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THE LEGAL AND PROFESSIONAL CONSIDERATIONS OF SOCIAL NETWORKING – HOW FACEBOOK, TWITTER AND OTHER SOCIAL NETWORKING SITES PROVIDE OPPORTUNITY (AND RISK) FOR FRATERNAL ORGANIZATIONS

It seems beyond question that the world of social networking has taken root in the fraternity and sorority houses of North America. Sites like Facebook, Twitter, MySpace and Linked-In, (among many others) provide socializing and networking opportunities for members of fraternal organizations that just five years earlier seemed unfathomable. Facebook alone (now with over 230 million individual users) now permeates the landscape of college campuses to such an extent that it is almost impossible to find a national fraternity or sorority that does not have a Facebook group, and indeed, many chapter houses also have their own pages specifically for the members from their school.

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The questions that the leaders of fraternal organizations must face when considering the use and promotion of social networking sites amongst their members are many. From determining whether to have their sites open to any who wish to join, or instituting a member confirmation process (and determining who will undertake that confirmation function), to considering the content that is appropriate for a chapter's site, there are many things to consider. While this article cannot hope to provide an exhaustive list of pitfalls and opportunities presented by social networking sites, it hopefully will provide an overview of the world of social networking, and a place to start in considering how your fraternal organization wants to interact with this new world.

What is it and how did it begin?

Social networking services focus on building online communities of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. Most social network services are web-based and provide a variety of ways for users to interact, such as e-mail and instant messaging services. Social networking has encouraged new ways to communicate and share information.

Social networking websites are being regularly used by hundreds of millions of people. The main types of social networking services are those which contain category divisions (such as former school-year classmates), means to connect with friends (usually with self-description pages) and a recommendation system linked to trust. (Wikipedia).

While the concept of "social networking" has roots which go back hundreds of years, the concept of social networking online has much more contemporary origins. Unable to pinpoint when online social networking was "born," it is safe to say that it has become mainstream in recent years. Facebook was born on the campus of Harvard in 2004 and was originally envisioned to combine the content of college "face books" into an electronic medium. Originally open only to college students, Facebook became open to the general public in 2006. In less than five years since its start, Facebook now has over 230 million members and untold billions of posts. Over 96% of students with online access report that they have at least tried social networking technologies and 71% say they use it weekly.

Is it important?

Whether social networking is important to your organization is really dependent upon how you use it. In its simplest form, social networking is just a new channel to communicate, one that may have significant additional value over old channels. Social networking is mobile, it can keep your organization in contact with literally thousands of current and former members, and it allows you to circulate information about events and areas of interest to your house in a very timely and cost effective way. Moreover, in today's environmentally conscious world, it is important to note that communication through social networking provides environmental as well as economic benefits.

Should members of fraternal organizations be concerned when using social networks?

As with most forms of communication, the use of a healthy dose of common sense will prevent most problems that you will encounter. That being said, there are several areas of legal and professional concern that you (and your

members) should be aware of when using social networking services.

First, remember that what is being posted is public, and is potentially being broadcast to hundreds, if not thousands, of people. This concern is important to remember on a multitude of levels, but perhaps none more important than the legal implications that could face a house for an inappropriate statement posted by a member. Despite being social in nature and easily accessible for communications amongst members, an inappropriate or offensive remark directed at another organization or individual could have consequences for your member or organization as a whole.

Unlike Vegas, what happens on Facebook, does not always stay on Facebook.

Aside from the potential reputational damage that could occur as a result of an inappropriate comment, the legal ramifications are real. Lawsuits have been prosecuted, and won, on the basis of slander, defamation, and false accusation, for statements made on social networking sites. What may seem to be an “innocent prank” or a well meaning joke amongst members about a rival house or one of its members could expose both the house and its members to liability. Posts on social networking sites meet all the qualifications of publication and dissemination which trigger legal exposure, and even if the post is not made by the fraternal organization itself, in certain instances, the statements of its members could be attributed to the house and provide the possibility of legal exposure to the entire group.

Second, aside from being concerned about the legal ramifications of the statements of members, fraternal organizations should also realize that the professional aspirations of their members can also be affected by inappropriate social networking conduct. Posts, status updates, and personal information posted on Facebook or Twitter are generally searchable by most Internet search engines, including Google and Yahoo, and potential employers are using these tools during their consideration of prospective applicants.

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Even in the three short years since Facebook has been fully open to the public, there have already been countless numbers of job seekers who have unknowingly been the victims of their own inappropriate posts. Employers who find treasure troves of embarrassing or inappropriate pictures, statements, or video online often end their consideration of that applicant before going further, and without the applicant knowing why they were not considered for the job.

It is important for members of fraternal organizations to remember this as they go forward into the working world. Unlike Vegas, what happens on Facebook does not always stay on Facebook.

Is it worth the risk?

Considering the potential legal and professional ramifications of statements by members, some fraternal organizations may wonder whether their current presence on social networking sites is worth the risk. While that question can only be answered by the organization itself, it is important to remember that there are also substantial benefits. Aside from providing an easy avenue for communication with current and former members, chapter-sponsored sites provide alumni and current members an easy opportunity to network and learn more about business opportunities. These sites also provide alumni an easy manner through which they can reconnect with their brothers or sisters who they have long since lost touch with and potentially provide real benefits by way of business connections and referrals. In short, the benefits can, and often do, outweigh the risks.

What should your organization do?

Undoubtedly, many of the members of your organization are already active on social networking sites and by no means should you consider asking them to stop. What chapters can do is provide reminders to their members of the potential pitfalls of their social networking activities and recommend courses of action. If you do not have one already, consider implementing a social networking policy for your members, and be sure to enforce that policy with respect to posts on your chapter-specific page. There are professionals who can assist you in developing your policy if you need assistance. You might also consider asking chapter alumni to “review” the pages of active members who are seeking professional employment, so that someone with an unbiased eye and experience in the professional world can provide current members feedback on the appropriateness of their page’s content. This alone could provide a helpful networking opportunity for your members.

At the end of the day, social networking sites provide fraternal organizations, and their members, with an amazing opportunity to expand their networks and interact on a more real time and personal basis. However, members should always remember that they, and their organization, can be affected by their social networking presence.

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ZONING COMPLAINT AT UC-BERKELEY

On October 28, 2009, representatives of some 30 recognized fraternities at the University of California Berkeley were notified by the Director of Fraternity and Sorority Life that the Berkeley City Manager had received letters from an attorney who represented that he had “been retained by a number of residents of the City of Berkeley.” The letter sought action by the City to “abate the continuing public nuisance created and maintained by the inhabitants” of each of the fraternity houses. The Director of Fraternity and Sorority Life pointed to the Berkeley Municipal Code that provided for a private right of action permitting any resident to seek injunctive and compensatory relief to remedy a public nuisance. That local ordinance requires that before an action can be brought by private plaintiffs, the City must be given 30 days’ written notice and the opportunity to pursue the matter

itself. The University is not a party to the action, but simply sought all appropriate parties of the attorney’s letter.

The attorney’s letter, claiming that each of the fraternities constituted a public nuisance, made 17 different allegations, including disturbances of the peace, public drunkenness, underage drinking and public drinking, harassment of passersby, littering, noises, smells and fumes, public urination, fireworks, large parties, refusal to comply with state laws and city ordinances, and excessive attention required from Berkeley police and fire officials.

These are serious accusations and will have to be treated as such by the fraternities involved. There are likely to be further developments which *Fraternal Law* will follow.

• Timothy M. Burke

LAWSUIT FROM DEATH AT DREXEL

On October 19, 2009, a lawsuit was filed in Philadelphia by the Administratrix of the Estate of Michael Arizmendi. The defendants in the suit include several fraternities and the Interfraternity Council and “Panhellia Council” and Drexel University. Also named as a defendant is David Arizmendi. The suit alleges that a Halloween party was organized two years ago in which alcohol was sold to minors. The defendant David Arizmendi is one of the minors to whom it is alleged alcohol was provided.

Paragraph 18 of the suit states in part that “David Arizmendi, while intoxicated, did negligently strike plaintiff’s

decedent, Michael Arizmendi, his brother, as a result of which while intoxicated he struck his head on the floor and sustained personal injuries which ultimately led to his death” that same day.

As of this writing, no answers have been filed and it is far too early to determine what the facts are behind this complaint. Plaintiff will face a challenge to prove that the Greek groups and Drexel are responsible when it was the decedent’s brother’s actions that appear to be the proximate cause of decedent’s death.

• Timothy M. Burke

VERDICT IN PHI DELTA CASE AT MISSOURI

Falls from high places continue to be an important risk management issue.

In October of 2002, Katie Beetz was in attendance at a party at the Phi Delta Theta Chapter house in Columbia, Missouri. While on a cell phone, she went out a second floor fire door onto a fire escape platform and fell through the hole which provided a ladder access to the ground. She suffered significant injuries. Fortunately, the fall was only one story, but the injuries were still significant and the plaintiff continues to have migraine problems.

Seven years later, the trial of the suit she filed finally took place.

There had been an earlier fall through the same fire escape. While there was a dispute over who knew about that earlier fall, a hand-made sign had been posted on the interior of the fire escape door providing some warning. Following presentation of plaintiff’s case with 14 witnesses, the Phi Delta Theta Fraternity was dismissed as a witness. The case against the Phi Delta Theta Club, the owner of the house, ended in the jury’s hands following the presentation of three additional witnesses.

The liability of the Club appears to have been a close call. The jury initially reported it was deadlocked. The Judge instructed the jury to continue deliberations and ultimately they delivered a verdict finding that the Phi Delta Theta Club was 56% at fault and Beetz was 44% at fault. The jury awarded damages in the amount of \$211,000.00. As a result of liability being proportioned based on the percentage of fault, the award was reduced by the Judge to \$118,160.00.

The Beetz case has at least two lessons. First, when an incident creates knowledge of a dangerous condition, it is critical to act to address that condition so that it does not occur again. Second, the action taken to correct the dangerous condition needs to be appropriate to the situation. Evidently, the jury in Beetz wasn’t satisfied that taping a homemade paper sign to the door, which was sometimes up and sometimes not, was not adequate. A more appropriate action would have been to post a professionally made clear warning on the door that contained a specific warning of the hazard.

• Timothy M. Burke

ENDOWMENT FUNDS AND THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The Uniform Prudent Management of Institutional Funds Act ("UPMIFA") is a law that has been adopted, in one form or another, in all but eight states. Its provisions update and replace the Uniform Management of Institutional Funds Act ("UMIFA") that has been the law in most states for at least two decades. UPMIFA provides rules for spending endowment funds, guidance on investment and management of funds and permits the release of restrictions on the use and management of endowment funds. This article will focus on two provisions of UPMIFA that may help a foundation access endowment funds in situations where UMIFA would not.

Spending Provisions

One of the most significant changes UPMIFA made to UMIFA involves the rules applicable to withdrawing principal from endowment funds where the intent of the donor cannot be determined. As with the prior act, UPMIFA requires a charity to conform to the intent of a donor when determining how much of an endowment fund it could expend each year. Under the old act, institutions were limited to expending only the net appreciation in the value of its endowment assets over the "historic dollar value" of the fund. Historic dollar value is the value of a contribution when made. In other words, the old act would not allow an institution to draw against the principal of an endowment fund if the value of the endowment fund sunk below its date of contribution (or "book") value. Funds in such condition are often referred to as "underwater endowments."

In contrast, UPMIFA completely does away with the concept of historic dollar value and instead allows institutions to appropriate for expenditure or accumulate so much of its endowment fund as it determines is prudent for the uses, benefits, purposes and duration for which the endowment fund was established. That is, a foundation may, under UPMIFA, spend from an underwater endowment fund so long as it is prudent under the following factors.

- the duration and preservation of the endowment fund,
- the purposes of the institution and the fund,
- general economic conditions,
- effects of inflation and deflation,
- expected total return from income and the appreciation of investments,
- the institution's other resources, and the institution's investment policy

Ohio's version of UPMIFA is unique in that it includes a presumption of prudence when an institution appropriates for expenditure in any year an amount not greater than five percent of the fair market value of its endowment fund. The fair market value must be calculated on the basis of market values that are determined at least quarterly and averaged over a period of not less than three years. Under the Ohio UPMIFA, the appropriation of more than five percent of the fair market value of the endowment fund does not create a presumption of imprudence; it merely removes the protection of the safe harbor.

Institutions should review their procedures for endowment spending (or adopt procedures if they have not already done so) to ensure compliance with the new requirements of UPMIFA.

Institutions should review their procedures for endowment spending (or adopt procedures if they have not already done so) to ensure compliance with the new requirements of UPMIFA. Endowment spending procedures should include a prudent expenditure standard that takes into account the above listed factors. In Ohio, institutions should consider adding a provision to their endowment spending procedures mandating heightened scrutiny of decisions to appropriate for expenditure amounts that are greater than five percent of the endowment fund's fair market value because such an appropriation would put the institution outside of UPMIFA's safe harbor.

Release of Restrictions

Many foundations hold a number of relatively small restricted funds that, due to their size and restrictions, are not useful in fulfilling the foundation's charitable mission. While a foundation can always ask the donor to release his or her gift restrictions, many times donors are unavailable where the fund has been held for a long period of time. UPMIFA provides a simplified method to obtain a release of restrictions applicable to relatively small funds that have been held by the foundation for a long period of time. The holding period and the value of the fund limitations vary from state to state. In Ohio, this simplified method applies to institutional funds having a total value of less than \$250,000.00 and where more than 10 years have elapsed since the fund was established.

The institution may release a restriction on the use of such funds if the institution determines that such restriction is unlawful, impracticable, impossible to achieve, or is wasteful

and the institution provides 60 days advance notice to the Attorney General of its intent to take advantage of this provision. Upon release of the restriction, the institution must use the property of the fund in a manner consistent with the charitable purposes expressed by the donor.

The adoption of UPMIFA in Ohio and other states was well timed to assist foundations in that it coincided with the substantial drop in the market values of many endow-

ment funds. The new rules give an institution the opportunity to draw against an endowment fund even where it has fallen below its book value.

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HOST SCHOOLS CONTRACTUAL LIABILITY RISK TRANSFER: A RISK MANAGEMENT TIME BOMB OR FREE INSURANCE!

Like a time bomb, unknown adverse contractual liability risk transfer exposures represent an increasing and very significant cost exposure for fraternities and sororities. Contracts and risk transfer are daily issues in the Greek community. They are best addressed when your legal counsel, risk management and insurance representatives and underwriters work in concert. Failure to identify and subject contractual liability and risk transfer exposures to loss control is certain to lead to unanticipated and increased retained and insured losses with resulting higher claim costs and insurance premiums.

An obvious and ominous trend is that increasingly via "Recognition", "Approved Housing" and other contractual agreements, **Host Schools are seeking to impose Contractual Indemnification and Additional Insured obligations that require Greek organizations to defend and indemnify the school for the school's own negligence!** "Host Schools" represent another attractive target and deep pocket for plaintiff's attorneys. Several suits related to fraternity incidents have recently been filed against schools alleging the school's own liability for negligence including negligent supervision and failure to enforce hazing prohibitions.

Difficulties in managing contractual liability risk transfer exposures with "Host Schools" include: 1) the school's strong position of leverage, 2) your lack of any control over the school's actions and risk management practices and 3) no or poor communication about these agreements and exposures from your local chapters and house corporations. These factors may result in your being totally unaware of your contractual liability risk transfer obligations and missing the opportunity to limit or control these exposures and costs.

The time bomb explodes when suit is filed and the school pulls out a previously unknown contractual risk transfer of liability and tenders the claim to you demanding that you or your insurance company provide the school with Defense and Indemnity. You may have to pay these costs directly as part of your insurance program's retained or de-

ductible costs. If paid by your underwriter, the loss costs will certainly be reflected in your loss ratio, and future premiums. The potential for totally uninsured losses also exists. Liability and litigation results are at best uncertain and adverse results are a very real possibility. Especially if you are responsible for defense and indemnity, the schools may be reluctant to settle these claims resulting in a prolonged and very expensive trial and appeal process.

Contractual Liability coverage, at least to some degree, is afforded in most insurance policies. However, insurance policies can and do differ dramatically in the scope of coverage they provide. Standard I.S.O. Form policies contain no clear "Duty to Defend" the indemnified party. They also impose various other difficult conditions such as: 1) the insured and indemnified party must be named in the same suit, **(in most of the recent suits, separate suits have been filed against the schools and the Greek organization)**, 2) the obligation to defend must be contained in the same contract as the indemnification obligation, 3) no conflict exists between the insured and indemnitee, and 4) the insured and indemnitee ask the insurer to conduct and control the defense and agree to use the same legal council. **Unless all conditions are satisfied or Additional Insured status is provided, the defense costs incurred are considered as "Damages" and reduce the amount of coverage available to pay the claim.**

Any reduction of coverage available to resolve claims will lead to uninsured losses for groups that do not maintain excess liability coverage if defense and claims settlement costs exceed the reduced coverage limits. For groups that carry excess liability coverage this erosion of underlying coverage will lead to greater excess liability losses. While infrequent, excess liability insurers that suffer losses generally respond quickly to with higher costs and greater restrictions and even withdrawal from the already limited market for this coverage.

When more than one insurance policy may apply to a claim, the respective underwriters typically share the claim's cost. While schools already have their own liability

insurance, their coverage is commonly subject to significant deductible levels or self-insurance. To reduce their self-insured or deductible costs, the schools are also increasingly requiring that they be afforded Additional Insured status that provides "Primary Coverage". "Primary Coverage" essentially provides free insurance for the schools, eliminates any cost for the schools, reduces the Greek organizations coverage, and forces the Greek organization or its insurer to bear the total costs of the school's defense and indemnity.

IF THE GREEK COMMUNITY IS FORCED TO DEFEND AND INDEMNIFY THE SCHOOL'S FOR THEIR NEGLIGENCE, GREEK LOSSES AND INSURANCE COSTS WILL LIKELY INCREASE DRAMATICALLY. THE ENTIRE GREEK COMMUNITY AND ITS UNDERWRITERS SHOULD TAKE A UNITED POSITION AGAINST ACCEPTING ANY RESPONSIBILITY FOR A HOST SCHOOL'S NEGLIGENCE.

We offer the following recommendations to assist you in dealing with your contractual risk transfer exposures.

- 1) Risk management begins with identification of exposures. Communicate with your Chapters and Housing Organizations and attempt to determine the extent of any adverse Host School contractual liability risk transfer exposures.
- 2) Remind your entire organization at least annually that they are not authorized to sign any agreement on behalf of your national organization.
- 3) Stress the importance and potential costs of assumed risk in urging your Chapters and Housing Organizations to determine if any contractual liability risk transfer agreements exist, and to promptly provide copies to your risk management staff, legal counsel, insurance representatives and underwriters.
- 4) Advise your entire organization and your Host Schools that in order to assure coverage under your insurance any indemnification or Additional Insured agreements must be reviewed and be acceptable to the parties concerned, your legal counsel and underwriters BEFORE IT IS SIGNED.
- 5) Use your website and direct communication with Host Schools to advise them that your insurance will not provide any coverage for the school's negligence.
- 6) Use your underwriters as an ally to eliminate current and avoid any potential future contractual liability risk transfer obligations for a Host School's negligence.
- 7) Review your insurance coverage with your insurance representative, legal counsel, and underwriters to determine the scope of coverage provided for any contractually assumed liabilities of others.
- 8) Be sure you know if your insurance always pays for contractually assumed defense and indemnity costs of others in addition to your coverage limits or if restrictions and qualifications exist that could result in those costs reducing the limit of your coverage.

Our long standing advice is that the Greek Organizations should also use every opportunity to incorporate positive contractual risk transfer into their risk management programs. When applied for your benefit, effective contractual risk transfer is a very positive risk management and loss control technique for Greek organizations. Contractual risk transfer has been proven very effective in minimizing Greek risks and is particularly valuable for independent contractors such as those providing event hosting, security, and alcohol services. After all, effective contractual risk transfer is the cheapest insurance you will never buy!

Considerable additional information on these subjects is available without cost on our website www.jrfco.com.

- James R. Favor, CRM, CIC
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Fraternity Owned Insurance Brokers
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EDITOR'S NOTE

Whether or not a university can contract away liability for its own negligence is not at all certain. Requests to agree to indemnify against the institution's own negligence should, where possible, be avoided. However, in some instances, colleges and universities have made indemnification or hold harmless agreements or being named as an additional insured, a prerequisite to recognition. Women's groups, in particular, have been very aggressive over the years in analyzing these university agreements or requests by universities for some form of indemnification, hold harmless clauses or additional insured status. Where necessary, in order to ensure recognition, they have been able to provide additional insured status to the host institution and that has typically met that recognition requirement.

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