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FAMILY SUES UTAH STATE; STUDENTS SENTENCED

As reported in the January 2009 issue of *Fraternal Law*, the death of Michael Starks at Utah State University led to criminal charges being filed against two fraternities and members of both of those chapters.

While those charges have been resolved, now the University must defend a lawsuit recently filed against it and the State of Utah by the Starks family.

The charges against the individual Greek members varied but included hazing, attempted hazing, unlawful supplying of alcohol to minors and obstructing justice. The charges were ultimately dismissed against seven of the thirteen students individually charged. Another had the charges held in abeyance for one year while she is on probation and completes 50 hours of community service. Her community service includes speaking to middle schools, high schools and colleges in Utah emphasizing the dangers of underage and binge drinking.

> Fraternity chapters that had existed successfully at Utah State for decades are now gone and in all likelihood, under these circumstances, will never return.

Others did not get off so lightly. Sentences for those convicted included 365 days in prison, with all but 30 days suspended, a $1,000 fine, three years' probation and 200 hours of community service, 180 days in prison, with all but either 8 or 14 days suspended, and probation ranging from six months to one year. The terms of the probation also vary, but typically include public service of up to 200 hours, drug and alcohol counseling, prohibition against consuming alcohol or going to bars, parties or liquor stores, having to submit to random search and seizure and not belonging to a fraternity or sorority. Some were also required to write a letter to the family of Michael Starks.

While the charges against the individual members were all misdemeanors, the Utah State University Chapters of Sigma Nu and Chi Omega were both charged with felony hazing. The national fraternities, who had been effectively exonerated by the County Attorney, moved quickly after Michael Starks' death to close their respective chapters. With the chapters out of existence, the attorneys for both ultimately filed motions to dismiss the charges against the chapters. Judge Thomas Willmore of the First Judicial District Court of Cache County, heard these motions. In the case against the Chi Omega Chapter, the Judge found that the chapter was an unincorporated association whose operations were suspended and then had its charter revoked and the chapter closed. With the charter revoked, the Judge found the chapter "ceased to exist. It has no assets and no ability to pay fines, fees or restitution. There is simply no entity in existence against which probationary or regulatory action of any type can be taken."

The Judge went on to state that a chapter that had lost its charter and ceased to operate was the equivalent of the death of a criminal defendant. In the case of a death of a defendant, the prosecution ceases.

In the Sigma Nu case, Judge Willmore put it simply: "As a matter of law, the State cannot maintain a criminal prosecution against a dissolved unincorporated association; therefore, the [charge] is dismissed."

While at first glance it may appear that the chapters got off lightly, it should be kept in mind that fraternity chapters that had existed successfully at Utah State for decades are now gone and in all likelihood, under these circumstances, will never return. No students will have the opportunity to be a member of either organizations on the Utah State campus, nor will the alums of those chapters have a home to visit when returning to school. Worse still, a young man is dead. Those who were involved will have to live with that for the rest of their lives.

On July 21, 2009, the *Salt Lake City Tribune* reported in an article that:

> "The Starks family has reached an out-of-court civil settlement with Sigma Nu and Chi Omega. The May 5 settlement bars either side from discussing its terms and circumstances, said the Starks' lawyer...."

While the criminal prosecutions are now complete and the civil claims against the fraternities are resolved, the matter is not ended. On August 10, 2009, the Starks family filed suit against Utah State University and the State of Utah. The suit claims that the University was negligent in not adequately and appropriately supervising and disciplining the fraternity and that as a result of that negligence, Michael Starks died. The suit also claims that the University failed to fulfill its duty to warn incoming students of the conduct,

particularly the illegal use of alcohol and hazing, among Greek groups.

The *Salt Lake Tribune* in an August 13, 2009 article quotes the attorney for the Starks family as explaining the lawsuit saying, "if the University had done its job and monitored this fraternity and used the power it has to discipline the fraternity and its members, it probably would not have existed when Michael Starks got to USU." The suit alleges that the men's fraternity had a long history of the abuse of alcohol and describes in detail assorted alcohol-related conduct which the suit claims was so widespread that it should have been known by the University. The family's attorney went on to tell the *Salt Lake Tribune* that "they [the University] turned a blind eye." Whether the Starks can prove the allegations in their complaint remains to be seen, but in the absence of an agreement between the parties, this litigation could continue for years.

Now, as a new academic year begins, the death of Michael Starks should serve as a sad reminder of the consequences that can flow from acts of hazing, particularly when they are compounded by the illegal use of alcohol. While it has never been suggested that anyone at either chapter or any of the thirteen individuals who were charged ever intended for real physical harm or death to occur to Michael Starks, it did.

If there is anything at all to be gained from Starks' death, it is remembering and learning from it.

- Timothy M. Burke

TAX RETURN REDUX

Or How I Learned to Stop Worrying And Love the New Form 990

For several years, the Internal Revenue Service ("IRS") has worked to redesign the Form 990 annual tax return filed by tax exempt organizations ("TEOs"), including fraternities, sororities and their foundations. The redesign process was based upon three (3) guiding principles:

- Enhancing **transparency** to provide the IRS and the public with a realistic picture of the organization;
- Promoting **compliance** by accurately reflecting the organization's operations so the IRS may efficiently assess the risk of non-compliance; and
- **Minimizing** the burden on filing organizations.

IR-2007-117, June 14, 2007 (emphasis added).

The result is the redesigned Form 990, a detailed filing requiring input from all aspects of the reporting TEO, including operations, accounting and legal. The form consists of an eleven (11) part core form, with sixteen (16) schedules. However, the form is much more than a simple "check-the-box" return. The approach is one of general disclosure, requiring the reporting organization to explain many of its simple "yes" or "no" answers.

While the redesigned form may promote "**transparency**" and "**compliance**", the burden on filing organizations is clearly greater than it was. In fact, in its first ever Annual Report, the IRS TEO Division discarded the notion of "**minimizing**" the burden on filers, noting instead that the redesign accomplished the goals of "increasing transparency", "promoting accountability" and "encouraging compliance". *Exempt Organizations Annual Report*, November, 2008. The IRS jettisoned the goal of "minimizing" the burden on the filing organization somewhere along the way.

Moreover, more and smaller organizations will be required to report. The IRS itself has recognized the disparity in size of reporting TEOs noting that although small organizations make up the largest percentage of TEOs, the largest 1% of public charities hold 66% of the sector's assets, and account for 61% of the sector's revenue. (IRS pub. *Background Paper Redesigned Draft Form 990*). Nevertheless, all reporting TEOs, big and small, must file the redesigned Form 990. How small? Beginning in Tax Year 2010, all TEOs with Gross Receipts exceeding $200,000 or Assets exceeding $500,000 will be required to file the new Form 990. Currently, only TEOs with Gross Receipts exceeding $1 million or Assets exceeding $2.5 million are required to file a Form 990.

In addition to subjecting more and smaller TEOs to filing requirements, the scope of inquiry is significantly broader than before. The new form is no longer a sleepy "check-the-box" tax return, but rather something very much like an annual report with a focus on general disclosure. For instance, the new Form 990 inquires deeply into TEOs organizational structures and operations. However, the same general disclosure characteristic that makes the new Form 990 so challenging provides reporting organizations with great opportunity. A reporting TEO can use the Form 990 itself to explain any deficiencies it may have, while also using the return to trumpet its successes and mission. This article outlines the major changes in the redesigned Form 990 related to corporate governance, provides thoughts about what a filing organization can do to protect itself prior to filing, and finally provides thoughts on completing the new Form 990 itself.

Governance

Perhaps the most obvious and far-reaching change in the Form 990 is the IRS' adoption of a corporate "best practices" standard in the tax exempt sector. Some practitioners have concluded that these "best practices" are the non-profit equivalent of Sarbanes-Oxley. While there is no statutory authority for IRS review of TEO governance, the IRS "believes that a well-governed charity is more likely to obey the tax laws, safeguard charitable assets, and serve charitable interests than one with poor or lax governance." (IRS pub. *Governance and Related Topics - 501(c)(3) Organizations*). Fortunately, the redesigned Form 990 contains hints to satisfy the IRS "best practices" standards.

The first step in satisfying the IRS "best practices" standard is the articulation and adoption of a clear mission statement. The redesigned Form 990 both allows, and requires, all filers to describe its mission (*see* Form 990, Part I and Part III, respectively). Any organization that has not yet adopted a mission statement should and, if adoption is not possible prior to the filing date, thought should be given to a descriptive response in **Schedule O** (see discussion of **Schedule O** below).

The new Form 990 also requires information about the organization's governing board. The questions are designed to elicit information to identify potential self-dealing transactions, conflicts of interest, and excess compensation problems. Additionally, TEOs must report whether board meetings are contemporaneously documented and whether board actions are memorialized in writing. Perhaps most discomforting, TEOs must report whether each board member received and read the Form 990 prior to filing. ***Practice tip*** - you really want to answer "yes" to this question!

IRS "best practices" also require that TEOs adopt certain policies, in writing, including a conflict of interest policy, a whistleblower policy and a document retention policy. The existence or non-existence of these policies is required to be reported on the new Form 990. Additionally, with respect to the conflict of interest policy, the Form 990 requires explanation of how a conflict of interest is internally handled. Obviously, the "correct" response to these inquiries on the Form 990 is that the reporting TEO has adopted these policies.....

Top Ten list for reporting TEOs.

If your organization has not completed one or more of the following items, do so as soon as possible!

1) Articulate a mission statement and adopt it.

2) Adopt a written conflict of interest policy. This should include a mechanism for responding to a potential conflict of interest, as well as steps undertaken to document potential conflicts of interest.

3) Adopt a written whistleblower policy.

4) Adopt a written document retention and destruction policy.

5) Adopt a policy requiring your local chapters, branches and affiliates to adopt written policies and procedures governing their respective activities consistent with those of the umbrella organization.

6) Adopt a process for determining compensation of key employees and top management which process should include review and approval by independent persons of data from comparable organizations and contemporaneous substantiation of the deliberation and decision.

7) Adopt a policy and procedure to provide donors and the public with information about fundraising costs and practices.

8) Make a plan for how and where the organization will make its Forms 1023 or 1024 available for public review and copying as well as filed forms 990 and 990-T for a period of three (3) years from the date of filing.

9) Make a plan for how and where the organization will make its organizational documents, conflict of interest policy and financial statements available to the public.

10) Ensure board members have a copy of the Form 990, including schedules, for review prior to filing. If you are a board member, review the Form 990 and Schedules!

Using the Form 990 to TEOs Benefit.

While the redesigned Form 990 is new and challenging, it does allow a filing organization significant opportunity to explain any deficiency. So, if any TEO cannot complete items 1-10 above prior to filing, use the Form 990 itself to tell the IRS that the organization is aware of the issue, and is taking steps to remediate any deficiency. For instance, if a filing TEO does not have a written conflict of interest policy, it must check "no" in Part VI of the Form 990. However, such an infirmity can be explained in **Schedule O** together with assurances that the board is undertaking actions necessary to rectify the infirmity by 2010. While there is no textual or statutory authority for the position, many practitioners feel that the IRS will allow Form 990 filers some indulgences in tax year 2008 returns. This is particularly true if the filing TEO recognizes a problem

while providing a solution to the problem within the return. In fact, the IRS itself has described the intial review of the new returns in terms of evaluation "of the information reported" to "assess whether the form is serving its intended purpose." *Exempt Organizations Annual Report*, November, 2008. However, Form 990 filers should not expect the same largesse in 2010.

Moreover, the redesigned Form 990 allows more discourse and explanation than previously. A filing organization can use the "general disclosure" approach of the new Form 990 to its advantage, describing the great works of the organization. For example, Part III of the Form 990 not only asks for a mission statement, but it also allows the organization to describe how the organization's mission is accomplished through its program service activities. This is a great opportunity to explain how the organization accomplishes its mission.

Conclusion

Without question the redesigned Form 990 is a challenging return. The filing requirement applies to more and smaller organizations than before, while the demand for corporate "best practices" will surely strain smaller and less sophisticated organizations. However, if an organization undertakes the basic steps outlined above, the Form 990 return can also become a great way to broadcast the mission and successes of the filing organization. The organizations that can adopt "best practices" and be unafraid of "general disclosures" may well find the new Form 990 to be a great way to advertise its achievements. So, stop worrying and learn to love the redesigned Form 990.....

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MEDICINAL MARIJUANA IN A CHAPTER HOUSE?

California leads the nation in allowing the possession and use of small amounts of marijuana for medical-related purposes. Even though members of a fraternity may have complied with California law for the purpose of possessing and using medical marijuana, that does not exempt them from obeying fraternity rules requiring compliance with state and federal laws regarding drugs. Irrespective of the fact that the medical use of marijuana may, in certain circumstances, be exempt from prosecution for violation of state laws in California, the use and possession of marijuana remains illegal under federal law. As a result, the medical use of marijuana in a chapter house would still be illegal and therefore a violation of fraternity regulations requiring compliance with all drug laws.

The Supreme Court, however, readily recognized that "no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law.

The California Supreme Court, just a year ago, upheld the right of an employer to terminate an employee for violating the company's anti-drug policy when the employee tested positive for the use of marijuana. The employee argued that he was allowed to use marijuana because he had approval to use marijuana for medicinal purposes in California. The employee ultimately sued the employer, claiming that his termination violated California's Fair Employment & Housing Act.[1] The employee argued that the voters had approved California's Compassionate Use Act of 1966.[2] The Supreme Court of California recognized that the plaintiff was arguing that "just as it would violate the FEHA to fire an employee who uses insulin or Zoloft . . . it violates [the] statute to terminate an employee who uses a medicine deemed legal by the California Electorate upon the recommendation of a physician."[3]

The Supreme Court, however, readily recognized that "no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law. (21 U.S.C. §§812,844(a), even for medical users)"

In addition to the fact that federal law continues to criminalize the possession and use of marijuana, California's state colleges and universities, like those all across the country which receive federal funding, are under an obligation to comply with the federal Drug-Free Workplace Act of 1988. In essence, campuses may appropriately be concerned that they risk their federal funding if they fail to have a policy designed to promote a drug-free campus.

The bottom line is this, if a member of a chapter that has rules requiring compliance with state and federal drug laws believes he or she needs marijuana to address a medical condition, then living in a chapter house may not be the appropriate place for them.

• Timothy M. Burke

[1] Gov. Code, Section 12900, et seq.

[2] Health & SAF. Code, Section 11362.5.

[3] *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal.4th 920, 174 P.3d 200 (2008).

AKA NATIONAL PRESIDENT SUED BY MEMBERS

This summer, eight members of Alpha Kappa Alpha sued their international president, Barbara McKinzie, and some current and former members of the organization's board of directors in Washington D.C. Superior Court. The suit seeks the removal of Ms. McKinzie as the president and alleges that she spent hundreds of thousands of dollars of AKA's money on herself. The plaintiffs are also seeking the repayment of money they claim was improperly spent on personal items.

The complaint specifically alleges that Ms. McKinzie used her AKA credit card to buy herself designer clothes, lingerie and jewelry and then used the credit card "points" on the card to get a 46-inch high definition television and gym equipment for her personal use. She also allegedly purchased a wax figure of her herself for several hundred thousand dollars for display at the National Great Blacks in Wax Museum in Baltimore, Maryland.

The Board allegedly improperly approved a four-year pension stipend that would pay Ms. McKinzie $4,000 per month, purchased a $1,000,000 life insurance policy for her and started an endowment fund to be run and managed by Ms. McKinzie's management firm.

Ms. McKinzie has denied any wrongdoing, telling the Chicago Sun-Times, "Change never comes easy. The malicious allegations leveled against AKA by former leaders are based on mischaracterizations and fabrications not befitting our ideals of sisterhood, ethics and service."

Since filing the lawsuit, the plaintiffs now allege that AKA made nearly $500,000 in retirement payments to Ms. McKinzie after learning of the possibility of a lawsuit. The plaintiffs allege that AKA wrote five checks, totaling $499,699, to Ms. McKinzie with "Retirement" written in the description area, after AKA became aware that a lawsuit was imminent.

This case is currently pending in the Superior Court of Washington D.C. We will keep you updated as the case proceeds. However, this case provides a strong reminder of the duties that directors owe to their organizations.

All directors have a duty of loyalty to their organization. This means that directors must act in good faith and in the best interests of the organization. Directors cannot act in their best interests or in the best interests of a third party. It is critical for directors to avoid conflicts of interest involving issues that could benefit them individually. When a conflict arises, the conflicted director should recuse from both the discussion and vote on the issue, and leave the discussion and vote to the disinterested directors.

Directors also have a duty of care. This duty means that directors must be informed of the facts and issues facing the organization and they must act in good faith, with the care that an ordinarily prudent person in a like position would reasonably believe appropriate under similar circumstances. The duty of care requires directors to stay engaged and take an active role in the direction of the organization. Taking a passive role and letting other directors or officers call all the shots is not acceptable.

AKA is the oldest predominantly African American Greek-lettered sorority. This case has driven a divide between sisters across the country. Hopefully the case does not cause irreparable harm to a great organization.

• Daniel J. McCarthy

SIGMA CHI AND ITS UGA CHAPTER SUED BY INJURED GUEST; INSURER FILES SUIT FOR DECLARATION OF NON-COVERAGE OF INSURANCE

On April 9, 2009, a lawsuit was filed in the Superior Court of Athens-Clarke County, Georgia, against Sigma Chi, its Delta Chapter at the University of Georgia, Sigma Chi's Risk Management Foundation, the Delta Chapter House Association, Forrest Sylvester, who was an undergraduate member of the Chapter, and several John Doe defendants.[1]

The suit alleges that the Plaintiff, then a 19-year-old female student at UGA, attended a party at the Delta Chapter's fraternity house on the evening of September 26, 2008. When she entered the party, her left hand was marked with a large red stripe to indicate that she was under 21 and therefore could not be served any alcoholic beverages. The complaint states, "That in complete disregard of the markings on her hand, [Plaintiff] was served numerous alcoholic beverages by the Defendants and/or their agents to the extent she became highly and obviously intoxicated to a dangerous extent."

The Complaint continues that Mr. Sylvester knew the Plaintiff and was dancing with and kissing her at the party. Once he allegedly knew the Plaintiff was highly intoxicated, he took her to his room, removed her dress, placed her in his loft bed with no rails, which was several feet above the floor, and left her for approximately 45 minutes. Upon his return to his room, he discovered that the Plaintiff had fallen from the loft and was severely injured.

The Complaint alleges that the Plaintiff was bleeding from her mouth and ear, there were teeth fragments embedded in the carpet, and the carpet was soaked with blood.

After taking her pulse to confirm that she was still alive, a pledge of the Chapter dropped the Plaintiff off at the hospital. Meanwhile, Mr. Sylvester stayed behind and removed "evidence of the fall by cutting the bloody area out of the carpet and disposing of it. The cut out portion of the carpet was retrieved from a waste management dump site by police authorities the following day."

The Complaint alleges that "the Plaintiff has suffered general damages for temporary and permanent injuries including, but not limited to, broken jaw, scaring, loss of three teeth, damage to 16 teeth (requiring root canal work and crowns), loss of feeling in her facial area of her mouth (with likely drooling effect), condyle bone displacement (affecting her ability to chew food properly and likely affecting the shape of her face) having her jaw wired shut for months, severe weight loss, and other pain and suffering in an amount to be determined by the enlightened consciences of the jury."

At the time of filing, the Plaintiff's medical damages were approximately $100,000. Her medical bills are far from over, not to mention her pain and suffering, lost wages, and other potential damages she may be entitled to.

To make matters worse for the Defendants, Liberty Corporate Capital, LTD., who is currently defending the Chapter in the case brought by the injured student, filed a "Suit for declaration of non-coverage on insurance contract" on July 14, 2009, in the United States District Court for the Middle District of Georgia.[2] In its suit, Liberty is seeking a declaration that the Delta Chapter is not an insured because, among other reasons, "The Delta Chapter and its members were not acting in accordance with The Risk Management Foundation's policies or the Fraternity's policies, to the extent that [the Plaintiff]'s allegations are proven true." Further, the suit alleges because the Chapter failed to follow Georgia law and Sigma Chi policies, "the Delta Chapter is not an insured within the meaning of the [insurance] Contract, and Liberty does not owe a duty to defend the Delta Chapter in the Underlying Lawsuit and/or indemnify the Delta Chapter for damages sought by [the Plaintiff].

The suit contains additional reasons for exclusion of coverage, including that "The Delta Chapter's conduct was intentional and/or the injury sustained was expected" (Count II); the "Delta Chapter violated the Fraternity Alcohol Policy" (Count III); the "Sexual abuse of misconduct exclusion bars coverage" (Count IV); "The assault and/or battery exclusion bars coverage" (Count V); "The punitive damages endorsement" exempts coverage for punitive damages (Count VI).

Both of these cases are in the very early stages of litigation. Answers have not yet been filed in either case. We will keep you updated as the cases progress.

These cases again demonstrate the need to strictly enforce the alcohol policies that all organizations have in place. Alcohol policies are in place to not only prevent the type of injuries that the Plaintiff sustained, but also to provide protection against liability should another accident occur in the future. It is important for students to know that insurance coverage can often be denied if the applicable alcohol policies are not strictly followed.

• Daniel J. McCarthy

[1] *Booth v. Sigma Chi et al.*, Superior Court of Athens-Clarke County, Case No. SU-09-CV-0822-SW.

[2] *Liberty Corporate Capital, LTD. v. Delta Chapter of Sigma Chi, et al.* U.S. Dist. Court, Md. Dist. Of GA., Case No. 3:09-cv-87(CDL).

OREGON AMENDS HAZING STATUTE

The Oregon legislature recently passed, and Governor Ted Kulongoski signed, Senate Bill 444, which amends Oregon's hazing statute, found at O.R.S. 163.197. The statute changed the definition of "haze" by adding numerous specific activities that are legally considered hazing. For example, the new statute specifically identifies the following as hazing: "To subject an individual to whipping, beating, striking, branding or electronic shocking, to place a harmful substance on an individual's body or to subject an individual to other similar forms of physical brutality." This is only one of four subsections in the statute under the definition of hazing.

The new statute also follows the lead of most other states by making it clear that "Consent of the person who is hazed is not a defense in a prosecution under this section."

The other significant change is that athletic teams are now specifically included as student organizations and are subject to the hazing statute. Under the previous statute, while fraternities and sororities were subject to the statute, the statute specifically did not apply to "curricular activities or to athletic teams of or within the college or university." The Oregon legislature has apparently finally recognized that Greeks are not the only organizations that occasionally haze.

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