STETSON LAW CONFERENCE

Registered Student Organization, Fraternities and the Modern University – Protecting Rights, Combating Hazing and High Risk Alcohol Use and Foster Leadership

I. Introduction.

Fraternities and sororities have existed in a symbiotic relationship with American colleges and universities for over a century and a half. Today, chapters of national Greek organizations exist on more than 800 campuses. Even during these difficult economic times, the number of student members is increasing as are the number of fraternities and sororities. Over 635,000 college students are members of chapters belonging to North American Interfraternity Conference ("NIC") or National Panhellenic Conference ("NPC") fraternities and sororities and tens of thousands more are in other fraternal groups. Multi-cultural Greek organizations continue to expand and the historically African American Greek organizations that form the Divine Nine of the National Panhellenic Council ("NPHC") remain strong.

Greek groups are formed for grand purposes which attract members not simply for the social experience, but to be associated with other members who share in those purposes. There is no doubt that social activities are a part of the attraction, but historically Greek organizations encourage educational excellence and nationally demonstrate higher educational achievement than student bodies as a whole. They also engage in impressive philanthropic and community service programs. As a practical matter, at many universities, fraternities and sororities also provide important alternative housing opportunities relieving some of that burden from the host institution.

II. Recognizing Student Organizations – or Not. Denying Recognition on the Basis of Membership Practices.

- *Christian Legal Society v. Martinez*, 561 US ___, 130 S.Ct. 2971, 177 L.Ed. 2nd 838 (June 28, 2010) denies recognition to a Christian group because of its religious based membership requirements in the face of a college-mandated "all comers" policy which permitted all students to join any organization. In August of last year, the 9th Circuit Court of Appeals followed the *Martinez* decision and upheld the denial of recognition to two Christian Greek groups (*Alpha Delta Chi – Delta Chapter v. Reed*, 648 F.3d 790, Court of Appeals, 9th Cir. 2011).

  Petition for a Writ of Certiorari was filed with the United States Supreme Court December 14, 2011.

  The difference between *Martinez* and the SDSU case appears to be that SDSU's policy allowed all organizations to restrict membership based on the goals and purposes of the organization except for religious groups, where such rules resulted in the denial of recognition.

  Could the just decided United States Supreme Court decision in *Hosanna – Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 2012 U.S. LEXIS 578 (January 11, 2012) be a predictor that the Court might take the San Diego State case? In *Hosanna – Tabor*, the Court unanimously ruled in favor of the ministerial exception holding that a church school could terminate a "called" teacher although that termination might otherwise violate the Americans With Disabilities Act, because churches have the right to select their own ministers. If a church school can select its own leaders,

why shouldn't a religious oriented student organization have the right to select only officers who conform to the religious beliefs espoused by the organization?

While San Diego State's policy prohibited discrimination in student organization membership on a variety of different demographic characteristics including race, religion, sexual orientation and handicap and sex, it specifically excepted from those restrictions those groups which were "explicitly exempted under federal law."

Title IX specifically exempts fraternities from its constraints. The pertinent language is quite specific:

> "*Prohibition against discrimination: exceptions.* No person in the United States 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, except that: …
>
> "*Social fraternities or sororities, voluntary youth service organizations.* [T]his section shall not apply to membership practices…of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [26 U.S.C.S. 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education." (20 U.S.C. 1681 *et seq*.)

Thus, the gender discrimination engaged in by men's and women's Greek social organizations did not disqualify them from recognition at San Diego State.

On the other hand, at least one Court of Appeals case, *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York*, 502 F.3d 136 (2 N.D. Cir. 2007) found that a public university which had adopted a policy refusing to recognize groups which engaged in gender discrimination in their membership practices was not a violation of the freedom of association rights of the groups involved.

The denial of recognition does not necessarily mean that groups won't exist, simply that they will exist without university involvement and oversight. Even the United States Supreme Court in the *Martinez* case recognized that fraternities and sororities can exist without recognition by a host university.

III. Regulating Student Organizations and Their Members.

- Relationship Statements. Many institutions have established standards and expectations for fraternities and sororities that often go beyond the basic requirements of other registered student organizations through documents commonly referred to as relationship statements.

The practice of granting recognition to fraternities and sororities based on these types of agreements is not new; however, the number of campuses utilizing agreements continues to increase, and the obligations and requirements continue to expand. Couched in terms such as: minimum requirements; chapter standards; award/recognition programs; covenants; memorandums of understanding; etc., documents are often created with the best of intentions but without careful consideration of potential legal consequences for the institution, the organization or the student. Some documents, by design or inadvertently, insert the institution into the internal operations of these private membership organizations.

Student and/or student affairs driven documents often lack the understanding of the legal complexities involved in such agreements. Conversely, agreements drafted by university legal counsel run the risk of not being understood or embraced by the students bound by the documents. Are these types of documents accomplishing worthwhile goals or creating additional liability? Does the admonition found in a 1984 article still hold true today?

> It can be a difficult and often expensive lesson, but increasing numbers of college administrators are realizing the dangers they embrace when they try to exercise detailed control of the internal affairs of fraternities. The more control that the college administrator attempts to assert over fraternities, the more liabilities the college administration imposes upon itself. ("College Administrators Should Avoid Control," Robert E. Manley, *Fraternal Law*, November 1984, Number 10)

There is likely to be a clash between well-intended university regulations and well organized student groups over certain issues, including:

- Insurance requirements unequally imposed;
- Indemnification requirements;
- Discipline of chapters, members and interference in internal disciplinary decisions;
- Searches of chapter houses and who is required or allowed to perform them;
- Requirement that financial accounts be placed with the university.

- Speech Conduct. It's Halloween and a group of white student sorority members decide to dress as the Supremes, using the modern equivalent of black face. The black student organization on campus is outraged. Can the university constitutionally discipline the students? Probably not if they are students at a public university. (For example, *Doe v. University of Michigan*, 721 F.Sup. 832 (1989) and *Iota X Chapter of Sigma Chi v. George Mason University*, 993 F.2d 386 (1993).) A private university might be able to. The social organization can.
- Alcohol and its abuse is an issue for both the social organizations and their host institutions. There is a legitimate debate over whether the increased drinking age helps or hurts, but it certainly has not eliminated the problem.
- Hazing. The death of Albert Champion at Florida A&M has prompted United States Representative Frederica Wilson to introduce a bill that would make hazing a federal crime and among other things, deny financial aid to any student who has been found responsible for hazing.

  Forty-four states already have hazing laws, although the definitions of hazing and the penalties imposed vary greatly.

  Who decides the imposition of that penalty? Left to the courts, the accused have a panoply of due process rights and consideration in a judicial process less impacted by unfavorable publicity. Even at a state college campus, the process due in a university disciplinary setting typically does not involve the right to counsel, to cross examine witnesses, discovery, and offers only limited appeals. If private colleges are placed in a position of deciding to permanently

deprive a student of all sources of federally supported funds, does the private college campus potentially become a state actor and subject to the Federal Civil Rights Act (42 U.S.C. 1983 and 1988)?

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