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SECOND CIRCUIT REVERSES FREEDOM OF ASSOCIATION CASE

The Second Circuit Court of Appeals recently handed down its decision in *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York*,¹ one of the more important cases for Greeks in years. The Court ruled against the fraternity and reversed and vacated the District Court's preliminary injunction.²

The case stemmed from the College of Staten Island's ("CSI") policy restricting official recognition (and resulting benefits) to groups that do not discriminate on the basis of gender. Alpha Epsilon Pi wanted to create a new chapter at CSI, but was denied official recognition from CSI because the Fraternity refused to admit female members.

CSI informed the Fraternity that "[m]embership in a chartered club must be open to all students. Because your constitution appears to exclude females, it contravenes the College's nondiscrimination policy." The Fraternity filed suit, alleging that CSI was violating the First and Fourteenth Amendments, and subsequently sought a preliminary injunction to force CSI to recognize it as an official organization and to prevent CSI from enforcing its prohibition on single-sex organizations.

The District Court, as reported in the September 2006 issue of *Fraternal Law*, granted the Fraternity's motion for preliminary injunction.³ The District Court found that

12th National Fraternal Law Conference

The 12th National Fraternal Law Conference will take place on November 16 and 17, 2007, in Cincinnati, Ohio. The line-up of speakers is the best yet.

Professors Lisa A. Penland and Melissa Weresh of Drake University Law School will address legal issues and the Internet in the "Google Age."

Louis Billionis, the Dean of the University of Cincinnati College of Law and a former National Board member of the ACLU, will discuss fraternities and the First Amendment.

A panel of law enforcement experts which includes: Ken Parker, an assistant U.S. attorney who specializes in forfeiture issues; Tom Johns, a Cincinnati police captain who, for seven years, commanded the police district that included all of the fraternities at the University of Cincinnati; Chris Wagner, the assistant Cuyahoga County prosecutor who prosecuted a Cleveland area college official for failure to report sexual assaults on her campus; and Dave Westol, a former prosecutor and long time Greek advisor, will address interactions with law enforcement and obligations to report criminal activity.

Cindy Stelhorn from M-J Insurance and Kevin Canavan of the Philadelphia law firm Schwartz Campbell, will discuss responding to claims and lawsuits.

William A. Nolan of Squire, Sanders & Dempsey, who serves as counsel to Delta Zeta, will address the suit against DePauw University. Daniel J. McCarthy of Manley Burke will join him on a panel and address Sigma Chi's litigation against Dickinson College.

Victor Lloyd of the Mental Health Association of Southwest Ohio, will address mental health issues affecting college students.

The always popular Barbara Schwartz Bromberg of Dinsmore & Shohl, will discuss recent developments in tax laws and policies that impact Greek organizations.

Greg Hauser, the attorney for AEPi in their case against College of Staten Island, will be the featured luncheon speaker.

A registration form for the Fraternal Law Conference is included inside this issue.

the Fraternity's size, purpose, recruiting practices, and attitude toward non-members qualified it as a protected intimate association, and that being forced to admit women would burden its associational rights. The District Court also held that the intrusion on the Fraternity's associational rights was subject to strict scrutiny, and rejected CSI's contention that its policy was narrowly tailored to serve a compelling state interest.

CSI appealed to the Second Circuit Court of Appeals. The Court of Appeals first vacated the injunction on June 20, 2007. The Court then handed down its decision on September 13, 2007.

Court's Must Do a Balancing Test

The Court first noted that the District Court applied a categorical approach when looking at whether CSI's policy affected a constitutionally protected liberty: "[e]ither the policy affected a constitutionally protected liberty or it did not." The District Court ruled that if a policy intruded upon a group's constitutionally protected interest, the policy was subject to strict scrutiny. The Court of Appeals held that this was the wrong approach. "[T]he appropriate question in evaluating an associational-interest claim is not—as the district court asked—whether the associational interest claimed receives constitutional protection. Rather, the question is: Upon a balancing of all pertinent factors, do the state's interests, and its means of achieving them, justify the state's intrusion on the particular freedom?"

Intimate Association Factors

The Court then examined the factors relevant in the intimate association analysis: size, selectivity, purpose and exclusion of non-members. On size, the Court noted that the Fraternity's size limitation was "the product of circumstances, not a desire to maintain intimacy" and that its characteristics were similar to groups not found to be intimate associations. The Court also refused to find that the Fraternity was highly selective because "a relatively high percentage of Jewish men at CSI who express an interest in the Fraternity are invited to join." On the purpose element, the Court found that the Fraternity's purposes were "broad, public-minded goals that do not depend for their promotion on close-knit bonds." On the exclusion of non-members, the Court noted that some of the Fraternity's activities take place only among its members. However, the Court also noted that the Fraternity involved non-members in several crucial aspects of its existence, such as rush events and parties.

The Court also noted that the Fraternity desired to be part of the larger national AEPi organization, and that this desire hurt its intimate association claim. "Association with AEPi would involve the members to some extent in activities of the national group and would thus dilute the intimacy of the Fraternity. The Fraternity opposes admitting women at least in part because admitting them would make the Frater-

nity ineligible for this affiliation. The Fraternity's desire to associate itself with this national organization is in some tension with the purpose of the right to intimate association."

The Court concluded that "[b]ased on its size, level of selectivity, purpose, and inclusion of non-members, the Fraternity lacks the characteristics that typify groups with strong claims to intimate association."

Degree of Interference & State's Interest

The Court then found that the policy only minimally interfered with the Fraternity's associational rights because the Fraternity could exist off campus, it just could not use CSI resources or receive CSI funding. The Court found that CSI's interests in applying its non-discrimination policies were substantial, and that the policy was well tailored to achieve CSI's stated interests of ending discrimination.

Accordingly, in conclusion, the Court found the Fraternity's intimate association claims "relatively weak," that CSI's policy did not greatly burden the plaintiffs' enjoyment of their associational interests, that the policy served several important state interests and that the policy was well tailored to effectuate those interests.

What Does the Future Hold?

This very important case is a set back for all Greeks. The only other federal appellate decision concerning associational rights of Greek students was *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*.⁴ The *Lambda Phi* case dealt with a chapter with an unenviable record, presenting a less than sympathetic case. The AEPi decision is particularly disappointing because AEPi did not enter the case with a negative record and its emphasis on Jewish heritage and causes should have strengthened its First Amendment claims. As of this writing, AEPi is evaluating its options. (Gregory Hauser, who represented the Fraternity in this litigation, is the scheduled luncheon speaker at the 2007 Fraternal Law Conference and will discuss the case in length at that time.)

• Daniel J. McCarthy

¹ *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York*, -- F.3d--(2nd Cir. 2007), 2007 WL 2677037 (C.A.2 (N.Y.)).

² The North-American Interfraternity Conference (NIC) and the National Panhellenic Conference filed amicus curiae briefs in support of AEPi in both the District Court and the Court of Appeals. Manley Burke drafted and filed the briefs on behalf of the NIC and NPC.

³ *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).

⁴ *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435 (3d. Cir. 2000).

FILING REQUIREMENTS FOR EXEMPT ENTITIES NOT CURRENTLY REQUIRED TO FILE FORM 990

Smaller organizations (those normally having no more than \$25,000 of gross receipts each year), churches and some other organizations did not have to file annual information returns (Form 990) prior to the passage of the Pension Protection Act of 2006 ("PPA"). The PPA requires all such organizations to electronically provide certain information annually (apparently on a calendar year basis), including name of an officer and "evidence of its continued exemption" from filing the annual return. This information will be subject to the exempt organization disclosure requirements, so that all such organizations will have to make this information publicly available upon request. An organization that fails to file this information for three consecutive years loses its tax exemption. This provision applies to annual periods beginning after 2006.

In July, 2007, the Internal Revenue Service began mailing educational letters to more than 650,000 small tax-exempt organizations that may be required to submit the annual notice required under the PPA. The annual notice has been designated "Form 990-N Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required to File Form 990 or 990-EZ." IRS expects to mail the letters over a period

of several months, finishing in December, 2007.

According to its news release, the IRS calls the new form an "e-Postcard" because "it is short, easy and electronic." Organizations will be able to submit it free of charge. The e-Postcard requires small organizations to provide a legal name and mailing address, any other names used, a Web address if one exists, the name and address of a principal officer and a statement confirming that the organization's annual gross receipts are normally \$25,000 or less.

The IRS continues to develop a free reporting system for the e-Postcard and an application to make the information available to the public on IRS.gov. The IRS says that information about these systems will be announced as soon as it becomes available.

There are many small fraternity organizations that have not been previously required to file Form 990. This includes fraternal chapters, alumni(ae) associations and even some house corporations. All national organizations should immediately inform all of their affiliates and subordinates of this new requirement and the penalty of loss of exempt status for noncompliance.

- Barbara Schwartz Bromberg, Esq.

DRAFT REVISED FORM 990 ISSUED

INTRODUCTION

On June 14, 2007, the IRS released for public comment a discussion draft of a redesigned and revised Form 990, Return of Organizations Exempt from Income Tax. This, of course, is the Form that most fraternal organizations and their foundations are required to file annually. The discussion draft constitutes a significant redesign of the Form, which has been revised only on a piecemeal basis since 1979. The public comment period is scheduled to end on September 14, 2007, but ASAE and others are asking to have the comment period extended. The IRS hopes to have the Form ready for the 2008 tax year (i.e., Forms filed in 2009).

In its news release announcing the release of the discussion draft, the IRS stated that the redesign of Form 990 is based on three guiding principles: enhancing transparency, promoting tax compliance, and minimizing the burden on the filing organization. In elaboration on these guiding principles, the IRS has stated:

- Enhancing transparency means providing the IRS and its stakeholders with a realistic picture of the organization and its operations, along with the basis for comparing the organization to similar organizations

- Promoting compliance means the Form must accurately reflect the organization's operations and use of assets, so the IRS may efficiently assess the risk of noncompliance.

- Minimizing the burden on filing organizations means asking questions in a manner that makes it relatively easy to fill out the Form, and that do not impose unwarranted additional recordkeeping or information gathering burdens to obtain and substantiate the reported information.

The redesigned Form 990 consists of a 10-page core Form, including a summary page at the beginning. In addition, an organization may be required, depending upon its type and activities, to complete one or more schedules. A list of the proposed schedules to the redesigned Form 990 is attached.

PART I OF THE CORE FORM - THE SUMMARY PAGE

In this part, this page provides the organization's identifying information and a snapshot of certain of the organization's financial, compensation, governance, and opera-

tional information. The summary page highlights certain items, such as the number of individuals receiving compensation in excess of \$100,000, the highest compensation amount paid by the organization, and the percentage of program service expense that is made up of officer, director and other key employee compensation. The Summary also provides information on the number of members of the governing body and the number of independent members of the governing body. Items reported in the Summary are derived from information provided elsewhere in the Form.

PART II OF THE CORE FORM

In this part, the organization is required to report information about compensation of officers, directors, trustees, and certain other employees. As is the case with the current Form 990, an organization must list each officer, director, trustee, or key employee of the organization, regardless of compensation amount. The redesigned core departs from the current Form, however, by requiring the reporting of compensation based on Form W-2 reporting for employees, and Form 1099 reporting for directors and other independent contractors. As is the case with the current Form, compensation paid by related organizations must be reported separately.

If an individual officer, director, employee or former officer, director or employee receives more than \$150,000 in reportable compensation, or receives more than \$250,000 of reportable and non-reportable compensation (e.g. deferred compensation, nontaxable fringe benefits and expense reimbursements) from the organization or a related organization, then the organization would be required to complete and file Schedule J, which is an in-depth analysis of compensation. Similarly, if an individual received or accrued compensation from any source, other than the organization, for services rendered to the organization, then Schedule J is required to be filed.

PART III OF THE CORE FORM

Each organization is required to provide certain information regarding the composition of its board or governing body, certain of its governance and financial statement practices, and the means by which the organization is accountable to the public by making certain governance information publicly available. According to the IRS commentary accompanying the proposed Form "[g]ood governance and accountability practices provide safeguards that the organization's assets will be used consistently with its exempt purposes, a critical tax compliance consideration, especially with respect to organizations that are subject to private benefit, excess benefit, and private inurement prohibitions." The latter includes both Code Section 501(c)(7) and 501(c)(3) organizations.

PARTS IV, V, AND VI OF THE CORE FORM

These sections generally follow the current Form 990's layout for reporting of revenues, expenses, and balance

sheet items. One proposed major change places all the required supplemental financial information from Parts I, VII and VIII of the current Form 990 into a separate schedule, Schedule D, and eliminates the requirement for UBIT exclusion codes. The redesigned financial statement reporting requires additional reporting of actual and contingent federal tax liabilities, and other amounts that are not necessarily reported on an organization's balance sheet (such as museum collections, conservation easements, and escrows held for the benefit of others).

PARTS VII AND VIII OF THE CORE FORM

These sections contain questions about the general activities of the organization and its compliance with various IRS filing requirements. Many of the questions in Part VII serve as "trigger" questions for the various schedules an organization might be required to complete, depending upon its type and activities. Part VIII requests information about the organization's employment tax, excise tax, unrelated business income tax, and other filing obligations.

PART IX OF THE CORE FORM

Here, information on the program service and exempt function activities of the organization is required, and the organization is asked to describe its most significant accomplishment for the year.

SUMMARY OF POTENTIALLY APPLICABLE SCHEDULES

The redesigned Form's fifteen schedules are designed to require reporting of information only from those organizations that conduct particular activities. A list of the Schedules is attached. Certain Schedules, such as Schedules A and B, generally will be completed only by public charities, such as most fraternal foundations, as is the case with the current Form. Most of the remaining Schedules will be completed by only a small percentage of the organizations filing the core Form. Nearly every organization will be required to complete at least one portion of Schedule D, Supplemental Financial Statements, similar to what is required presently.

CONCLUSION

The IRS recently released approximately 300 pages of public comments about the draft Form and more will be forthcoming. Some commentators praised certain aspects of the Form and others were critical. It behooves every fraternal organization and fraternal foundation to review the draft Form and discuss it with their tax advisor, and to watch for further developments, as almost all such organizations will be affected.

- Barbara Schwartz Bromberg, Esq.
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SUMMARY OF SCHEDULES AND FILING PROFILE June 14, 2007

Redesign Schedule	Topic	Current/New Item	To Be Completed By	Comments
A	Public Charity Status	Current Sch A Part IV	All 501(c)(3) organizations	Redesigned Sch A focuses exclusively on Public Charity status; May take the place of Form 8734 in the 5-year advance ruling process.
B	Contributors	Current Sch B	Any organization that received \$5,000 or more from any one contributor	Same as 2006 Sch B
C	Political and Lobbying Activity	Current Sch A Part VI (lobbying); new (political)	Organizations that conducted lobbying or political activities	Redesign requires new political activity and inter-corporate funds transfers reporting
D	Supplemental Financial Statement Detail	Conversion of required attachments into unified Sch D; some new items	All types of organizations	New items include FIN 48 uncertain tax position and art collection financial statement footnote disclosures, 5-year endowment table
E	Schools	Current Sch A Part V	All private schools	No changes
F	Foreign Activities	New	Organizations that have a foreign account or office, or have employees or activities outside the U.S.	Retains question regarding foreign accounts or office; adds reporting of exempt and other activities outside the U.S.
G	Fundraising and Gaming	Part I, L9 attachments	All organizations with more than \$10,000 from fundraising events or outside fundraising costs	Expands reporting regarding certain professional fundraising
H	Hospitals	New	Organizations that operate at least one hospital facility that provides hospital or medical care, including as part of a hospital system or university	Requires organization to report aggregate community benefit for all facilities, and certain information regarding billings, collections, and joint ventures; requires list of facilities and description of type of services provided at each facility; requires reporting of certain policies and activities to communities served by the organization
I	Grants	Current Part II, L22b, 23 attachment	Organizations that make more than \$5,000 of aggregate grants	Retains current reporting but with new filing thresholds
J	Compensation	Comprises portions from Part V-A and V-B, as well as Sch A, Part I	Generally those organizations that pay more than \$150K reportable compensation/\$250K total compensation to at least one individual or compensates Former officers, directors, trustees, or key employees	Most organizations have simplified reporting (W-2 or 1099) on the core, with additional reporting regarding its compensation practices; Sch J requires detail beyond current reporting for various types of compensation
K	Tax Exempt Bonds	New	Organizations with an outstanding tax-exempt bond issue greater than \$100K	Retains certain information from Part IV, L 64a, but adds use and investment of proceeds information and relationships with outside advisors
L	Loans	Part IV, L 50a, 50b, 63 on balance sheet	Organizations that lend money to or borrow from officers, directors, and certain disqualified persons	Generally unchanged but eliminates some items currently required
M	Noncash Contributions	New	Organizations that received more than \$5,000 of noncash contributions	Requires reporting by types of contribution and information regarding donee's valuation methods for financial reporting
N	Termination or Significant Disposition of Assets	Part VI, L 79 (terminations and substantial contractions)	Organizations that have ceased activities or that made a significant disposition of assets (more than 25% of net assets)	Part I expands current termination reporting; Part II requires new reporting for dispositions of more than 25% of the at fair market value of the net assets of the organization irrespective of whether it is a sale or other transaction.
R	Related Organizations	Comprises portions from Parts VI, L 80b; IX; XI; Sch A Part VII	Organizations that own a controlling interest in (or are controlled by the same persons as) a partnership, LLC, corporation, trust, or other exempt entity	Locates related organization reporting in one schedule and classifies it by type of tax entity (partnership, corporation, disregarded entity, or exempt)

CHARGES DROPPED AGAINST RIDER U. OFFICIALS

As reported in the last issue of *Fraternal Law*, the Mercer County, New Jersey Prosecutor recently filed hazing charges against five individuals, including two Rider University administrators, following the binge-drinking death of Gary DeVercelly. Mr. DeVercelly, a pledge of the Phi Kappa Tau fraternity, died in March from alcohol poisoning. His blood alcohol level was .426, more than five times the legal limit.

Three weeks after the Prosecutor, Joseph Boccini, Jr., filed charges against Dean of Students Anthony Campbell and director of Greek life Ada Badgley, all charges were dropped against the administrators. The Prosecutor told the Associated Press that he was unsure from the beginning whether the charges would result in convictions. According to the A.P., Mr. Boccini stated that the Grand Jury was "upset with the University. This was an emotional case."

The New Jersey hazing statute provides: "A person is guilty of hazing, a disorderly persons offense, if, in connection with initiation of applicants to or members of a student or fraternal organization, he knowingly or recklessly organizes, promotes, facilitates or engages in any conduct, other than competitive athletic events, which places or may place another person in danger of bodily injury." It was difficult to imagine how the Prosecutor could have established the necessary elements for the administrators. Apparently, the Prosecutor agreed, but unfortunately not until after filing the charges. This case should serve as a reminder that both

school and Greek leaders must ensure they are doing everything possible to prevent and eliminate hazing.

Charges were also filed against three students. At least two of the students, Dominic Olsen and Adriano DiDonato, will avoid prison time. Both defendants applied for, and were accepted into, a pretrial intervention program, which allows defendants to forgo prison and follow a supervised rehabilitation program. The third student charged, Michael Torney, was not eligible for the program and turned down a plea deal from prosecutors. Mr. Torney's trial date has not been set.

In response to Mr. DeVercelly's death, Rider created a task force to examine the University's alcohol policy. According to the *New York Times*, one of the task force's recommendations included eliminating fraternities and sororities on campus. Thankfully, the University rejected that idea, according to Debbie Stasolla, Rider's associate vice president for planning, partly because of a fear that such a move would push binge drinking off campus. Rider did implement several of the task force's recommendations, including banning alcohol on most of the campus, requiring that freshmen take a seminar on the dangers of alcohol, and creating stiffer penalties for violating the alcohol rules.

Look for updates on the evolving status of this case in future issues of *Fraternal Law*.

• Daniel J. McCarthy

ACLU AND SIGMA ALPHA MU CHALLENGE CHAPMAN UNIVERSITY

According to an October 2, 2007, letter from the ACLU of Southern California to the President of Chapman University, Chapman has restricted the free speech and association rights of students desiring to affiliate with Sigma Alpha Mu. Banning the group's events from campus, the University has extended the prohibition to the wearing of Greek letters or advertising Sigma Alpha Mu on the facebook website.

While citing to numerous federal court decisions comparing university campuses to public forums, the ACLU principally relies upon the California Constitution and, particularly, the California Code, which provides that "no private post-secondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that when engaged in outside the campus, or facility of a private secondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."¹

The effort to form a Sigma Alpha Mu Chapter at Chapman has been underway for several years, sparked by

the desire of several students led by Pascal De Maria, a senior, who argued that "all the group wanted to do was have a positive Jewish fraternal experience." De Maria was willing to accept non-recognition by the University, but wants the same rights to "have a table on campus like the other groups and advertise on campus."

Hector O. Villagra, Director of the Orange County Office of the ACLU of Southern California, concluded his letter to Chapman's President by asking the President "provide immediate written confirmation that the restrictions on the free-speech rights of students from Sigma Alpha Mu ... have been rescinded and that the penalties for their violation, if any, have been rescinded as well."

California's State Constitution, particularly combined with the statutory protection adopted by the State Legislature, goes farther than that of any other state in protecting the free speech rights of students on both public and private campuses.

• Timothy M. Burke

¹ Cal. Educ. Section 94637(a).

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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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FRATERNAL LAW CONFERENCE 2007

The 12th national FRATERNAL LAW CONFERENCE will take place November 16-17, 2007, at the Westin Hotel in downtown Cincinnati, Ohio. The full day session will begin at 9:00 a.m. on Friday and the half-day session on Saturday ends at noon.

Who should attend?

Fraternity officers, council members, administrators, students, school officials, attorneys and anyone involved with Greek organizations. We offer a substantial discount to students.

CLE credit is available from the State of Ohio and many other states. We are happy to cooperate in providing you or your state CLE Board with conference information.

The **general registration** fee is \$350.00 per participant; **student fee** is \$250.00. Included in the conference fee is a continental breakfast on Friday and Saturday, lunch on Friday and a reception to be held Friday evening. Parking is not included but is available at the Westin for \$15 per day for self parking, and also at several garages nearby.

A block of rooms have been reserved at the Westin Hotel for \$149.00 per night for a standard room. Conference Hotel room rates are subject to applicable taxes in effect at the time of check in (currently 10.5% occupancy Tax and 6.5% State and Local Taxes). Reservations must be made no later than October 27, 2007, to guarantee the group rate. Hotel reservations may be made by calling the Westin Hotel toll free at (800) 937-8461. Ask for the Fraternal Law Conference rates when making your reservation. For further information contact **Bonnie S. Hill** at (513) 721-5525.

REGISTRATION FORM

Return to: Bonnie S. Hill, *Fraternal Law*, 225 West Court Street, Cincinnati, Ohio 45202 Phone: (513) 721-5525; Telefax: (513) 721-4268; E-mail: bsh@manleyburke.com.

Name _____ Title _____

Affiliation _____

Address _____

City/State/Zip _____

Phone _____

I am a/an: Attorney Fraternity/Sorority Leader Student University Official

Enclose Conference fee of \$350.00 per participant, made payable to *Fraternal Law*.

Enclose Conference fee of \$250.00, per participant, student registration fee.

Refund Policy: Full refund for cancellations received on or before October 20. Refund minus \$50 for cancellation received between October 21 and November 15. No refunds after November 15.