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COUNTERPOINT: RELATIONSHIP STATEMENTS AS AN EFFORT TO USURP CONTROL

The November 2002 issue of *Fraternal Law* featured an article by Holiday Hart McKiernan of Alpha Chi Omega on the subject of relationship statements. Ms. McKiernan recommended that Greek-letter groups cooperate with their host universities in developing relationship statements which set forth mutual expectations, as well as procedures for accountability and enforcement. She argued that trends in academia and society compel this process, and that Greeks should not resist by emphasizing their associational rights.

On the contrary, Greek organizations should firmly assert their associational rights at every opportunity. Although this may be perceived in some quarters as an uncooperative attitude, it is the Greeks' best defense against heavy-handed university administrators whose goals, in many cases, are not consistent with the rights of Greek organizations. Those goals often involve bringing Greek groups under tight university control.

This is most clearly seen in one of the publications cited by Ms. McKiernan, "Greek Organizations on the College Campus: Guidelines for Institutional Action," a 1990 product of the American Council on Education (ACE). Because ACE viewed Greek groups as being "particularly visible and susceptible" to regulatory action, its report recommended that member institutions implement a series of "activist" measures. These included issuance of strict standards for Greek organizations (with penalties for violation), deferred rush, a minimum GPA for membership, elimination of pledge status, designating a staff member to supervise Greek affairs, and required educational programming. To enforce these measures, ACE recommended that Greek groups' status as recognized campus organizations be made to expire regularly, and be renewed only if university requirements have been met. ACE boldly described regular renewal as "the key to institutional control of Greek organizations."

The problem with ACE's plan is that campus recognition is not a mere privilege, to be dispensed on whatever terms the university chooses; it is an affirmative right anchored in the First Amendment. Beginning with the U.S. Supreme Court's decision in *Healy v. James*, 408 U.S. 169 (1972), courts have consistently held that student groups are entitled to the

benefits of university recognition unless the group disrupts campus order. A university must shoulder a "heavy burden" to justify denying or removing those benefits, a burden of proof the Supreme Court explicitly placed on the *university*, not the students. This is the foundation of freedom of association for students.

However, many universities have denied that Greek organizations have any such rights, characterizing them as merely "social" groups not protected by the First Amendment and *Healy*. There has also been an assertion that Greek groups, because of their visibility, are fundamentally different than other student organizations and are therefore fair game for intrusive regulations and forced programming. An ACE-style system of regular renewal, found in several relationship statements, provides the coveted "institutional control" by making a Greek group's very existence conditional. That is a fundamental threat that must be opposed.

Some universities have implemented ACE-inspired rules based on their alleged fear of liability for Greek activities. Ironically, ACE made its recommendations despite warnings about possible institutional liability contained in a "White Paper" that ACE itself commissioned the previous year. The author of that paper (Sheldon Steinbach, now ACE's general counsel) noted that issuing a detailed relationship statement in an effort to control Greek activities may actually *increase* a university's risk, because a court could then reasonably find that the university has assumed a legal duty to prevent injuries. In fact, the relative handful of reported cases in which a university has been held liable for injuries arising from Greek activities (as opposed to merely being named in a lawsuit) have each been based on a finding of an assumed duty.

Ms. McKiernan argued that today's legal climate does not favor an emphasis on Greek associational rights. On the contrary, this author believes that legal trends are actually running in the Greeks' favor. After the U.S. Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it seems clear that fraternities and sororities are not merely social groups, they are "expressive associations" entitled to the same rights and campus privileges as any political or advocacy group. (Although the later case of *Pi*

Lambda Phi v. Univ. of Pittsburgh, 229 F.3d 435 (3rd Cir. 2000) reminded us that such status cannot be taken for granted, but instead depends on proper presentation of evidence.)

Although most universities have not yet attempted to impose draconian ACE-style measures, the relationship statements that are being issued are increasingly intrusive and controlling. Whether they disguise their intentions by using euphemisms like “expectations” or “standards,” the

goal of many university administrators appears to be to erode student rights and obtain by contract what they cannot obtain by law. And that must be resisted, even at the expense of a cooperative relationship.

• James C. Harvey

Mr. Harvey is an attorney in Orange County, California. He is a member of Phi Delta Theta and the NIC Law Committee. The opinions expressed herein are solely those of the author.

RELATIONSHIP STATEMENTS ARKANSAS STYLE — NO WOMEN NEEDED

Relationship statements or expectation documents developed by universities are frequently a mixed bag. Many of the standards these documents seek to implement are in and of themselves innocuous and do not necessarily place major new impositions on the fraternity groups sought to be regulated. Some standards essentially incorporate by reference the expectation that, like all other student groups, fraternities and sororities are expected to abide by laws related to alcohol, drugs and hazing. These are reasonable expectations which, when applied equally to Greeks and non-Greeks, should not create a significant legitimate controversy.

Other regulations or standards can be very intrusive, attempting to define what constitutes a “good” fraternity or sorority on the basis of whether or not an organization meets as frequently as the university fraternity advisor thinks is a good idea or whether they invite faculty members to dinner often enough or even how the chapter handles its financial accounting. Some of these kinds of regulations may in and of themselves be good ideas, but are they necessarily ideas which each fraternity and sorority should be required to adopt? The question becomes who should make decisions on the internal functioning of a private membership group like a sorority chapter?

The development of standards documents or relationship statements or expectations is, at times, done exclusively by university administrators and at other times with the input and advice from students, faculty and alums of the institution.

One recent bad example of how to include student input comes from the University of Arkansas. This past fall, the Task Force for the Enhancement of Greek Life issued recommendations to the University Chancellor. While the introductory paragraph to that document suggests that it was specifically developed to deal primarily with fraternities – as opposed to sororities – the University is now seeking to apply the document and its recommendations to sororities as well as to fraternities. What makes this particularly unusual is that while there was student involvement, the University included representatives of only men’s groups. Thirteen men’s fraternities were represented on the task force by an

advisor and/or the chapter president. The IFC had its own three representatives on the task force. In addition, the task force included representatives from the Board of Trustees, the Alumni Association and the University administration. The make-up of the task force included a total of 35 people, including 26 fraternity representatives (all of whom were male). There were only three female members, all from the University administration.

Such an imbalance of representation does little to encourage cooperation between a strong and healthy sorority system at the University of Arkansas and the University administration. It also may very well be a violation of Title IX,¹ the federal law requiring that female students have equal opportunity to that of their male counterparts. Title IX has frequently been discussed in the context of equal access for women to intercollegiate athletic activities. It states, in part:

“No person ... shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

The University of Arkansas certainly receives federal financial assistance. The membership practices of social fraternities or sororities are by statute exempt from the prohibitions of Title IX. That exemption, however, does not extend to a University’s decision to exclude women from participation on a task force which is designing regulations to apply to female organizations while granting men such participation. The opportunity for equal participation and benefit was not provided by the University of Arkansas on its Task Force for the Enhancement of Greek Life.

Under these circumstances, it would not be surprising if the sororities resist the implementation of rules designed by exclusively male students as “enhancements to Greek life dealing ... in particular, with the men’s fraternity system.”²

• Timothy M. Burke

¹ 20 USCS 1681 et seq.

² Recommendations to Chancellor John A. White, University of Arkansas, from the Task Force for the Enhancement of Greek Life, Fall 2002, p. 1, 2nd sentence.

NEW IRS PUBLICATION ON FRATERNITY FOUNDATION GRANTS

Introduction:

In October, 2002, the National Office of the Internal Revenue Service released its annual Continuing Professional Education (CPE) materials for 2003 relating to tax-exempt organizations. CPE materials are used for training IRS agents in the field. These new materials include a segment on "Fraternity Foundation Grants." The last time the IRS addressed the subject of fraternity foundation grants in its CPE materials was in 1999, and those materials related strictly to the housing area.

Non-Housing Educational Grants:

These materials really contain very little in the way of new information, but since fraternity foundations were selected as one of approximately fifteen important subjects for the Service to discuss, they do show that fraternity foundations are still very much on the Service's agenda. The materials are interesting as they confirm the long-standing rule that scholarships restricted to members of a particular fraternity are acceptable as long as they are awarded on an objective basis consistent with the accomplishment of educational and charitable purposes. In addition, the Service also confirmed that the sponsorship of leadership training classes for fraternity members, which "assist members in managing their local fraternities and in their personal development" also further educational purposes, even though the group receiving the training is limited to fraternity members. The Service states that the reason for this is each member would be receiving training in skills that would improve his or her individual capabilities in the future, even though there is some benefit to the fraternity. Again, such leadership grants should be awarded on an objective basis consistent with the accomplishment of educational and charitable purposes.

Educational Areas Housing Grants:

The new CPE materials then proceed to discuss the subject of housing, and contain the first public pronouncement of the IRS position on fraternity foundation housing grants since its issuance of two private letter rulings in September, 2001, following the issuance of the new IRS housing guidelines in July, 2001. (See my articles on this subject in the November, 2001 and March, 2002 issues of *Fraternal Law*.) The materials indicate that the IRS is continuing to view favorably grants made for projects which satisfy the requirements stated in the 2001 guidelines, as long as such grants are properly structured and memorialized.

The materials confirm that the analysis of whether a housing project can be funded with foundation grant money remains twofold. First, the IRS will analyze whether a particular grant supports a project that replicates the practices of

the particular university where the chapter house is located. Second, the IRS will analyze whether any recreational, social or private purposes are incidental as compared with the educational purposes accomplished by the funding. The materials also emphasize that fraternity foundations must keep records showing that the grant funds are being used for charitable and educational purposes. This requirement can be satisfied by appropriate educational area grant documentation tailored to the specific housing project involved.

As contrasted to the 1999 IRS CPE materials, which initiated an approximately three-year dialogue with the IRS, the 2003 CPE materials end on what appears to be a positive note, with the IRS acknowledging that technology and evolving educational approaches will fuel innovation by fraternity foundations, and that the principles and examples set out in the new CPE materials provide a guide for analyzing such new programs. The materials then conclude with instructions to agents when processing an application or examining a fraternal foundation, to apply these standards.

Conclusion:

As mentioned above, the issuance of these materials and the concluding instructions to IRS Exempt Organizations agents evidence the IRS' continuing interest in the fraternity world. If you have any questions as to how these materials apply to your specific circumstances, or how to implement an educational area housing program that complies with the new IRS guidelines, you should seek professional advice.

• Barbara Schwartz Bromberg

WATCH FOR NEWS ON STUDENT GROUPS AND FIRST AMENDMENT RIGHTS

The Philadelphia-based Individual Rights in Education (FIRE) recently filed a federal lawsuit against Rutgers University on behalf of the student group InterVarsity Multi-Ethnic Christian Fellowship. The student group alleges that the university revoked the group's recognition because InterVarsity's constitution and leadership policy reserving leadership positions for only those individuals who share the same religious beliefs of the organization does not comply with University guidelines on nondiscrimination. As a result, InterVarsity alleges that the university violated its first amendment rights of freedom of speech and religion as well as its freedom of association rights.

Watch for an article discussing this case and others like it and their implications for the Greek world in the next issue of *Fraternal Law*.

MIT — THE FRATERNITY SETTLEMENT EMPHASIZES EDUCATION AND PREVENTION

Scott Kruger died at the age of 18 during his freshman year at the Massachusetts Institute of Technology. He attended a Phi Gamma Delta party where he was a pledge and consumed alcohol to the point that he lapsed into a coma and died three days after the party. Now, more than five years later, the litigation brought against the fraternity, its chapter and several of the individual members and officers of the Chapter has ended in a settlement.

Scott Kruger's death resulted in a series of reactions. The local district attorney indicted the Phi Gamma Delta Chapter at MIT for manslaughter and hazing. That indictment was later dismissed when the Chapter went out of existence and there was no legal entity left to prosecute. MIT revoked the diploma that had been issued to the Chapter's pledge trainer, who is alleged to have served the alcohol to Scott Kruger. The Kruger family reached a separate settlement with MIT two years ago in which MIT agreed to contribute \$1.25 million for scholarships to be established by the Kruger family and to pay the Kruger family an additional \$4.75 million to be used as the Krugers determined.

Combined, the fraternity and several members of the

Chapter will pay \$1.75 million to the Kruger family. Phi Gamma Delta has agreed that they will not reorganize another chapter at MIT until at least 2007. The Fraternity will also produce two separate videos – one for use on campuses and another directed at high school students. The videos will “use Scott’s tragic death as a cornerstone” and will, according to the fraternity, “further augment the aggressive program on pro-active alcohol education that Phi Gamma Delta already delivers to its membership.” At the suggestion of the Kruger family, the videos and a series of seminars will feature the Chief of Emergency Medicine from Beth Israel Deaconess Medical Center, Dr. Richard M. Schwartzstein, M.D.

As the litigation over Scott Kruger's death came to an end, Phi Gamma Delta released a statement that while they were providing compensation to the Scott Kruger family, “neither the family nor fraternity believes this is the important part of the settlement – the ongoing education to prevent another tragedy is the goal of the settlement. We intend to deliberately and aggressively implement these actions in hopes of preventing another family from suffering what Scott’s has endured.”

• Timothy M. Burke

FIRST AMENDMENT PERMITS MUSLIMS TO EXCLUDE WOMEN

The Nation of Islam held a “Men’s Meeting on Black on Black Crime, Violence and Drugs in Communities of Color” in the City of Boston-owned McCormick Center. Louis Farrakhan was the principal speaker. Women were barred from attending. One of the women prohibited from attending the meeting filed a complaint with the Massachusetts Commission Against Discrimination. The complainant argued that the McCormick Center was a place of public accommodation and women could not legally be excluded.

The Massachusetts Supreme Court disagreed.¹ The court noted that the separation of sexes is part of the belief system of the Nation of Islam’s religious practices. Relying on two previous U.S. Supreme Court cases,² the Massachusetts Court recognized that “intrusion into the internal structure or affairs of an association is one way in which government action may unconstitutionally burden this freedom.” According to the Court “if the forced inclusion of an unwanted person affects in a significant way the group’s ability to advocate public or private viewpoints, it is in violation of the First Amendment.” The Court recognized that “to be afforded First Amendment protection, there is no requirement that an association exists for the particular purpose of disseminating a specific message ... it must merely engage in

expressive activity that would be impaired by the unwanted inclusion.”

There are contrary cases, as the court noted. For example, the Massachusetts Supreme Court had previously ruled that a rod and gun club must admit female members because its policy of admitting any man over the age of 21 indicated a “total absence of genuine selectivity in membership” and that, therefore, the “purportedly private club was, in fact, a place of public accommodation.”³

As has been discussed in previous issues of *Fraternal Law* (January 2001 for example), fraternities may avail themselves of protection of the First Amendment, at least at public institutions, under both the theory that they are intimate associations and that they are expressive associations. The Massachusetts Supreme Court found that the Nation of Islam was an expressive association and, therefore, had little apparent difficulty in finding that it could exclude females from a male-only meeting.

• Timothy M. Burke

¹ *Donaldson v. Farrakhan*, 436 Mass. 94, 762 N.E.2d 835 (2002)

² *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

³ *Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination*, 402 Mass. 716 (1988).

NEVADA DROWNING LEADS TO HAZING CHARGES

At approximately 2:00 a.m. on October 10th, Albert Jerome Refuerzo Santos drowned in Manzanita Lake at the University of Nevada Reno. Santos was a freshman pledge of Pi Kappa Alpha Fraternity. Published reports indicate that at the time of his death he had a blood alcohol content of .062. Prosecutors ultimately decided not to file criminal charges against the pledges or fraternity members. In December, the University of Nevada Reno brought disciplinary violations against 15 students who had been members or pledges with the Pi Kappa Alpha Fraternity. The charges range from illegal swimming to hazing. A month earlier, the University had banned the Pi Kappa Alpha Chapter from campus and prohibited its 33 members from joining any other Greek organizations.

The *Reno Gazette-Journal* editorialized on December 22, 2002 that:

“The evening that ended with the death of Albert Refuerzo Santos undoubtedly started innocently enough. College kids usually consider themselves invulnerable and are sure that the rules apply to everyone but them. A late-night swim probably seemed harmless, especially to young men who’d apparently been drinking.

“But actions have consequences, and breaking the rules resulted in a tragic death. It is a tough lesson, but one that all students should – must – learn.”

• Timothy M. Burke

44 INDIVIDUALS SUED IN DEATH OF PLEDGE

Two years ago, in December of 2000, Terry Sterling died, allegedly as a result of choking on his own vomit after a bout of binge drinking. Sterling had been a freshman at Old Dominion University and a pledge of Alpha Tau Omega.

Some students had faced University discipline; however, the University dismissed all cases because there was “insufficient evidence to find them in violation.” Alpha Tau Omega revoked the charter of the local chapter and the University moved to close the chapter.

The family filed a lawsuit against the national fraternity and the former local chapter seeking \$5.35 million in damages. That suit was settled on the eve of trial for an undisclosed amount.

That did not end the story, however. On November 22, 2002, Kandi Sterling, the student’s mother, sued 44 individual defendants, including the couple that owned the house

where the party took place and individual members of the former chapter who are alleged to have had some responsibility for Sterling’s drinking.

Tragedies like the death of Terry Sterling shouldn’t happen to begin with, and wouldn’t happen if chapter members took reasonable steps to ensure compliance with the laws regarding the consumption of alcohol. It ought to be clear from lawsuits like those brought in the Sterling case and in the MIT cases discussed elsewhere in this issue, that when tragedies do occur because chapter members failed to accept and acknowledge their individual responsibilities to obey the law, it is not just the chapter or the national fraternity which is going to suffer the consequences. Individuals who had a hand in causing the tragedy are just as likely to be defendants in the litigation that follows.

• Timothy M. Burke

BLACK FACE CONTROVERSY REDUX

Two of the University of Virginia’s oldest fraternities – Zeta Psi and Kappa Alpha – hosted a Halloween party in 2002 at which at least three costumed students painted their faces black or brown. *The Washington Post* reported that Larry Wiese, the Executive Director of the Kappa Alpha Order, called the conduct “wrong and offensive” and that Richard Breswine, the Executive Director of Zeta Psi, while indicating that he did not believe the intent was racist said “this was still a grossly insensitive thing to do.”

As was discussed in the January and March 2001 issues of *Fraternal Law*, whether or not a public university

like the University of Virginia can punish the chapter or members involved in wearing blackface is a legitimate First Amendment question. On the other hand, national fraternities are not limited by the First Amendment when taking action against their members. The national fraternities must follow their own statutes, constitutions and bylaws and can impose sanctions for violations of their own rules, including rules which are no more specific than prohibiting conduct which brings discredit upon the fraternity.

• Timothy M. Burke

HOUSE CORPORATION HEROES

The unsung heroes of the Greek world are officers and trustees of house corporations. The typical house corporation owns land and a building occupied by a fraternity chapter. The officers and trustees have special duties and conflicting demands upon them.

Their special duties include the trust they have for the current members of the chapter.

They have a duty to make the house available and see that it is properly maintained for the use of the current members of the chapter. They also have a duty to the future members of the chapter to make sure that the house is useful in the long run. They also have a duty to the donors of the past and present who have provided financial resources to make the house possible.

Sometimes these duties present conflicting demands. The current actives obviously want instant gratification of their current needs. Sometimes this is inconsistent with the duties to the future members of the chapter and to the past and present donors.

Sensible trustees and officers of a house corporation do a few things to minimize friction:

- There is an effective and regular way to keep the chapter informed about the financial affairs of the house corporation. Sometimes this is done by scheduling regular meetings between the representative of the house corporation and the officers of the chapter. Sometimes an officer of the chapter serves as an ex-officio, nonvoting member of the house corporation board. In some house corporations, the members of the chapter are automatically elected nonvoting members of the house corporation and there are meetings once or twice a year at which the house corporation board meets with the members.
- A well-run house corporation will have a lease with the chapter that spells out the financial obligations of the chapter or of its members to provide rental payments to the house corporation. The lease also covers the duties of the house corporation to maintain the house and to provide for replacement of parts of the house systems that may need to be replaced, such as a furnace or a hot water heater. Among the provisions that should be in the lease is an agreement on the part of the chapter that it will not permit the house to be used for any purpose that is a violation of state or local law, a violation of university policies, or a violation of policies of the fraternity. This, of course, means that the lease is representing that the chapter will not provide alcohol to minors or allow drug activity in the house.

The trustees and officers of the house corporation should not micro-manage the internal affairs of the chapter. They are landlords. Hopefully, the chapter has some other mature advisors who are chapter advisors. It is not wise for house corporation trustees or officers to also be chapter advisors. The chapter advisor is helping the chapter deal with its current operations. The house corporation trustees and officers are interested in protecting not only the current operations, but the future operations as well.

Some house corporations have self-perpetuating boards. This means that the members of the board reelect themselves or elect replacements for themselves at regular intervals. Other house corporations are membership corporations, which means that there are a larger group of members who vote for the trustees and the officers. The voting members usually are alumni of the fraternity who live in the community where the chapter exists. In some communities, there are not enough alumni to run a membership corporation, but in other communities it is possible. The advantage of having a membership house corporation is that it provides a necessity to get the alumni together periodically for a report on the status of the house and the house corporation and to conduct elections.

A common pathology for house corporations is that one alumnus becomes super proprietary of the house and the corporation. Other alumni are happy to have the one person take charge and run with it as long as things are going well. The problem is that often, things are not going well and no one realizes it until a real disaster happens. For example, the one person who was running things suddenly dies and no one knows the status of anything. This can be a messy thing to untangle. The one person who was taking charge of things needs money for some private purpose and "borrows" it from the house corporation. This is embezzlement under the laws of most states. The one person who is in charge hires a brother-in-law to put a new roof on the house. It may be a fair price, but if anybody finds out about the relationship between the leader of the house corporation and the roofer, it can raise all kinds of suspicions and accusations of improper behavior.

Whenever other people's money is involved, it is of the utmost importance that the volunteer leaders of the house corporation have full and fair disclosure of all financial affairs throughout the year. Whenever the leader of a house corporation becomes too proprietary, trouble often ensues.

• Robert E. Manley

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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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