretti, was sentenced to a year in jail for involuntary manslaughter. Two others received six months in jail as accessories to manslaughter. A fourth, who pled to a misdemeanor of hazing, received a ninety-day jail sentence. Probation following service of their jail time was as long as five years.

A fifth student had previously plead guilty to a charge of misdemeanor hazing and received a sentence of 30 days in jail.

As a result of Carrington's death, officials at Chico State banned all Chico State chapters from recruiting new pledges during this fall semester while new rules were imposed.

- Tim Burke

A DEATH IN TEXAS

Hazing and alcohol continue to take a toll on college campuses, in spite of the efforts by national fraternities and colleges and universities which host fraternities to end the practice once and for all. A needless death happened again on December 10, 2005, when Phanta "Jack" Phoummarath died in the Lambda Phi Epsilon Fraternity House at the University of Texas. Travis County Chief Medical Examiner, Dr. Roberto Bayardo, ruled that Phoummarath died of alcohol poisoning.

Following the University's investigation, on December 20, 2005, the University of Texas announced that Lambda Phi Epsilon's status "as a registered student organization at the University of Texas at Austin has been cancelled until December 19, 2011 because of hazing." Teresa Graham Brett, the Associate Vice President for Student Affairs and Dean of Students, said "the cancellation of the group's registration is the most severe penalty that can be levied against a registered organization." Lambda Phi Epsilon, an Asian interest fraternity founded in Berkeley, California in 1981, had been on the University of Texas campus since 1989. Lambda Phi Epsilon was not, however, part of the inter-fraternity council at the University of Texas.

At the end of the cancellation, the fraternity chapter will face an additional one-year suspension and one-year probation, should the organization register as a student organization. "During the suspension," Brett said, "returning and new members of the fraternity must sign a non-hazing statement. Each member must participate in five hours of community service and three hours of educational programming per semester. The fraternity must also hold and attend a risk management information work shop approved by the office of the Dean of Students, that will include information on hazing and alcohol.

In a press release issued by the University, Brett described the University's investigation of the death as having included interviews with members of the fraternity, which caused University officials to determine that the organization's activities constituted hazing, including "the expectation that new members should consume large amounts of liquor at the presentation of new members and new members being required to shave their heads."

Brett was quoted in the *Houston Chronicle* as saying "we didn't find out what he drank or how much, what we did find was that when the fraternity was presenting its new members - they were becoming active (members) - there was an expectation that they consume large amounts of liquor. It was an expectation versus forced. We don't have any indication they were forced to (drink)." Various news sources also reported that Phoummarath and other new members of the fraternity shaved their heads as a part of becoming a member of the Chapter.

Typically, when a fraternity or sorority loses uni-

versity recognition, it loses many of the rights that registered student organizations have, including the right to use university facilities, participate in University programs, and receive whatever other support the University provides to registered student organizations.

The fact that an organization is not registered or recognized by the University does not necessarily mean that the organization ceases to exist. At least at state universities, organizations may exist off-campus without recognition. Neither does lack of official recognition mean that students who are members of an unregistered organization cannot be disciplined by the University for violating University conduct codes resulting from their activities with the unrecognized student organization.

For the members of Lambda Phi Epsilon, the repercussions from the death of Phoummarath may not be complete. The University is continuing to investigate to determine whether any individuals will be subject to University disciplinary action. Austin Police are continuing their own investigation and the Texas Alcoholic Beverage Commission is, according to the *Houston Chronicle*, attempting to determine the source of the alcohol. In the State of Texas hazing is a crime, as is providing alcohol to those who are underage. Phoummarath was a freshman and 18 years old. Hazing that causes a death is a felony punishable by confinement in jail for up to two years and a fine of up to \$10,000. Thus, it is quite possible that criminal charges could still be brought in this matter.

Additionally, the family of Mr. Phoummarath could bring a civil action against those they believe were responsible for his death.

Typically, when conduct such as this occurs, a national fraternity will conduct its own investigation and determine whether or not any fraternity sanctions, either of individuals or of the chapter as a whole, are appropriate. For the chapter, the most severe sanction could be the withdrawal of its charter. Such action would bring to an end the legal right of the organization to continue to exist as a part of the National Fraternity or to use the name, or trademarked or copyrighted materials, of the fraternity.

Tragedies like this should not happen. Hazing, which too frequently becomes the punishment of new members, has no place in the brotherhood or sisterhood that fraternities and sororities seek to create. In virtually every state, conduct which constitutes hazing is a criminal act. So is providing alcohol to minors. The consequences of committing those crimes can be severe. Such conduct should not be tolerated by chapters, national fraternities and sororities, universities or society as a whole.

• Tim Burke

THE NIC AND NPC FILE BRIEF IN SUPPORT OF SINGLE-SEX ORGANIZATIONS

As previously reported in *Fraternal Law*, Alpha Epsilon Pi ("AEPi") is fighting to protect the First Amendment Freedom of Association rights of its members at the City University of New York College of Staten Island ("CSI"). Among other restrictions, CSI requires all student groups, including fraternities and sororities, to admit members of both sexes. AEPi currently has a colony of approximately eighteen undergraduate men at CSI. The University denied the colony's application for official recognition, in part because the colony limits membership to males. AEPi sued CSI in Federal District Court in New York alleging that its colony is both an intimate and expressive association and is entitled to official recognition. AEPi is seeking official recognition and an order preventing CSI from enforcing its single-sex policy. AEPi's suit contained numerous allegations of violations of both federal and state law. The court recently dismissed the state law claim, but the federal law claims remain.

The North-American Interfraternity Conference ("NIC") and the National Panhellenic Conference ("NPC") recently filed a joint *amicus curiae* brief in support of AEPi because of the magnitude of the interest at stake. The NIC and NPC fear that if the Court upholds CSI's single-sex policy, other public institutions may follow suit. The result could be devastating to single-sex fraternities and sororities across the nation. The following is a short summary of the NIC and NPC brief.

Purpose of the Brief

Men's fraternal organizations formed the NIC in 1909, which currently has 64 member organizations, with 5,500 chapters located on approximately 800 campuses in the United States and Canada, with roughly 350,000 undergraduate members and 4,500,000 total active and alumni members. Women's fraternal organizations formed the NPC in 1902. The NPC currently contains 26 member organizations, with 2,908 chapters on over 620 campuses, with approximately 232,500 undergraduate members and 3,600,000 total active and alumnae members.

If permitted to stand, CSI's single-sex policy could potentially lead to the end of the Greek system as it currently exists in the United States. Every member of the NIC permits only male members; similarly, every member of the NPC permits only female members. CSI's single-sex policy eviscerates the purpose and policies of every member of the NIC and NPC. It is crucial for AEPi to prevail in this case so that other colleges and universities do not institute similar single-sex prohibitions.

That stated, what are the legal arguments?

Freedom of Association

Numerous articles previously appearing in this publication have discussed the two types of freedom of association: intimate association and expressive association. Both associational rights center on the First Amendment and provide the right for individuals and groups to associate freely with others.

Intimate Association

The right of intimate association is the right of one to enter with others into close personal relationships without fear of government intrusion. "Choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 608, 618 (1984). In *Roberts*, the United States Supreme Court set out the attributes that intimate associations possess: "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. In the brief, the NIC and NPC argued that the AEPi colony, like most fraternities and sororities, qualifies as an intimate association.

Expressive Association

The Supreme Court has long recognized the right for individuals to associate with others for a variety of reasons, including political, social, economic, educational, religious, and cultural goals. The Court has also acknowledged that freedom of association includes the freedom not to associate. See *Roberts* and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The brief highlighted examples of the expressive nature of a handful of NIC and NPC organizations and focused on the particular expressive activities of AEPi. AEPi maintains a unique emphasis on Jewish religion and culture. The NIC and NPC argued that while most fraternities and sororities qualify as expressive associations, AEPi in particular qualifies because of its unique focus on Jewish issues. The brief then detailed why fraternities and sororities possess the right to limit their memberships to members of a single-sex.

Right to Recognition

Healy v. James, the landmark Supreme Court case involving the rights of student organizations, held that host

colleges have a "heavy burden" to justify the denial of recognition of student organizations. The NIC and NPC argued that CSI failed to overcome this heavy burden with sufficient justification for their prohibition of single-sex organizations, particularly in light of the historical role that fraternities and sororities have played in higher education.

Title IX

Title IX requires all universities receiving federal money to provide equal opportunities to male and female students. Shortly after its passage in the early 1970s, the Department of Health, Education and Welfare attempted to apply Title IX to college fraternal organizations. In response, Congress passed an amendment specifically excluding college fraternal organizations. The sponsor of the amendment, Senator Birch Bayh, stated: "Fraternities and sororities have been a tradition in the country for over 200 years. Greek organizations... must not be destroyed in a misdirected effort to apply Title IX." See Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive the 1990s?* 18 J.C. & U.L. 419 (1992). Senator Talmadge of Georgia noted that Title IX "was never meant to force groups such as Greek-letter societies and the Girl Scouts to abandon their practice of limiting membership to individuals of the same sex." See *id.*

Though CSI did not argue that Title IX was the driving force behind its prohibition of single-sex organizations, the policy is as equally misdirected as the previous attempt to apply Title IX to fraternities and sororities. Nearly 30 years ago the United States Congress acknowledged the important role single-sex fraternal organizations play on college campuses. The same fraternal organizations protected by the 1974 amendment to Title IX play the same important role on college campuses today. These same organizations must be similarly protected against misdirected attempts to limit their single-sex memberships.

Higher Education Amendment Act of 1998

In 1998, the Congress of the United States re-emphasized the associational rights of students on American college and university campuses. Specifically, Congress declared:

It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this Act, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution. 20 U.S.C. §1011.

Congress defined "Protected Association" as "the joining, assembling, and residing with others that is protected under the First and Fourteenth Amendments to the Constitution, or would be protected if the institution of higher education were subject to those amendments."

This provision bolsters the associational rights of students at colleges and universities across the country. The NIC and NPC argued that AEPi's colony at CSI is exactly the kind of organization Congress intended to protect with the Higher Education Amendment Act of 1998.

Conclusion

Single-sex collegiate fraternal organizations have existed and thrived on campuses throughout North America for over 200 years. Collegiate fraternal organizations serve unique roles in the development of young men and women by creating brotherhoods and sisterhoods that foster leadership, promote academic achievement, and encourage civic and campus involvement through philanthropic activities.

Should CSI prevail, other colleges and universities, both public and private, could attempt to prohibit single-sex membership organizations. If successful, the membership of fraternities and sororities would be radically altered. The briefing is now complete in the case, and AEPi is waiting to hear whether the court will hear oral argument. Look for updates on this case in future issues of *Fraternal Law*.

• Daniel J. McCarthy

MUSLIM SORORITY

National Public Radio recently reported on the efforts to develop the first Muslim sorority. According to the December 13, 2005 newscast, Gamma Gamma Pi has groups of Muslim students organizing at both the University of Kentucky and Massachusetts Institute of Technology, each of which is vying for the honor of establishing the nation's first Muslim sorority chapter.

In recent years, local and occasionally national fraternal organizations concentrating on gay, Asian or Hispanic members have also come into existence. Fraternal organizations dedicated to a particularly cultural, national or religious background are not a new phenomenon. Alpha Gamma Delta was founded in 1924 based on the traditions and missionary zeal of Ignatius Loyola, a Jesuit Catholic Priest. In

1913, Alpha Epsilon Pi was launched on the Washington Square campus of New York University by Jewish founders, and while open to members of all faiths willing to embrace the Fraternity's cultural traditions, Alpha Epsilon Pi continues to pride itself on being the Jewish fraternity. Alpha Tau Omega began in 1865 with the intent of "fostering a Christian brotherhood dedicated to the task of achieving and cherishing permanent peace" following the Civil War. Theta Phi Alpha launched in 1912 at the University of Michigan as a sorority for Catholic women. Alpha Phi Alpha's celebration of its centennial in 2000 marked a century of National Pan-Hellenic Council historically black fraternal organizations.

A Muslim sorority is well in keeping with the long tradition of college fraternal associations organized by individuals who share similar personal interests, cultural and even religious traditions.

Fraternal organizations built around such common bonds strengthen their entitlement to First Amendment Freedom of Association protections. Courts have long recognized that there are two types of associations entitled to First

Amendment Freedom of Association protection -- intimate associations and expressive associations.

The characteristics of intimate associations are that they are relatively small; maintain a high degree of selectivity in decisions to begin and maintain the relationship; and others are secluded from critical aspects of that relationship. Fraternities and sororities which select their members based in part on the prospective member's commitment to the common purpose of the association -- moral, cultural or religious -- are demonstrating one of the key characteristics of intimate association.

To qualify as an expressive association, an organization must be able to demonstrate that they are more than merely a "social organization." Fraternities and sororities that can demonstrate activities and programming, internal or external to the group, based on or furthering cultural, religious or charitable beliefs or even political advocacy on public issues, demonstrate a critical characteristic of expressive associations.

• Tim Burke

AEPi AND UNIVERSITY OF DELAWARE REACH AGREEMENT

Alpha Epsilon Pi had a chapter at the University of Delaware, dating back to 1925. In the late 90's a series of disciplinary problems resulted in the University withdrawing recognition from the Chapter and National AEPi pulling the chapter's charter.

When AEPi sought to re-colonize at the University of Delaware, they met resistance from the University which ultimately led to litigation. The lawsuit, *Alpha Epsilon Pi Fraternity, Inc., et al. v. The University of Delaware, et al.*, Court of Chancery of the State of Delaware in and for New Castle County, C.A. No. 1462-N, was scheduled to go to trial in December. On December 14, 2005, the eve of trial, the University and AEPi each issued the following statement:

The University of Delaware and Alpha Epsilon Pi fraternity have agreed to settle their legal dispute on mutually satisfactory terms.

The terms include the commencement, in spring 2006, of a yearlong process for the review and official recognition of fraternities returning from suspension by the University. That process will be supervised by the University's InterFraternity Council, composed of student leaders.

Under the agreement:

- The University affirms the right of all students to associate with one another so long as their resulting groups do not engage in conduct that

violates its Student Code of Conduct;

- AEPi acknowledges the important role a national fraternity can and should play in assisting the University to create a positive undergraduate experience and commits its best efforts to the supervision of its student members to that end;
- UD acknowledges that fraternities and sororities can play a valuable role at the University, providing important leadership, educational, service and social opportunities that can augment the University's educational mission; and
- Both the University and AEPi have concluded that such cooperation is preferable to the adverse relationship that frequently accompanies litigation and have chosen to end the pending lawsuit.

The University of Delaware was represented by William E. Manning and the Wilmington, Delaware firm of Klett, Rooney, Lieber and Schorling. AEPi was represented by Peter Ladig and the Bayard firm and Daniel J. McCarthy and Tim Burke of Manley Burke.

• Tim 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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