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HAZING: A PRIMER AND REMINDER

Despite the virtually universal effort of national and international Greek organizations to ban hazing and to discipline members who engage in it, periodic reports of hazing activities continue. With the constant turnover in membership because of the induction of new members and the graduation of older members in the active undergraduate chapters, it is necessary for all chapters to frequently discuss hazing. Such discussions should include the definition of hazing, including all activities that constitute hazing, and the possible legal ramifications for hazing.

HAZING DEFINITIONS

Most states have statutes that specifically define hazing. For example, in Ohio, hazing is defined in O.R.C. §2903.31 as “doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.” Any person who violates the statute is subject to criminal prosecution. In addition to potential criminal charges, in O.R.C. §2307.44, Ohio law also provides for civil liability for hazing. Under the statute, the victim can sue the participants in the hazing and any organization or officer who “authorized, requested, commanded, or tolerated the hazing.” It is also important to note that consent of the victim is not a defense to civil liability.

The NIC, NPC and most fraternities and sororities also specifically define hazing for their organizations. A representative definition is found in Kappa Sigma’s Code of Conduct. Kappa Sigma defines hazing as

“any action, behavior or situation created by any Kappa Sigma chapter or by any member—pledge, active, or alumnus—as part of the operations of any Chapter voluntarily or involuntarily involving any member(s) or potential member(s) to produce or result in mental or physical discomfort, embarrassment, harassment or ridicule as a prerequisite to or as a requirement for membership or

initiation in the Fraternity, or which is otherwise prohibited by federal, state, provincial, local or host institution policies, rules, regulations, statutes or ordinances.”

Because of the broad definitions found in state statutes and the organizations’ own definitions of hazing, it is crucial for chapters and their members to fully understand how broad hazing is defined. Common activities, such as scavenger hunts and mandatory interviews, are considered hazing.

As the Ohio statute is simply a representative statute, each chapter should be familiar with the laws in their jurisdictions and make their members aware of the possible legal consequences, both criminal and civil, for hazing.

RECENT HAZING INCIDENTS

Hazing is still too frequent. Some recent cases that have garnered headlines are below.

At the University of Pennsylvania, two members of Alpha Phi Alpha have been convicted of assault and harassment for beating a pledge and branding him with rubber bands. The victim said he and two other members suffered the treatment for violating pledge rules. He reported that the bands were placed tightly around prospective members’ arms and then snapped repeatedly until the skin was broken and ultimately scarred. Two fraternity members were convicted and each received a sentence of nine months of probation. In addition, the University has placed one of the perpetrators on academic probation, suspended the second for a semester and fired him from his job with the University. The victim, who, according to a doctor who testified, must attend physical therapy sessions because of his injury, also took a leave of absence from the College because of the psychological and emotional distress.

According to an article in *The Chronicle of Higher Education*, members of the Phi Gamma Delta Fraternity at the University of Vermont had faced criminal charges under Vermont’s new anti-hazing law. The charges against the four members who were cited for conduct at a party where

pledges were allegedly mocked as being gay were dismissed, but the University suspended the chapter while the University completed its judicial review of the incident.

Anyone convicted of hazing which either resulted in "serious bodily injury or death" or created "a substantial risk of physical injury or death" is also required to attend and complete a four-hour hazing education course.

At the University of Central Florida, the Florida Epsilon Chapter of Sigma Alpha Epsilon, one of the oldest chapters on campus, was recently closed because of a hazing incident that occurred on October 26, 2006. According to published reports, at least three pledges dressed in woman's clothing were hospitalized due to excessive alcohol consumption. The chapter had approximately 90 members, and it is believed that as many as 2/3 of the members participated

in the hazing activities. Though the case is still under investigation, SAE's national office already closed the chapter.

CONCLUSION

Whether it is a crime or not, hazing is an anathema to the very brotherhood and sisterhood that fraternities and sororities strive to promote. It should not be condoned under any circumstances. The most common excuse for hazing is the illogical, "I was hazed; therefore the pledge class after me will be hazed." Chapters must break this vicious circle of hazing. One of the best ways to stop hazing is to make members appreciate the potential risks involved for those who are hazed and the potential criminal and civil liability for those who do the hazing.

- Daniel J. McCarthy
- Timothy M. Burke

APPEAL FILED IN AEPI FREEDOM OF ASSOCIATION CASE

The City University of New York, College of Staten Island ("CSI") recently appealed to the Second Circuit Court of Appeals the August 11, 2006 opinion from the United States District Court that granted the Chi Iota Colony of Alpha Epsilon Pi's motion for preliminary injunction.¹ As has been previously reported in *Fraternal Law*, the Colony sought relief against CSI's policy prohibiting single-sex student organizations. The Court, for the first time in any court, found that the Colony was a constitutionally protected intimate and expressive association (the injunction was only granted on the intimate association claim because the Colony did not establish that CSI's policies would affect the Colony's expressive purposes).

In its appeal, CSI states that it "extends official recognition to student clubs only if they do not discriminate on the basis of, *inter alia*, gender, and only if membership is available to all students." Both sides agree that the heart of this case is about whether or not a public college or university may prohibit single-sex organizations on campus.

In its appeal, CSI first argues that the District Court erred in finding that the Colony was an intimate association. CSI argues that the Colony does not conduct its "core activities" in seclusion because it meets weekly with a rabbi, hosts parties and social events, and conducts philanthropic events that are open to the public. CSI also argues that the Colony is neither a relatively small organization nor a particularly selective organization. The College then argues that even if the Colony was a protected intimate association, the Court

still should not have granted the injunction because "CSI would have no duty to support the exercise of that right" by giving the Colony the benefits of official recognition.

On the expressive association claim, CSI argues that their policies have not infringed on the Colony's right of expressive association because the Colony is still able to carry out its expressive purposes. CSI argues that it has not forced the Colony to accept women, but has only stated that the Colony must open its membership to women if it wants official recognition. CSI then states that even if it did force the Colony to accept women, the Colony's expressive rights would not have been infringed because the inclusion of women would not affect the Colony's ability to advocate its viewpoints.

This appeal is still in the briefing stages. The Colony has not yet filed its brief in response to CSI's brief. This case is extremely important for Greek organizations across the country because it will provide an answer to the question of whether or not a public university can prohibit traditional fraternities and sororities on campus by prohibiting single-sex organizations.

- Daniel J. McCarthy

¹ *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York*, 443 F.Supp. 2d 374 (E.D.N.Y. 2006).

BALANCING UNIVERSITY NON-DISCRIMINATION POLICIES AND THE FIRST AMENDMENT: THE CLASH BETWEEN UGA AND BYX

At numerous universities across the country, heated conflicts have arisen between universities that have adopted nondiscrimination policies and fraternal and other organizations that on the one hand wish to restrict membership to those who hold specific religious beliefs and on the other still desire to be officially recognized student groups. Often, this sort of membership restriction directly conflicts with university-imposed nondiscrimination policies, forcing organizations to decide what they would rather have: exclusive membership or university recognition. This contentious debate is aptly illustrated by a recent dispute between Beta Upsilon Chi and the University of Georgia ("UGA").

The conflict began when UGA removed Beta Upsilon Chi (or "BYX" for "Brothers Under Christ") from its roster of recognized student groups due to the fraternity's requirement that members and officers "profess faith in Jesus Christ, affirm the Doctrinal Statement¹ and adhere to the Code of Conduct."² This requirement conflicted with UGA's nondiscrimination policy, which requires, in relevant part, that membership in a student organization may not be denied on the basis of religion. Losing its official recognition meant that the fraternity would be stripped of numerous rights and privileges, including the use of university facilities for meetings, advertising, a campus mailbox, the right to apply for certain funding, access to audiovisual equipment, fundraising on campus, and other benefits.

When the president of BYX, Jacob Webster, approached UGA's Assistant Director of Student Activities to explain that the fraternity is a registered social or recreational organization under I.R.C. 501(c)(7) and is thus exempt from any University-imposed requirement not to discriminate on the basis of religion,³ UGA responded that the organization fell under the jurisdiction of the educational code, not the tax code. As a result, UGA argued, the fraternity must comply with any University-imposed nondiscrimination policy. Refusing to compromise its religious beliefs by expanding its membership to include non-Christians, BYX sought to enforce its legal rights in court.

On December 5, 2006, the local chapter of BYX at UGA, as well as the national organization, Beta Upsilon Chi, Inc., filed suit in the United States District Court for the Middle District of Georgia against UGA seeking declaratory relief and an injunction permitting the fraternity to re-register as a recognized student organization with all rights and privileges stemming from such recognition. The plaintiffs were represented by the Alliance Defense Fund and the Center for Law and Religious Freedom (CLRF).

In the complaint, plaintiffs argue that they have a "basic organizational purpose: to provide a fraternity for Christian men where close bonds of brotherhood can be cultivated while avoiding the unchristian lifestyle often associated with college fraternities." Because of this, plaintiffs explain, membership is limited to those embracing, and living by, the basic tenets of Christianity. The complaint sought to enforce plaintiffs' constitutional rights, namely their right to freedom of expressive association, freedom of intimate association, free speech, free exercise of religion, and their right to equal protection under the law.

On December 7, 2006, only two days after suit was filed, UGA capitulated and acknowledged that a student group like BYX could be formally recognized as a fully-functioning student organization even if it did not adopt the University's nondiscrimination policy if that policy would force the inclusion of individuals whose religious beliefs would directly conflict with the declared purpose of the organization. In a letter from the UGA's Associate Director for Legal Affairs, Arthur H. Leed, to Timothy J. Tracey, attorney at the CLRF, BYX "will have all of the rights and responsibilities of a registered student organization except that they will be exempt from the provisions of the University's Non-Discrimination and Anti-Harassment Policy relating to membership in the organization based upon religion." The letter further stated that UGA would immediately register BYX as a student organization.

While the controversy at UGA has been resolved, at least for the time being, the same issues will spring up again as universities and fraternal organizations work to strike a delicate balance between promoting tolerance and acceptance while still preserving the free exercise of constitutionally protected rights.

• Elizabeth L. Hutton

¹ In sum, the Doctrinal Statement requires that all members of BYX affirm a belief in one God, the truth and authority of the Bible, Jesus Christ, the Holy Spirit, and that man was created in the image of God.

² Complaint, page 6, *Beta Upsilon Chi et al. v. Michael F. Adams, et al.*, filed in the USDC for the Middle District of Georgia, December 5, 2006.

³ BYX's gender and religion membership and leadership requirements are federally recognized associational classifications, not invidious discrimination. See Complaint, pg. 13.

⁴ A declaratory judgment is a "binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." *Blacks Law Dictionary*, West Publishing, 1996.

ALTERNATIVES TO TRADITIONAL HOUSING DEVELOP

Private-public partnerships to redevelop and revitalize neighborhoods are being forged in almost every American community today. In particular, colleges and universities are joining with municipal and state governments and private developers to revitalize neighborhoods adjoining campuses as part of university-wide strategic planning. These developments almost always include a residential component aimed at the students, which may have an impact on the traditional fraternity and sorority model of housing.

The construction of one such development was recently completed next to the campus of the University of Cincinnati. The University partnered with a non-profit group aimed at revitalizing the surrounding area, the University Heights Community Urban Redevelopment Corporation (UHCURC), to plan and construct the Stratford Heights community. Stratford Heights is a neighborhood of fifteen residential buildings positioned around a large, open green space. Unlike a traditional apartment complex, Stratford Heights is marketed as an opportunity for members of student groups or students with certain similar interests to live in a central community, including fraternities and sororities.

Greg Braun is a UHCURC trustee and University of Cincinnati and Lambda Chi Alpha alumnus who is closely involved with the operations of Stratford Heights and his fraternity's housing corporation. According to Braun, Lambda Chi Alpha's Cincinnati chapter previously owned its own house on UC's campus. Since Stratford Heights was constructed, however, the chapter has sold its house and the members have moved into one of the buildings in the com-

munity. The chapter pays a per bed yearly fee to have its name on the building, and the members execute individual leases with Stratford Heights.

The rent at Stratford Heights includes utilities (with air conditioning provided), furniture, big screen televisions, wireless internet, cable, room and common area cleaning, and professional management of the complex, all in a brand-new facility. "While the monthly rent may be a bit more expensive, the advantages for the students greatly outweigh any increase," according to Braun. The move has even better advantages for the leadership and alumni of the fraternity. Without having to serve as the landlord for each member, the chapter is no longer responsible for maintenance of the house or utilities, and does not have to worry about collecting rent from its members. The leadership of the chapter is then free to focus its energy on programming and the business of running the chapter itself.

For the alumni, rather than having to concern themselves with the operation of the house and the mortgage associated with it, they are also free to focus their efforts on programming. In addition, the proceeds from the sale of the former chapter house can be used for the benefit of the chapter and its members. "The Cincinnati Lambda Chi Alpha chapter took the proceeds from the sale of its house and started a 501(c)(3) education foundation for the chapter," Braun said. The foundation provides educational programming and scholarships to members, and allows alumni to make tax-deductible donations to the fund.

• Matthew C. Steele

TRAGEDY LEADS TO OFF-CAMPUS FRATERNITY SYSTEM

Many of the most common and important topics discussed in *Fraternal Law* have all surfaced recently at the University of Colorado in Boulder. The very real potential consequences of hazing and alcohol abuse were once again evident in the tragic, premature death of a promising freshman student. The University's actions following the unfortunate incident demonstrate the need for chapters to focus on the elements of protected constitutional associations in order to ensure their continued existence. Fraternity and sorority men and women should be aware of the events and current situation at CU because of the possibility of similar occurrences on other campuses.

Another Tragic Death

In September 2004, freshman Lynn Gordon "Gordie" Bailey, a pledge of the Chi Psi Chapter at the Uni-

versity of Colorado, died of alcohol poisoning following a pledging event. On September 16th, Chi Psi took Bailey and 26 other pledges, all blindfolded, into a nearby forest in the Colorado mountains. The pledges were told that before they could leave, they had to drink six bottles of wine and four bottles of whiskey in half an hour. The pledges, including Bailey, followed instructions and consumed the massive amount of alcohol. The group then returned to the chapter house, where Bailey was too drunk to function. The care he received was to put him on a couch with a bucket next to him as he passed out.

The next morning, Bailey was still on the couch when he was discovered by a member who was not present at the activities of the previous evening. That member, only known by his first name, Cal, called 911 at 8:57 a.m. When asked by the dispatcher what was going on, Cal responded that Bailey was passed out after drinking "way too much."

The paramedics arrived shortly thereafter and attempted, without success, to revive Bailey. He died that morning at the age of 18.

The University Reacts

In addition to the Chi Psi's hazing activities that resulted in Mr. Bailey's death, numerous other fraternities and sororities at Colorado committed disciplinary violations on campus within the past decade. Some of the other violations at Colorado included alleged sexual assaults, parties with kegs of beer, parties with strippers, and parties in violation of the local fire code. After Mr. Bailey's death, the University decided to take a stand and instituted major changes in the Greek system on campus.

The University mandated that each Greek organization sign the Agreement and abide by the terms set out therein in order to remain an officially recognized student organization on campus.

In an attempt to curtail the problems with the fraternities and sororities on campus, the University created a document entitled "Registered Fraternal Organization Agreement." In the 2006-07 version of the Agreement, the overview section states that "[t]he University and the Greek Community have established these standards in an effort to strengthen the collegiate experience of University of Colorado students. The University's vision for a successful Greek Life experience at the University involves Registered Fraternal Organization's collaboration, communication, and adherence to these high standards and core principles. Working together, these standards and principles can be realized."

The Agreement then outlines the terms and conditions that registered fraternities and sororities must abide by in order to remain in good standing with the University. The terms and conditions are broken into the following separate sections: Academics, Advising and National Commitment, Risk Management, New Member Recruitment and Education (including a ban on hazing), Taxes, and Nondiscrimination. The Agreement also details the services that the University provides to Registered Fraternal Organizations. Such services include the provision of a full-time Greek Advisor, use of the University name, the inclusion of a Greek Affairs budget within the Student Affairs' budget, the use of University facilities and recreational space, assistance in recruiting a Faculty Advisor, the provision of office space for the officers on the Panhellenic Association or IFC, inclusion on the University's webpage, assistance in the recruitment of new members, and the provision of funding support during the recruitment period.

The University mandated that each Greek organization sign the Agreement and abide by the terms set out

therein in order to remain an officially recognized student organization on campus.

The Fraternities Object

Immediately after the University announced the requirements set forth in the Agreement, the fraternities on campus, through the IFC, objected to two of the provisions in the Agreement, according to Marc Stine, the current Independent Greek Advocate for the IFC at CU. First, the Agreement mandated a "deferred" rush period. Historically, the fraternities could recruit year round, including freshmen during their first semester on campus. The Agreement changed this to require no recruitment until the second semester. Second, the Agreement required each organization with a chapter house to hire a live-in House Director.

Because of their objections with the requirements set forth in the Agreement, every fraternity at the University refused to sign the Agreement. When the fraternities refused to sign the Agreement, the University in turn refused to recognize the fraternities as Registered Fraternal Organizations.

The Current Status

The female Greek organizations on campus ultimately all agreed to sign the Agreement and abide by the terms set out in it. Today there are ten National Pan-Hellenic organizations part of the Panhellenic Association at CU. These organizations are recognized as official student organizations on campus and work with the University's Office of Greek Life. As official organizations, they have full access to the privileges and benefits detailed in the Agreement.

Various multi-cultural Greek organizations have also signed the Agreement. Four historically black Greek letter organizations, four historically Latino(a) Greek letter organizations, one Asian interest Greek letter organization, and one Gay, Bi-Sexual, Progressive organization have signed the Agreement, are part of the University's official Greek life and have full access to the privileges and benefits detailed in the Agreement.

The fraternities object to the deferred rush requirement because the University unilaterally attempted to immediately change the policy in such a way that would severely hurt the fraternities ability to add new members and because the policy violates the students' associational rights.

The male fraternity organizations, however, have still refused to sign the Agreement because of their objections with the terms set forth in it. The fraternities moved their operations off-campus and continue to operate independently from the University. The fraternities set up and

incorporated an independent IFC and the Alumni Interfraternity Council hired Marc Stine as an Independent Greek Advocate for the IFC. Mr. Stine owns and runs a consulting company that currently only works for the independent IFC. Mr. Stine is responsible for the advocacy and advisement of the IFC and the individual chapters. Essentially, Mr. Stine serves as an independent Greek advisor, similar to many advisors in Greek Life offices on campuses across the country.

According to Stine, the fraternities object to the deferred rush requirement because the University unilaterally attempted to immediately change the policy in such a way that would severely hurt the fraternities ability to add new members and because the policy violates the students' associational rights. As for the live-in House Director requirement, Stine said that the requirement would be impossible for the smaller chapters to afford a live-in House Director. Some chapters have as few as 12 spots and can not afford to use one of those spots on a paid live-in House Director.

Despite the University's denial of many privileges and benefits, Stine said that the fraternity system is thriving in its current form. He said that overall membership is up and that three new national fraternal organizations recently joined the IFC. The fraternities continue to be able to recruit year round, including freshmen students during their first semesters on campus.

When asked about the relationship between the fraternities and the University, Stine stated that the University

has told him that the fraternities will be treated "like any other private business that markets services to students off-campus, just like a hardware store." John Henderson, the Director of Greek Life at the University, in an email in August 2006, clarified the privileges and benefits that are not available to those groups that refuse to sign the Agreement. Mr. Henderson made it clear that fraternities can continue to exist off campus, but none of the privileges or benefits detailed in the Agreement would be available to such organizations.

Going Forward

First, the fraternities must learn from the tragic and unnecessary death of Mr. Bailey. Second, if the fraternities desire to continue to remain off-campus, they must keep in mind the requirements for intimate and expressive associations, as discussed in the AEPi article in this issue. The Chapters must be careful to ensure they are doing all they can to qualify as protected associations so that the University does not have the ability to prohibit membership in off-campus fraternities. This case demonstrates just how important the AEPi case is for fraternities and sororities across the country. Without a court finding that a fraternity does indeed warrant constitutional protection, public colleges could feel emboldened to prohibit and restrict membership in fraternities, both on and off campus.

- Daniel J. McCarthy

INSULTS AND STUPIDITY LEADS TO SUSPENSION

Sophomoric humor at the expense of racial or cultural minorities has enormous opportunity to bring disrepute to fraternal organizations whose members engage in it. Such was the case when the Sigma Chi Chapter at John Hopkins University held a party with the theme of "Halloween in the Hood." According to press reports, invitations posted on the Facebook web site urged guests to adorn themselves in "bling," "grills," and "hoochie hoops." Part of the party decorations allegedly included a skeleton hanging from a noose. Black students at the University, as well as the Baltimore Chapter of the National Association for the Advancement of Colored People properly took great offense.

The University suspended the chapter pending an investigation and Sigma Chi International imposed a 45-day suspension while it investigated.

A December 1, 2006 UPI story reported that the University banned an 18-year old freshman from campus until January of 2008 and require that he engage in 300 hours of community service and read and write reports on 12 books. The Foundation for Individual Rights in Education

(FIRE) and some 30 students were reported to have protested the punishment.

Whether such conduct was done with innocent intentions or not, it almost always results in a negative reaction against the organization that engages in it. Legal questions exist as to who can punish such conduct. As discussed at length in prior issues of *Fraternal Law*, state universities may not punish for such speech related conduct. However, a private social organization whose disciplinary rules include broadly stated prohibitions against bringing the organization into ill-repute may, consistent with its own rules, impose disciplinary sanctions for such conduct.

- Timothy M. Burke

See: "It's Ugly But It's Free Speech," *Fraternal Law*, September 1993; "Klan Costumes and Black Face – Can Anyone Punish," *Fraternal Law*, January 2002; and "Klan Costumes or Black Face – The Aftermath," *Fraternal Law*, March 2002.

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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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