# FRATERNAL LAW

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**IN MEMORIAM**

On March 23, 2006, the founder of *Fraternal Law* and the Manley Burke law firm, Robert E. Manley, died suddenly of a heart attack. Bob was an aggressive advocate of the rights of fraternities and sororities beginning with his representation of Chi Omega more than 30 years ago. He was an educator, a litigator and, most importantly, a problem solver. As *Fraternal Law* enters its 25th year of publication with this issue, it does so for the first time without an article contributed by Bob. He will be missed.

## FRATERNITIES PROTECTED AS INTIMATE ASSOCIATIONS

"For the reasons set forth above, the court grants Plaintiff's Motion for a Preliminary Injunction on the basis of their intimate association claim" -- with those words, United States District Judge Dora L. Irizarry upheld the right of Alpha Epsilon Pi's Chi Iota Colony to operate as a single sex membership organization.[1] The decision, entered on August 11, 2006, exempts AEPi, at least for now, from the regulations of CUNY's College of Staten Island, which required that "for an organization to be officially recognized at the College of Staten Island, membership and participation in it must be available to all eligible students of the College. In addition, in order to be recognized, each organization must agree not to discriminate on the basis of age, alienage or citizenship, color, gender, differing ability, national or ethnic origin, race, religion, sexual orientation, veteran or marital status or social class."

As with most national social fraternities and sororities, AEPi had a long and unbroken history of limiting its members to a single sex. The court's 39-page decision offers a detailed analysis of the First Amendment Freedom of Association Rights of fraternities and sororities and examines the question of whether or not the College's regulations interferes with those rights. The court examined the various decisions of the United States Supreme Court and other courts that have considered the associational rights of private membership organizations, ranging from the United States Jaycees and the Rotary Club, to smaller men's clubs like the Louisiana Debating and Literary Association. In those cases, the courts have considered whether or not the organization involved was either an intimate or an expressive association.

The freedom of intimate association has generally been described as protecting "the choices to enter into and maintain certain intimate human relationships ... against undo intrusion by the state." Freedom of expressive association has been stated to be the "right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion."

As the United States Supreme Court noted in the Rotary Club case, "When the state interferes with individuals' selection of those with whom they wish to join in a common endeavor, Freedom of Association in both of its forms may be implicated."[2]

In examining whether or not the AEPi Colony was an intimate association, the court considered the standards articulated in previous private association decisions -- was it relatively small, did it have a high degree of selectivity in decisions to begin and maintain membership, and did it exclude non-members from critical aspects of the relationship?

The only previous case to consider these issues as it applied to fraternities was a case decided by the United States Third Circuit Court of Appeals.[3] In that case, the University of Pittsburgh stripped a Pi Lambda Phi Chapter of its recognized status after a drug raid on the house resulted in four arrests after officials found a significant amount of drugs, including heroine, cocaine, opium and rohypnol. The court held that the Chapter, in that case, failed to establish that it was very selective in its membership practices or that it excluded non-members from its critical activities. The Chapter also failed miserably in attempting to establish that it was an expressive association because the Chapter "(1) 'Never took a public stance on any issue of public political, social or cultural importance;' (2) Had never 'done anything to actively pursue the ideals underlying' its connection to the international organization of Pi Lambda Phi, 'the country's first non-sectarian fraternity;' (3) Had never participated in any individual development programs run by the International Pi Lambda Phi organization; and (4) Showed 'underwhelming' participation in only 'a couple of relatively minor acts of charity.'"

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The AEPi decision analyzed and distinguished the facts present in that case from the facts in the Pittsburgh case. In completing its analysis of the AEPi Colony's intimate association, the court held that having a membership of 18 with a potential estimated membership of 50 out of an undergraduate student population of 11,000 made the colony "relatively small."

The court examined in some detail the membership practices of AEPi and found them to be selective, with an emphasis on determining that new members would be socially and philosophically compatible with existing members. The fraternity was an exclusive organization with highly selective membership policies.

On the question of seclusion, the court was not bothered by the fact that the fraternity sponsored certain social events to which non-members were invited. Importantly, the court noted that the fraternity excludes "non-members from initiation and pledgeship ceremonies, which include rituals, and weekly business meetings," and that "shared rituals are activities central to the fraternity's purposes of brotherhood, congeniality, functioning as a surrogate family and sharing a community of thoughts, experiences and beliefs."

The court held that the fraternity was indeed a protected intimate association. Next, the court examined the College's intent in banning single-sex organizations.

The court recognized that there was indeed a compelling interest in eradicating discrimination based on gender, but it also recognized the long-standing traditions of single-sex membership of fraternities and sororities at educational institutions throughout the United States. Federal law has clearly exempted fraternities and sororities from the generalized prohibition against sexual discrimination. The court favorably noted the explanation of former United States Senator Birch Bayh, who was the author and prime sponsor of Title IX, that Congress did not intend to cause a change in the membership practices of social fraternities and sororities. The court referred to Bayh's letter to the Secretary of the Department of Health, Education and Welfare when Bayh wrote that "[f]raternities and sororities have been a tradition in the country for over 200 years. Greek organizations ... must not be destroyed in misdirected effort to apply Title IX."

Therefore, the court concluded the AEPi Colony and its members formed an intimate association whose rights would be violated if required to admit members not wanted and that the College's interests did not justify a violation of the fraternity's associated rights.

The court also considered whether or not the AEPi Colony was an expressive association. After detailing AEPi's emphasis on its Jewish heritage and culture, the court also noted the philanthropic activities which the colony had engaged in. The court recognized the expressive nature of these activities and concluded that the fraternity was a protected expressive association. However, the court determined that "based on the record before the court, the Plaintiffs[AEPi] have not shown a 'clear' or 'substantial' likelihood of success on the merits that admitting women would significantly effect the fraternity's expressive purposes." Therefore, the court declined to grant any relief on that basis.

This was a decision on a preliminary injunction. It is not necessarily the final decision of the court, but in order to receive a preliminary injunction, it was necessary for the fraternity to establish to the satisfaction of the court that it had a likelihood of prevailing on the merits. That is, ultimately winning the case. The fraternity met that burden with regard to its intimate association rights. AEPi will have another opportunity to prove to the court that it is also entitled to protection against the College's anti single-sex membership policies because they interfere with the expressive nature of the organization.

This case is of particular importance because it appears to be only the second time that a federal court has specifically dealt with the Freedom of Association Rights of a fraternity.

- Timothy M. Burke

AEPi and the other plaintiffs were represented by Gregory Hauser, a member of the NIC Legal Committee and an attorney with the New York firm of Alston & Bird.

The North-American Interfraternity Conference (NIC) and the National Panhellenic Conference (NPC) filed an amicus curiae (friend of the court) memorandum in support of AEPi, prepared by Manley Burke. The court acknowledged that memorandum and quoted from it in its decision.

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[1] *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York,* U.S. D.Ct., Eastern Dist. of N.Y., Case No. 05-CV-2919(DLI)(MDG).

[2] *Bd. of Directors of Rotary Int'l v. Rotary Club of Doarte,* 481 U.S. 537 (1987).

[3] *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh,* 229 F.3d 435 (3d Cir. 2000).

# CHRISTIAN FRATERNITY'S LAWSUIT IS DISMISSED AFTER REGAINING OFFICIAL RECOGNITION

A lawsuit brought by Alpha Iota Omega in the United States District Court against the University of North Carolina at Chapel Hill has been dismissed.[1] As previously reported in *Fraternal Law, AIO,* a Christian fraternity, filed the lawsuit in response to UNC's denial of official recognition as a result of the fraternity's refusal to

follow the University's non-discrimination policy. The federal judge's dismissal of the lawsuit stemmed from UNC modifying the challenged non-discrimination policy and subsequently granting the fraternity official recognition.

Under the old UNC non-discrimination policy, all officially recognized student organizations were required to agree to open their membership to students "without regard to age, race, color, national origin, religion, disability, veteran status, or sexual orientation." AIO came into conflict with this policy by objecting to the portions dealing with religion and sexual preferences. AIO argued that forcing it to adhere to these policies would bring it into conflict with the fraternity's fundamental beliefs, goals, and standards of conduct, which are based on its Christian faith. AIO's refusal caused UNC to withdraw the fraternity's official recognition, which led to the lawsuit. Based on the rights of freedom of association, freedom of speech, and free exercise of religion, the lawsuit sought official recognition for the AIO at UNC without following the non-discrimination policy.

While the lawsuit was pending, UNC officials modified the challenged non-discrimination policy to offer official recognition to "student organizations that select their members on the basis of a commitment to a set of beliefs." After this change, AIO applied for and received official recognition from UNC. In light of these developments, the federal court held that AIO's claims were rendered moot because the official recognition sought by the lawsuit had been granted. Consequently, the lawsuit was dismissed. AIO had maintained that the lawsuit should be allowed to continue by arguing that the change in the non-discrimination policy had not afforded the fraternity sufficient protection. The federal judge in the case, however, disagreed. In his view, the revised policy adequately balanced the interests of the University in fostering diversity and discouraging discrimination with AIO's interests in organizing with like-minded Christian students. The judge noted that under the new non-discrimination policy UNC is now required to "allow all student organizations to limit membership according to shared beliefs and common goals, regardless of whether they are social, religious or political, and regardless of whether they are in line with the University's beliefs and goals."

• Brian W. Wais*

[1] *Alpha Iota Omega Christian Fraternity v. Moeser*, United States District Court, Middle District of North Carolina, Case No. 1:04CV00765.

* The author was a summer law clerk at Manley Burke

# UNIVERSITY PRESIDENT SPEAKS FOR FIRST AMENDMENT RIGHTS

A recent controversy at Northern Kentucky University is worth noting for the statements by the University President, James C. Votruba.

A campus Right to Life organization chose to make its position on abortion known, after going through proper University channels, by placing hundreds of small crosses in an open area on campus.

A campus faculty member, who disagrees with that expression, took it upon herself to invite members in one of her classes to join with her, without any permission to do so, in removing or destroying the crosses.

Northern Kentucky University acted to remove the professor from her classes and placed her on leave from the University because she violated the First Amendment rights of those who placed the crosses to begin with. The faculty member was permitted to retire at the end of the semester.

Those facts are reported here simply as background. The statements by the University President are of relevance to fraternities and other campus organizations that may be required to engage in their own fights to preserve their First Amendment Rights.

President Votruba's statements offer excellent insight into the nature of a university and its nurturing of such rights. Excerpts from his statement follow:

"One of the important roles that a University must play is to be a forum for debate and analysis concerning the important issues of the day. Often, these issues are surrounded by strident rhetoric and strong emotions, which makes it even more incumbent on the University to create and nurture an intellectual environment in which reason and evidence prevail and where all points of view can be heard...."

"... We are proud that, as a campus, we are not the captive of one ideology or point of view. At their best, universities are not places of comfortable conformity. They are places where ideas collide as students and faculty search for deeper understandings and perspectives."

"While the University supports the right to free speech and vigorous debate on public issues, we cannot condone infringement of the rights of others to express themselves in an orderly manner...."

"America is, today, debating a variety of polarizing issues around which people feel great passion. It is not surprising that these strong sentiments find their way onto college campuses. However, our role is to add light to these debates, not more heat. If we don't serve this role, who will?"[1]

Fraternities and sororities do, on occasion, find themselves at loggerheads with administrative officials who do not believe in fraternities and sororities and would just as soon regulate them out of existence. Freedom of expression and free speech are grounded in the same constitutional protection of the First Amendment. Even on private college campuses, where constitutional obligations may or may not apply, President Votruba's comments still are an exceptionally appropriate description of one of the roles of a university.

[1] Posted on Northern Kentucky University's website, April 18, 2006.

# WHY GREEK LIFE?: ANSWERING THE TOUGH QUESTIONS

As the new school year begins, college and university administrators plan diligently for orientation sessions to welcome new students to our campuses. Along with new students, we often face the ever-increasing interest of parents of our students asking detailed questions about every imaginable (and often unimaginable) aspect of campus life.

With a Greek student population averaging about 75 percent, a question I face every orientation has to do with why we have Greek life on our campus. With more and more colleges and universities across the country abandoning Greek systems, and tragedies making headlines that may (or may not be but are perceived to be) linked to Greek life, how can college and university administrators best answer questions of parents that question the value of such systems on our college campuses? After a recent session with parents, a colleague of mine suggested I should write down why I so fervently believe Greek life has a place on our campus and, I would argue, these thoughts have applicability on many other campuses as well.

First and foremost, Greek students, through their Greek organizations, are provided an opportunity for learning and leadership development. Greek national organizations believe this and, in my experience, do all they can to promote this. Our Greek organizations have to grapple with the toughest issues that colleges and universities face today in life outside the classroom: harm reduction and risk management practices and issues ranging from under-age and high-risk drinking to vandalism, sexual misconduct, and altercations with the legal authorities. Leaders of Greek organizations on our campuses must truly understand how to practice and articulate the missions of their national organizations as well as institutional values and do all of this while managing personnel and budgetary aspects of their organizations. This is, indeed, no easy task to do well. Colleges and universities must appropriately staff and budget Greek life areas and hold Greek organizations accountable to institutional and national organization standards set forth for them. Failure to do so is not only an educational disservice to students, it is also practicing Russian roulette with the lives of today's college students.

Akin to this, and the second reason why I value Greek organizations so highly on my college campus, is that Greek organizations provide an automatic accountability structure that should be considered a blessing to any institution (or parent) rather than a concern. Provided the tools, Greek leaders understand their responsibilities and are entrusted by the institution to carry those out. As I share with parents, if something, God forbid, goes wrong, I know EXACTLY where to go and who to talk with. A failure in the wristband system? A noise violation? A violation of "no contact rules" during recruitment? The accountability structure is firmly in place to teach students about consequences of failures in leadership.

Last and perhaps most important, is the concept of getting rid of Greek organizations. Sad to say, whether Greek organizations exist on our college campuses or not, high risk behaviors continue and can have dangerous consequences. Perhaps ridding a campus of Greek life is the right thing to do, however, I firmly do not believe it is the right thing to do on our college campus. I would much rather, as stated above, have a firm accountability structure in place to manage potentially high risk situations than to risk that all behavior occurs with little guidance or structure provided by the university system and systems of national organizations.

Creating partnerships with national organizations and institutionalizing the philosophies of national organizations along with institutional missions are the keys to promoting further responsibility among Greek leaders and members. Does this mean the tragedy may not occur? How we all wish it were so. Regardless, it is our responsibility to do all we can to support our Greek leaders and to require University leadership to support the mission of Greek life -- not only for the sake of educating our students but also to, potentially, save lives. That is the message that we can tell our parents.

• Dawn Watkins, Ph.D.
•Dean of Student Affairs
•Washington and Lee University
•Lexington, VA

# NPC RELEASED FROM LITIGATION

In the fall of 2002, Jacqueline Gufrovich was in the process of pledging the Zeta Kappa Chapter of Sigma Sigma Sigma. She and other new members, apparently along with some of the actives, were engaged in a game called "Menu Mania." They were driven to various restaurants in the vicinity of Montclair State University in New Jersey where the Chapter was located. After collecting menus from several restaurants, Gufrovich, one other of the new members and the driver of the car, an active, decided to stop at McDonald's to get something to eat. Turning left into the McDonald's parking lot, the driver failed to honor the right of way of an oncoming car. A collision ensued. Gufrovich was very seriously injured and paralyzed.

The lawsuit[1] that followed named the driver of both cars, the cars' owners, members of the Chapter, Sigma Sigma Sigma, the "National Organization," the Sigma Sigma Sigma Executive Council and National Officers and the National Panhellenic Conference (NPC) as defendants.

The basic allegation against the fraternity-related defendants was that the activity in which Gufrovich had been engaged was a "sorority pledge scavenger hunt which was an improper hazing activity" and that the National Organization "knew or should have known of the continued custom and usage of scavenger hunts during initiations and failed to prohibit such activities."

The suit, initially filed in January of 2004, remains pending. But the National Panhellenic Conference was released as a defendant following a good deal of discovery, the deposition of a former National Chairman of NPC, and the production of numerous documents from NPC's files, when a Motion for Summary Judgment was granted to NPC on August 1, 2006.

A motion for summary judgment is a legal tool which allows a court to make a decision prior to trial that there is or is not sufficient evidence to go forward with the claim at trial against a particular defendant. The New Jersey standard for a motion for summary judgment is similar to that in other states. In a damage claim such as Gufrovich's, in order to have a valid claim there must be evidence to establish that the defendant owed a duty of care to the plaintiff and breached that duty. In this instance, pre-motion discovery of NPC and the other defendants documented the fact that NPC had absolutely nothing to do with nor any knowledge of the events leading up to the accident, nor any ability to discipline those involved.

There was no doubt a relationship existed between NPC and Sigma Sigma Sigma, but it was not a relationship which gave NPC power to direct or control Sigma Sigma Sigma's Zeta Kappa Chapter in any way.

In her deposition testimony, Jean Scott, the former Chairman of NPC, made it clear that NPC had no enforcement or disciplinary abilities over the conduct of the chapters of member organizations and did not approve or review any chapter's social policies, plans for parties, events or membership activities. The Chapter "pledge mom," technically the Vice President of the Chapter, made clear in her testimony that she was the one who decided what activities new members would participate in during the pledge period. She acknowledged that she did not advise NPC of the Menu Mania activity, nor anything else the Chapter was doing with its new members.

Because NPC had no authority to dictate, control or manage Sigma Sigma Sigma or its Chapter's conduct at Montclair State, it had no duty to the plaintiff.

Even the plaintiff's own expert witness was not able to assign any negligence to NPC.

Additionally, NPC's trial counsel[2] also argued that the actions of NPC were not the proximate cause of the injuries to Gufrovich. To establish proximate cause, "a plaintiff must first show that the defendant's negligence was a 'cause in fact' of the accident." New Jersey law defines it this way:

> "Any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred."

NPC's counsel argued that even if the court should find that there was a duty owed to the plaintiff, summary judgment in favor of NPC would still be appropriate because the proximate cause of the accident had nothing to do with any actions by NPC, but were solely the responsibility of the actions of the defendant driver who caused the accident.

In this case, at the time of the accident, the game of Menu Mania had ended. The three women in the car were on their own. They were not directed to the accident scene by NPC or anyone else. As NPC's counsel put it in his motion, "What proximately led to the ensuing accident and plaintiff's injuries arriving therefrom was Mary Merenda's negligent and reckless operation of her vehicle." NPC clearly had no involvement in that.

New Jersey's summary judgment rules require that "if the pleadings, depositions and answers to Interrogatories and Admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party should prevail as a matter of law." Summary judgment is intended to provide a prompt, business-like and inexpensive means of disposing of a case where it is clear that, under the law, no decision could be made by a jury or finder of fact to impose liability or damages on the seeker of the motion.

Finally, more than a year and a half after NPC was named as a defendant in the lawsuit, the court granted summary judgment in favor of NPC. Claims against other defendants remain pending and trial is still some time off.

Already, there are lessons to be learned from this case. Even seemingly innocent activities can lead to tragic

results if not planned carefully. It is just not wise for new member activity to require either the new members or active members to drive vehicles in order to engage in the activity. Safety depends upon the ability and care exercised by each individual driver.

Even a totally innocent and uninvolved party, in this case NPC, can find itself embroiled in a suit and though insurance coverage may exist, significant time, energy and expense can be involved in being extricated from such litigation.

• Timothy M. Burke

[1] *Gufrovich v. Merenda, Superior Court of* New Jersey, Law Division, Essex County, Docket No. ESX-L-793-05.

[2] David A. Weglin of the Fairfield, New Jersey firm of Kramkowski, Lynes, Fabricant and Bressler.

# CONFIDENTIALITY VS. LEGAL OBLIGATION

"I've been raped, but please don't tell anyone." When the young member of a fraternity or sorority comes to an officer or an alum advisor with that statement, it presents a difficult dilemma. Obviously, there is a desire to be supportive of the victim and to honor their request for confidentiality. But that might not be the correct or legally appropriate thing to do.

Notre Dame College, not the one with the golden dome, but the smaller liberal arts college in a Cleveland, Ohio suburb, recently learned just how inappropriate maintaining confidentiality under those circumstances can be. Late in 2005, a Notre Dame co-ed reported to the Dean of Students at Notre Dame that she had been sexually assaulted by another student whom she named, but she asked that the attack on her be kept confidential. The Dean apparently agreed and the matter was not reported to the police. Shortly afterward, a second co-ed approached the Dean with a similar complaint about the same assailant. Again, the victim asked that her complaint be kept confidential and, again, the Dean of Students honored that request.

Ultimately, another assault occurred on campus, and the same perpetrator was named. This time it was reported to the police and after their investigation was complete, charges were brought against the perpetrator for sexual attacks on six separate students at the College.

When the Grand Jury issued the charges against the assailant, the startling thing was that it also issued charges against the Dean of Students on three counts of the failure to report a felony. Those charges, just brought in June, remain pending as this issue of *Fraternal Law* goes to press.

While criminal law varies from state to state regarding the obligation to report a crime, generally there is an affirmative legal obligation when someone has direct evidence that a felony, a serious crime, has been committed to report that to the police. The section of the Ohio Revised Code under which the Dean of Students was charged (O.R.C. 2921.22) is fairly typical in demanding that, "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." The failure to do so is, under Ohio law, a fourth degree misdemeanor and subjects the defendant to potential jail time and fines.

Obviously, too, there is the potential for civil liability. It is easy to see why. Especially in the Notre Dame case. It is not difficult to conclude that had the Dean of Students reported the first incident to the police, the second, third, fourth, fifth and sixth incidents may never have happened. Arguably, those later victims have a civil cause of action for damages, not only against the Dean but against Notre Dame under the legal theory of *respondeat superior.* As the Latin implies, the master (the college) may, under many circumstances, be responsible for the wrongdoing of the servant (the Dean). One Cleveland newspaper reported that when the President of the college finally learned the whole story, he immediately asked "how much insurance do we have?"

Obviously, the victim of a sexual assault needs the support of friends and anyone else he or she consults with, but the fact that the victim wants to maintain confidentiality does not relieve someone who learns of the assault of the obligation to report it. Obviously, it is a different situation if the victim is reporting the matter to an attorney, where the attorney-client privilege may apply. But there is no such privilege that extends to the President of a Chapter or an Alum Advisor. If confronted with such a report, but the victim does not want to report it to the police and wants you to keep it secret, the best thing to do is to let the victim know that you want to be helpful and supportive, but under the law you may have an obligation to report it to the police. Promptly consult with legal counsel to determine what the specific obligations are in your state. Tell the victim you are going to do that. Once you have the legal advice that is necessary, follow it. If your lawyer tells you to report what you know to the police, do it.

The victim may choose not to prosecute. Depending on what the law is in the state where the attack occurred, she may have the right to make that choice, but at least the matter will have been reported to the police, who can do their own investigation. And at least you won't be responsible for future attacks by the same perpetrator who remained free only because his initial crime was not reported.

• Timothy M. Burke





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