

**HANDLING INCIDENTS,  
CLAIMS AND LAWSUITS**

**A FIPG REFERENCE BOOK**

**for**

**EXECUTIVE DIRECTORS  
and  
RISK MANAGEMENT DIRECTORS**

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written by

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## **the**

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## **I. GLOSSARY OF TERMS**

A glossary for certain terms used in this handbook is set forth in **Appendix A**.

## **II. INTRODUCTION: BASIC LEGAL CONCEPTS**

There are civil claims (suits) and criminal proceedings.

An attorney representing the state, a municipality, or the United States government generally prosecutes criminal proceedings. These attorneys often have the titles of U.S. Attorney or Assistant U.S. Attorney, District Attorney or Assistant District Attorney, and Municipal Counselor or Assistant Municipal Counselor.

Civil actions are those involving monetary claims between two or more parties, or a request for some action to be taken by the court in a civil (non-criminal) nature, such as a request for injunctive relief (ordering a party to or not to do something).

In civil cases, the claimant is referred to as the plaintiff. The person or entity against whom the action is brought is referred to as the defendant.

Alleged legal bases for claims of a civil nature where a request for monetary relief is made by the plaintiff against the defendant are generally of two types, those actions where the legal basis is an alleged contract and those asserting a tort claim.

Contract claims are based upon an agreement and an alleged breach of that agreement, with damages resulting from the breach of the agreement. Contracts can be written or verbal. They also in some cases can be implied by the facts.

Tort claims are based upon a legal duty or an alleged legal duty owed by one person or party to another, a breach of that duty, and damages caused as a result of that breach of that duty. Most claims of a personal injury nature are tort claims.

### **A. The Anatomy of a Successful Tort Claim**

In order for a plaintiff to recover a judgment against the defendant on a tort claim, the following elements must be present:

1. The defendant must have owed the plaintiff a legal duty with respect to the fact situation asserted;
2. The defendant must have breached that duty;
3. The plaintiff must have sustained injuries or damages as a result of that breach of duty; and
4. The defendant's breach of its duty owed to the plaintiff must have been the proximate cause of plaintiff's injuries or damages.

There is a difference between a claim for which a plaintiff can recover a judgment, and a claim that is generally worth pursuing.

For a claim to be generally worth pursuing, there must be damages that are worth the time and the effort of pursuing the claim, and there must be an ability to collect any resulting judgment. As an example, if the plaintiff has significant injuries but the defendant has no assets or insurance to cover the claim, then it is generally not worth the time and effort to pursue the claim. On the other hand, if a defendant has considerable assets or insurance, but the damages are slim, then this can also impact the attractiveness of the claim from the perspective of the claimant.

Some cases, while not attractive from a monetary standpoint, might still be pursued if there are matters of principle or anger involved. However, it is unlikely that counsel (the attorney) for the plaintiff would take such a claim on a contingency fee basis (which means that the attorney recovers a percentage of what the plaintiff recovers). If an attorney charges (bills) the client for such a case, the motivation for such a case can lessen over time.

## **B. Actual and Consequential Damages**

Actual and consequential damages are monetary damages to compensate the claimant or plaintiff for his, her or its loss. For example, lost wages and medical expenses are damages subject to calculation and are actual damages. A recovery for pain and suffering (if recovery for such is permitted by applicable law for the type of claim asserted) are not capable of mathematical computation but are in an amount to be determined by the trier of fact (generally a jury). These are often termed consequential damages.

## **C. Punitive Damages**

Punitive damages (or exemplary damages) are damages that are in addition to the actual and consequential damages sustained by the claimant or plaintiff. They are recoverable in certain types of cases where the tortious conduct was intentional, egregious, or was with reckless disregard for the rights of the plaintiff. States have varying laws with respect to the amount of punitive damages that can be recovered under particular fact situations.

## **D. Attorney-Client Privilege and Work Product**

In a civil lawsuit, one party can discover from another party information, materials, and documents that the other party has that are relevant to the claims

asserted, or the defenses to the claims asserted, and which are reasonably calculated to lead to the discovery of admissible evidence. This is called “discovery.” There are two exceptions to the right of one party to discover information, materials, and documents that are otherwise within the scope of discovery. One exception is information, materials, and documents that are subject to the attorney-client privilege. The other exception is work product.

Communications that a party or a party’s representative has with his or her or its attorney and which are intended to be confidential communications and are provided pursuant to an attorney-client relationship are generally exempt from discovery as “privileged” communications.

An attorney-client communication that is privileged (exempt from discovery) can be waived by the client. For example, if an attorney provides a written communication to his or her client, and that client subsequently gives it to persons outside of the attorney-client relationship, then the client has waived that privilege and that communication (and perhaps others connected with it) can be discovered.

There is also some protection given by the courts from one party discovering the “work product” of another party. In general, work product is information obtained for the purpose of pending or possible litigation. The Federal Rule of Civil Procedure that addresses work product is Rule 26(b)(3). This rule is applicable in Federal Courts. It is set forth in **Appendix B**. State work product exceptions to discovery are generally in harmony with this Federal Rule of Civil Procedure. It is possible to obtain discovery of information that is otherwise protected by the work product exception to discovery if the party seeking that information shows certain elements. These elements are set forth in Federal Rule of Civil Procedure 26(b)(3), attached as **Appendix B**.

## **E. Cases Affecting Fraternities and Sororities**

Potential defendants for claims against fraternities and sororities, depending upon the facts, include the national organization, the chapter, the local house corporation, volunteers, chapter officers and chapter members, and others.

Legal liability theories asserted against fraternities and sororities include negligence, agency, alleged duty to control or supervise, premises liability claims, and others.

Claims can be asserted in a lawsuit even if there is no legal basis for the claims. Whether there is a legal basis for a claim can depend upon the facts as they unfold during discovery in the case. Discovery is a process pursuant to which one party obtains documents and written answers to written questions (called interrogatories) from another party to the case. Depositions (testimony taken under oath) are also part of the discovery process.

Negligence claims are based on an alleged duty and an alleged breach of that duty. An example of a legal duty and a breach of that duty is a person who is driving a vehicle and runs a stop sign and, because the driver ran the stop sign, his or her vehicle hits another vehicle. There is a legal duty of care with respect to the operation of motor vehicles. By running the stop sign, the driver breached his or her legal duty of reasonable care in the operation of a motor vehicle and caused damage to the other vehicle because of a breach of that duty of care.

Duties of care can be created by courts through its holdings and rulings (known as case law).

Laws enacted by the federal government, a state or a municipality can also create legal duties. An example is hazing statutes. Many states have laws that prohibit hazing.

A duty of care that one will not act in a way to cause injuries to others can exist regardless of a codified statute. Again, hazing is an example. Even without a hazing statute, there can be a breach of a legal duty of care if one person harms another by subjecting another person to hazing.

State laws differ on whether one person can be liable to another for providing alcohol to another where the provider is not in the business of providing or selling alcohol. This is often referred to as social host liability. Some states recognize some forms of social host liability, and some do not.

Often the national organization is brought into a suit as a defendant based upon some act or omission by a chapter or by some person associated with a chapter. The claims against the national organization are often more tenuous than the claims against the actual participants.

One allegation sometimes made in attempts to hold the national organization responsible for the acts of an undergraduate chapter or undergraduate student is an allegation that the chapter or the undergraduate member was acting as the agent of the national organization with respect to the act or omission at issue.

“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.” Restatement (Second) of Agency §1. The one for whom action is to be taken is the principal. The one who is to act is the agent. As stated by the Court in *Reiling v. Missouri Ins. Co.*, 153 S.W.2d 79 (K.C. Ct. App. 1941) citing *Restatement of the Law Agency*, pp. 559, 560, “It is only when to the relationship of principal and agent there is added that right to control *physical details as to the manner of performance* which is characteristic of the relationship of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor.”

(*Emphasis added*). The requisite “control” necessary for an agency relationship is not control with respect to the result to be accomplished. It is a right to control the *physical details* as to the *manner* of performance before an agency relationship can result.

With an agency theory of liability against the national organization, often lacking in the reality of the relationship between the national organization and an alleged participant is the “control” factor that is an element of the agency relationship.

A frequently asserted theory of liability against the national organization is an allegation that the organization has a “duty to control” or a “duty to supervise” the undergraduate chapters. There are a few cases that have held that a national organization has a duty to supervise or control the acts of an undergraduate chapter. However, the significant majority of the reported decisions that have addressed this alleged duty have held that there is no such duty of control or supervision. An example of a case so holding is *Alumni Assn. v. Sullivan*, 572 A.2d 1209 (Pa. 1990). It held:

“[S]igma Chi fraternity is an inappropriate body from which to require the duty urged by appellant. By definition such organizations are based upon fraternal, not paternal relationships. National organizations do not have the ability to monitor the activities of the respective chapters which would justify imposing the duty appellant seeks. The national organization...has only the power to discipline an errant chapter after the fact. It does not possess the resources to monitor the activities of its chapter contemporaneously with the event.”

The author of this handbook believes that the few cases finding that there is a duty of control or supervision lack the substantive analyses that are general underpinnings of a decision that creates a legal duty not generally recognized by case law.

An FIPG statement that addresses the relationship between a chapter and a national organization is attached as **Appendix C**. The reader should familiarize himself or herself with it. It is a useful tool in understanding the relationship between the national organization and a chapter. It also is a useful tool to educate local counsel and others involved in the claims and lawsuit process (discussed more extensively below).

Premises liability claims generally assert a dangerous condition on the premises of which the owner or occupant of the premises knew or should have known existed. Assault cases have sometimes asserted this theory of liability in an attempt to impose liability for a criminal assault by a third party.

## **F. Utilization of Counsel Who Specialize in Fraternity and Sorority Law.**

In appropriate cases, attorneys who specialize in fraternity and sorority law can assist the organization and the organization's local counsel in the defense of a case.

One area where assistance can be given is in educating local counsel on the substantive body of reported case law that has developed regarding claims against Greek letter organizations. The body of reported case law involving claims against Greek letter organizations is always evolving. Reported decisions can be impacted by subsequent decisions. New reported decisions can and will be issued. Attorneys who specialize in the representation of fraternities and sororities can provide local counsel with the available case law for claims asserted without local counsel having to go through the expense of completely researching the area and "recreating the wheel." This can also help local counsel understand what is available to defend a claim.

Where it would be helpful, attorneys who specialize in fraternity and sorority law can also assist in the education of local counsel with respect to the nuances involved with the relationships between the national organization and the chapter and other fraternity or sorority entities that might be applicable to the defense of the claims asserted. It is not uncommon for local counsel and others involved in the legal process to not have an in depth understanding of the relationships. A substantive understanding of the relationships is generally important to adequately analyze and defend claims against Greek letter organizations.

## **III. GENERAL PROCEDURES, SUGGESTIONS AND CONSIDERATIONS FOR INCIDENTS, CLAIMS AND LAWSUITS**

### **A. Incidents involving a potential for a later claim**

There are at least two types of situations where an investigation by the national organization might be considered or implemented.

One situation is where something has happened that is not in accordance with the organization's policies, and an investigation is implemented to determine what occurred for purposes of potential further follow up by the national organization.

The second situation involves an incident that has occurred that could result or has the potential to result in a potential civil claim against the national organization, a chapter, or some entity affiliated with the Greek organization. This portion of the handbook addresses this situation.

In these potential claims situations, an investigation for potential claims can sometimes overlap with a potential investigation with respect to the policies of the Greek organization and potential follow up by the Greek organization.

With respect to an investigation involving a potential claim, considerations include who should be involved in the investigation, what should be memorialized in some fashion, and to what extent the attorney-client privilege and the work product exception to discovery can be preserved.

**1. Internal file procedures that might be implemented regarding the incident**

It is suggested that a legal file be started for the incident. The title of the file should include the word “Legal.” This will help identify the file as a file that contains information that is subject to the attorney-client privilege and/or the work product exception to discovery. It “red flags” the file so that special attention can be given to it if and when requests for protection of documents are served in a case.

If there is an outside person or firm that conducts the investigation, consider having that outside person or firm be the one that keeps and files any investigation reports. This can help further demonstrate that the investigation file is a “work product” file.

**2. Checklist of persons who might be notified or contacted about the incident**

Persons who might be notified or contacted about the incident include legal counsel for the national organization (discussed further below), the chapter advisor, university personnel, and the organization’s insurance broker. Necessary board member and staff member notifications are addressed in Part II, section A(5)(g) below.

**3. Media relations checklist**

Most organizations have a media relations checklist or crisis management plan. If appropriate, that plan should be referenced and put into operation.

It is generally recommended that there be one spokesperson for any media inquiries to the national organization, and one spokesperson (generally a chapter president) for any media inquiries to the chapter. The organization’s crisis management plan should be consulted with respect to what types of responses are provided by any chapter spokesperson for inquiries to the chapter. One possible course of action is to have the chapter spokesperson refer all media inquiries to the identified spokesperson for the national organization.

**4. Internal review that might be conducted before any investigation is commenced and why**

When an incident occurs, it may sometimes be helpful to pull and review reports and information on the involved chapter for the last four (4) years (or for the period of time that chapter documents are maintained under the organization's document retention policy). (The four [4] year period is suggested because of a total turnover or near total turnover that occurs in a chapter every four [4] years.) If this review indicates a prior history of any similar matters that might be involved with the incident, or any prior incidents that might be used by a plaintiff's counsel, this can assist with respect to how any investigation is performed. It also can assist with conversations with the general counsel for the national organization on any legal considerations that might be discussed or addressed given the history indicated by this review.

**5. Fact Gathering**

**a. What can be done to preserve work product protection for documents prepared in anticipation of a possible claim**

The staff person with hands on responsibility for the investigation of the matter should contact the organization's general counsel and advise him or her of the situation. If an investigation with respect to potential litigation is suggested, the organization's counsel can make that request by email, letter, or some other written form to the staff person primarily responsible for follow up with respect to any investigation from a potential claim prospective. This written request from legal counsel will help document that the forth-coming investigation is one that should be protected by the work product exception to discovery.

**b. Considerations on whether the incident is one for which facts should be gathered if there is a later claim**

If the incident is one where the recollections of certain individuals or witnesses could be pertinent to a claim or a defense of a claim, the memories of witnesses can fade with time. Witnesses or persons with helpful information also graduate and move on. The ability to contact them months or years later can fade with time. Consequently, memorandums on what witnesses say, hand written statements of witnesses, and, at times, recorded statements of witnesses can help preserve the memories, as they are then intact. If there is a potential for a claim involving an incident, an investigation for the purposes of a potential claim should generally be considered.

**c. Considerations on whether cooperation on gathering facts and availability of potential witnesses have the potential to vanish or become more difficult with time**

If some action is going to be taken against the chapter, such as closure or probation, or if some action is going to be taken against members of the chapter, then the cooperation of those needed to perform a thorough investigation can vanish once a course of action is determined and the persons affected by that action are advised. Consequently, time can sometimes be of the essence with respect to performing any desired investigation.

**d. Considerations on factual investigations**

**i. Considerations on who is involved in the factual investigation**

Sometimes it is helpful and sometimes it is advisable to have a professional investigator or claims person be part of an investigation for potential claims purposes. The professional investigator or claims person has experience in how to conduct and document an investigation. There is no rule of thumb as each matter differs. General counsel for the national organization can assist in determining whether involvement by a professional investigator or claims person is advisable.

When a professional investigator or claims person is involved, it is sometimes helpful to also have a professional staff member involved in the investigation to work with the professional investigator or claims person. The staff member will often have easier access to the chapter, chapter members, university personnel and alumni advisors. At the same time, the professional investigator or claims person will have experience in taking statements and performing an investigation.

Additionally, fairly or unfairly, and inaccurately or accurately, when a staff member is involved, there is the potential for statements to be attributed to the staff member in later litigation whether actually made or whether allegedly made. Protecting against this possibility by the use of a professional investigator or claims person is sometimes advisable.

There may be occasions where it is determined to be advisable to make contact with parents or others that could be potentially involved in a claim against the organization at a later date. This is further discussed below. A professional investigator or claims person with experience in making these contacts for Greek organizations can sometimes be a

plus. This person can also be of assistance when professional staffs are stretched thin and time does not permit their being involved in these contacts.

**ii. Considerations on whether an attorney is used as part of a factual investigation**

Generally a professional investigator or claims person can assist to the extent needed. However, for potentially significant matters, it might be advisable to have counsel (an attorney) assist in the investigation. The attorney will be able to analyze the situation on a substantive legal basis (or be educated of such by attorneys who specialize in the representation of fraternities and sororities). The attorney can, in these potentially significant matters, know what facts should be preserved.

**e. Considerations on what facts are preserved and for how long**

General counsel for the national organization and any professional investigator/claims person involved in assisting the organization of the matter can provide guidance on what type of facts and documents should be preserved or considered for preservation.

Questions that can be presented in an investigation can include whether the incident occurred at a chapter event or whether it was individuals working or doing something on their own behalf and not as a chapter or at a chapter event. If alcohol is involved, questions could include the sources of the alcohol, whether the alcohol was purchased with chapter funds, what was the access to alcohol, limitations on access to alcohol, the presence of an invitee list, among other items. Legal counsel and/or the insurance broker or a risk management professional should be consulted with respect to the types of information that should be obtained or attempted to be obtained as part of the investigation from a potential claims standpoint. The fact situations vary. Legal knowledge on what types of claims might be asserted is part of the analysis process. Consequently, no standard rule of thumb can be applicable in all fact situations.

**f. How long the “legal” file is maintained**

The “legal” file for the incident should be preserved for as long as a claim could be brought arising from the incident. States have “Statutes of Limitations.” These are the periods of time post-incident during which a claim can be filed of record with a court. The limitations periods for contract claims and for tort claims differ by state. Legal counsel should be consulted for the limitations period applicable for a particular incident before the “legal” file is destroyed pursuant to an organization’s document

retention policy. Consequently, the document retention policy period for a file can be different than the period for which a legal incident file is retained for legal or potential legal purposes.

**g. Considerations on how facts are preserved**

“Facts” include those that are in document form and those that have been or can be provided verbally.

Verbal communications can be preserved by hand-written notes of the interviewer, by memorandums to the file by the person obtaining the information, by tape recorded statements which can then be transcribed with the tape retained, by hand-written statements by the witness, and by statements that are typed based upon what the witness has advised, then put into written form and subsequently reviewed and signed by the witness with any revisions made by the witness. Statements can also be taken by recording a telephone conversation. This can be a summarization taken toward the conclusion of the telephone conversation.

Legal counsel and a professional investigator/claims person can assist in an analysis of how facts might be preserved for the particular matter involved.

The method to preserve facts can depend upon factors such as the time involved to have a statement taken and the willingness of the witness or information provider to provide a documented statement.

Whenever a recorded statement is taken, it is advisable to state on the tape that it is being recorded with the permission of the person being recorded. It is also advisable to state on the tape when the interview is being concluded. The actual tape should be preserved for the period of time that the “legal” file is retained.

**h. Considerations on how necessary board members and necessary staff members are apprised of the incident and any factual investigation**

To preserve the attorney-client privilege with respect to privileged communications, only persons properly coming within the scope of the attorney-client privilege are persons to whom the communication can be given with minimal risk that a privilege has been waived. National board members, the Executor Director and the Risk Management Director are persons that should, in most cases, fall within the protected “class” of distributees. The broader the transmission of an attorney-client privileged communication, the greater the risk that the privilege can be deemed to have been waived. For this reason, extreme care should be taken before any attorney-client privileged communication is provided to anyone other

than the Executive Director and national organization board members. If the national board consists of numerous persons, or includes undergraduate members, then an analysis by general counsel for the national organization might be appropriate before an attorney-client communication is distributed to the entire board.

A communication by an Executive Director to the national board with respect to an incident is not an attorney-client communication and it is not protected by the attorney-client privilege. A communication by the Executive Director to legal counsel for the organization and with the national board being copied on the communication may be covered by the attorney-client privilege.

If a communication that is subject to the attorney-client privilege is subsequently provided by a recipient to a person outside of the attorney-client relationship, then the privilege can be waived.

The ease with which email communications can be distributed to others and forwarded to others without substantive thought before doing so make email communications particularly susceptible to having the attorney-client privilege waived for that communication and perhaps for other privileged communications as well. Once an attorney-client privilege is waived, it is up to the court to determine how broad that waiver is.

For documents and communications that are subject to the attorney-client privilege, it is recommended that it be boldly stated on the communication that it is subject to the attorney-client privilege and that it should not be distributed to others. A sample statement is set forth in the following paragraph.

**i. Sample introductory paragraph for internal communications that are subject to the attorney-client privilege**

A possible statement that can be placed at the top of written or electronic communications that is subject to the attorney-client privilege follows. Incorporating a statement of this nature can serve two purposes. It alerts the recipient of the need to not share the communication with persons outside of the attorney-client relationship. It also helps local counsel flag the communication as one that should not be produced pursuant to a written discovery request as it is subject to the attorney-client privilege.

**THIS COMMUNICATION IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE. DISTRIBUTION OF THIS COMMUNICATION TO OTHERS CAN WAIVE THE PRIVILEGE.**

## **6. Chapter or member disciplinary action**

### **a. Consideration on disciplinary action**

What action to take with respect to a particular matter, as any seasoned staff member knows, is a product of and dependant upon many factors, and they vary with each situation. The quality of the membership, the quality of the alumni support, the quality of the chapter leadership, the sincerity of those with whom the staff has met, and other factors can all enter into the equation.

While the author of this handbook believes that the decision of what is best, given all the factors known, should generally be made without regard to potential second guessing legal arguments that could be asserted later by a plaintiff's counsel, at times it may be appropriate to discuss with general counsel for the national organization what impact a prior incident and/or the current incident could have with respect to any potential future claims should there be any future incident within a reasonable time frame of the subject incident.

## **7. Documentation on follow-up**

### **a. Memorandums to file of decisions made**

If another incident happens at a chapter, plaintiff's counsel will use a prior incident, put it under a microscope, and, with 20/20 hindsight, give his/her best effort to second guess the decision made with respect to what was done or not done for prior incidents. It is sometimes advisable to create a memorandum to the file that sets forth the facts as they were considered that supported the decision made with respect to what disciplinary action was or was not taken with respect to certain incidents. That memorandum can refresh memories at a later date. It can also be used to refute hindsight observations and second-guessing.

For example, there could be an allegation of hazing which even includes specifics. An investigation could fail to confirm that hazing did occur, or, based on the investigation, the determination could be made that the allegations were not true. Another example would be the determination that hazing did occur, but it was a sincere belief, based on total facts, that the situation has been remedied and will not reoccur. In such situations, a memorandum to the file setting forth the conclusions, the reasons for the conclusions, and the action taken or not taken, and the reasons therefore

could rebut any second guessing that might be asserted by a plaintiff's counsel at a later date.

**b. Communications to chapters on actions taken**

At times a chapter is placed on some form of probationary status as a result of information provided to the organization or learned during the course of an investigation. If there are probationary terms that the chapter must meet, it can be helpful to have a record of what those terms are. It also can be helpful to have a record showing the belief of the organization that the terms of the probation have been met or the period of probation has passed, and that the probationary status for the chapter has been removed.

**i. Sample temporary suspension letter for chapter**

Some organizations have the ability under its governing documents to place a chapter or some of its activities on temporary suspension pending the outcome of an investigation.

See **Appendix D** for a sample letter to the chapter advising it of a temporary suspension.

**ii. Sample form letter on probationary or other course of action taken**

See **Appendix E** for a sample letter to the chapter setting forth probationary or other terms.

**iii. Sample form letter confirming satisfaction of any probationary terms**

See **Appendix F** for a sample letter to the chapter advising it that probationary or other terms have been satisfied and that probationary status has been removed.

**iv. Sample permanent suspension letter for chapter**

When the charter of a chapter is suspended for behavioral reasons, upset parents are a possibility. It is possible that rational thinking for some parents can be absent in such situations. When that parent is an attorney, the parent may threaten legal action against the organization, and regardless of whether any threatened action has any substantive legal merit.

A possible course of action where such a situation exists or could exist is to send a “show cause” letter of charter suspension. A “show cause” letter basically says, “here is what action is intended. It is based on these facts.”

A “show cause” letter invites a response to address the asserted facts. That is sometimes hard to do for someone challenging the action being taken when he or she has to address and respond to the facts.

If there are additional facts or the organization’s facts are wrong, the show cause letter can flush this out before a legal action is brought to challenge the action taken.

The “show cause” approach also has the potential to avoid an action by the parent attorney asking a court to issue a temporary injunction to maintain the status quo while an attorney parent or an attorney hired by the parent argues that action was taken on “wrong” facts and the status quo should be maintained while the “true” facts are uncovered and revealed (or so the argument goes). Courts do not generally like to get involved in matters that have administrative proceedings and those administrative proceedings have not been exhausted. The “show cause” approach reduces the threat of a request for injunctive relief and focuses the issue for the irritated attorney parent.

A sample show cause letter is attached as **Appendix G**.

## **8. Communications with the host institution**

Often the host institution will be advised of action taken by an organization with respect to a chapter or individuals in a chapter.

Whatever the host institution provides might be subsequently produced by the host institution pursuant to a subpoena or other request. For this reason, care should be taken that whatever is provided to a host institution cannot provide a basis for a claim by an individual that he or she has been libeled by the communication. This can also at times be a consideration for communications involving actions taken for a chapter and which communication does not implicitly or directly address any individual. The reason is that someone might assert that the communication libeled persons who were associated with the chapter. It is generally wise to consult the organization’s general counsel on any such communication.

## **9. Communications with Parents**

It can sometimes be beneficial in the long run to consider making contact with the parent(s) of a student who has been injured or affected by some event. Contacts, if made, should generally be considered within a relatively short time period after the event or incident in question.

**a. Considerations on whether and when to make contact**

There is no set rule of thumb with respect to whether contacting the parent or parents should be made. The possibility is something that should be discussed with general counsel for the national organization and with a professional claims person who assists the national organization. Contacting parents has the potential benefit of opening up lines of communication, showing concern, and allowing for a dialogue that can lead to a resolution of any potential issues without the parent having to retain the services of and pay an attorney to accomplish the same thing.

**i. Considerations on who should make contact**

If there is going to be contact with a parent or parents of a student impacted by an incident or event, it is generally best made by a high level executive staff person, or by a professional claims person who assists the national organization with matters and who has some expertise in working with situations of this nature. The process requires tact and judgment.

**ii. Involvement of general counsel for the national organization**

The general counsel for the national organization should generally be consulted with respect to whether contact should be made with a parent and considerations that might be applicable to any such contact. The author of this handbook believes that a contact with a parent should probably not be by an attorney assisting the organization.

**B. Pre-lawsuit claim asserted**

There are at least two ways that a claim can be asserted. One is through a lawsuit that is actually filed and served. Another is through a claim made either verbally or in writing before an actual lawsuit is filed. This section of the handbook addresses a pre-lawsuit claim. A pre-lawsuit claim can be asserted by an attorney on behalf of a client or it can also be asserted by a non-attorney such as by a parent or a student.

**1. Communications**

**a. Claim asserted by an attorney – Considerations and determination of who is involved in any responding communication**

If a claim is asserted by an attorney on behalf of a client, then it is strongly suggested that any response to the claim be made by an attorney for the Greek organization, and not by a staff member of the organization. What the staff member communicates to the attorney is potentially admissible and can potentially be used against the organization. It can also allow for a situation where a statement was alleged to be made or a position was alleged to be taken when in fact that did not occur. An attorney responding to an attorney helps prevent these potential situations from arising. It also prevents the attorney for a potentially adverse party from gaining information for the purpose of using the information to attack the organization. An attorney responding to an attorney also allows the organization's attorney to be involved in the response and to be aware of a matter that can develop into a lawsuit.

Once counsel for a client is aware that the other party or potential party is represented by counsel, counsel is then precluded by his or her governing Code of Ethics from communicating directly with the adverse party with respect to the claim. The attorney must then communicate with the counsel that represents the other party. This can be an additional benefit to the organization as it will or should preclude further contacts to the organization by the adverse attorney.

If a verbal communication to the offices of the national organization is by an attorney, a standard response should be to take the attorney's name and number and advise him or her that an attorney for the organization will be in contact with him or her.

**b. Claim asserted by a person who is not an attorney – Considerations and determination of who is involved in any responding communications**

If a pre-lawsuit claim is asserted by an individual who is not an attorney (for example, by a parent), then it may be best to have an appropriate staff member with sufficient experience and rank in the organization respond to the person making the claim as opposed to an attorney for the organization. If an attorney for the organization responds, then the lines of communication may not be as open. Additionally, a response by an attorney for the organization in such situations may result in the retention of an attorney for the person making the claim which would then require the person to pay the fees for the attorney. This could make the process more expensive and perhaps more difficult to resolve as a result of these increased costs.

Even where a claim is made by a person who is not an attorney, the claim should still be provided to general counsel for the organization and to the insurance broker or claims person for the national organization for appropriate analysis, suggestions and follow-up.

**c. Consideration on whether local counsel should be retained to assist in analysis and/or possible resolution**

At times local counsel (which means an attorney in the area where a potential lawsuit would be filed or who is located in the state the law of which would be applicable to a potential claim) can assist in the analysis of the claim. This attorney can also at times assist in a possible pre-litigation resolution of a claim.

An analysis of some claims depends on what the law of the jurisdiction is on a particular point. An example is social host liability (discussed above). Local counsel may also be able to provide insight with respect to local matters such as a claimant's position in the community, considerations of a local nature that could impact the case if one were filed, and other items of a local nature. The general counsel for the organization can help identify the situations in which local counsel may be able to assist for a pre-lawsuit claim or matter.

**2. Analysis of claim for potential resolution before suit is filed**

Some pre-lawsuit claims can be analyzed for potential liability and damages and other costs in advance of a lawsuit actually being filed to pursue the claim. This analysis can include requests for additional information and costs (such as medical bills) from the person making the claim. Questions can also be asked of the claimant as to what he or she believes the facts were, and why he or she believes the national organization or some other potential defendant should be responsible for the claim. If a claim has potential merit from a potential liability and damages standpoint, or from a potential cost standpoint, then it can be analyzed for possible resolution without forcing the claimant to pay the expenses of retaining an attorney to pursue the claim.

Of course, not every pre-lawsuit claim deserves to be resolved or settled. The organization should involve its general counsel and its claims person in the analysis of any pre-lawsuit claim and its merits or lack thereof and other factors that could impact the question of whether the claim deserves some pre-lawsuit resolution efforts.

**a. Potential insurance coverage issues as part of the analysis**

Insurance coverage issues can be an important part of a claim analysis. If there is no basis for liability against the national organization, and if the

facts indicate there would be no insurance coverage for other potential defendants, then this can impact the value of a claim. This is discussed more fully in Part II, section C (13) below. The broker for the organization can assist with analysis questions of this nature.

### **3. Avenues for potential resolution before suit is filed**

Avenues for potential resolution before a suit is filed include direct communications with and negotiations with the claimant. It is also possible in appropriate situations to suggest that the parties get together with a trained mediator in an attempt to resolve the issues before the parties go to the expense of hiring counsel or of filing suit should counsel already be retained by the claimant. A mediator is someone trained to mediate disputes for the purpose of reaching a settlement between the parties. An attorney agreed to by the parties to facilitate discussions is also a possibility as a mediator. Many mediators are licensed attorneys.

## **C. Lawsuit filed**

This portion of the handbook addresses what to do after a lawsuit has been filed.

### **1. Commencement of a lawsuit**

A lawsuit is commenced by the filing of a petition or complaint. The petition or complaint names the defendants, sets forth the legal theories asserted against each defendant, and sets forth general facts to support an alleged basis for the legal theories of liability asserted in the petition or complaint. A summons is issued by the court clerk for each named defendant.

### **2. Service of court papers and time deadline to respond to a lawsuit**

A defendant to a lawsuit does not have to respond to the lawsuit until that defendant has been “served” with the court papers. The court papers that are served on the defendant generally include the summons issued by the court clerk. It sets forth the time by which the defendant must file an answer or response. It includes a copy of the petition or complaint filed by or on behalf of the plaintiff.

Service of the summons and Complaint or Petition can be made by personal delivery on the defendant. This can be done by a process server who is in the business of serving court papers. It also can be served by certified mail, return receipt requested.

Only certain persons can legally be served with papers for a defendant. If the defendant is an individual, then it is generally that individual who must be served. If it is an entity, such as a corporation, then it is generally the listed service agent for the entity. The service agent is the person who is listed as a service agent with the applicable secretary of state. An officer of the corporation can also be served under the law of some states.

Once a lawsuit is “served” on a defendant, the defendant has a limited time to file an answer or some other pleading in response to the lawsuit. This is generally twenty (20) days after service. If no answer or other responsive pleading is filed within the time allowed, a default judgment can and probably will be issued against the defendant.

Service of the court papers might be made on a person who is not a proper person for service of the court papers. The proper person for service purposes is a legal question and should be determined by legal counsel. Consequently, you should not assume that service is not good. As soon as court papers are received, they should be provided to legal counsel for the national organization for follow-up. They also should be provided to the insurance broker for the national organization for insurance defense purposes.

Immediate follow-up should also occur to prevent a default judgment. A default judgment is one that is entered against a defendant if the defendant is properly served and files no answer within the allotted time frame. The allotted time frame is generally twenty (20) days after the date of service of the summons and complaint or petition.

### **3. Checklist of persons who might or should be notified or contacted about a lawsuit**

The general counsel for the organization should be provided with a copy of the suit papers. The insurance broker for the organization should also be notified and provided with a copy of the court papers so that any defense provided by insurance coverage can be set in motion. Insurance coverage can be waived if the insurance company is not timely notified.

### **4. Media relations checklist**

Depending upon the nature of the claims asserted in the lawsuit, media contacts and media publicity can occur by virtue of the filing of a lawsuit. It is not uncommon for media to check court filings for new matters or for existing matters that have some element to them that is believed to be newsworthy. At times, the news media may learn of a case prior to the

organization learning of the case as service of court papers can take some time after the filing of the case.

The media relations plan of the organization should be put into effect. This includes a designated spokesperson for the organization. There should also be a designated spokesperson for the chapter if a chapter is involved. A suggestion to the chapter spokesperson may simply be to refer all media inquiries to the national office's designated media spokesperson.

## **5. Selection of local counsel**

Who is selected as local counsel to defend the organization and any related defendants can be an important decision. The quality of attorneys differs just like the quality of members of any other profession. With smaller cases, the selection of counsel may not be as critical. For cases of a potentially significant nature, the selection of counsel becomes more important.

If counsel can be identified who has previously represented Greek organizations in legal matters, who understands the relationships, and who has performed well as counsel for the Greek organization, such counsel may be among the top prospects as local counsel. FIPG maintains a list of counsel who has represented Greek organizations in various areas of the country. The national organization's claim adjustor or insurance broker may also be able to suggest local counsel.

There is a national listing of attorneys. It is Martindale-Hubbell. This publication includes peer review ratings of attorneys. The highest rating is AV. The next rating is BV. The third rating is CV. The fourth rating is no rating attributed to the attorney. Young attorneys often have no rating. An AV rating is generally a good indication of an attorney's competence and an indication of the respect he or she has among attorneys in his or her legal community.

### **a. Considerations on what type of attorney should be retained (examples include aggressive, overly aggressive, polished)**

Different attorneys have different approaches. The type of attorney selected can be impacted by the type of counsel retained by the claimant/plaintiff, and whether there are potentially sensitive or political considerations of a local nature involved with the claim. As examples, an overly aggressive bulldog attorney can be a great fit to oppose a plaintiff's counsel of a similar nature. In other situations, an overly aggressive, bulldog attorney can, in some situations, "fan the fire" and make ultimate resolution more difficult. In some situations, and as an example, an attorney who has some connections with a university might assist if there

are matters involving the university that could best be handled on a polished, non-combative basis. The type of attorney who could best fit a particular representation need is something that can be discussed with the organization's general counsel and its insurance broker or claims adjustor.

**b. How to be involved in the selection process, and available resources for the selection of local counsel**

At times it can be very helpful for the organization to be involved in the selection process for local counsel. An example may be a community where the organization's insurance broker or claims adjustor has not had prior experience with an attorney. The general attorney for the organization can help identify possible attorneys through the use of Martindale-Hubbell and other sources. Alumni of the organization who are attorneys and who live in the community can sometimes assist in providing information on the potential attorneys identified through Martindale-Hubbell and other sources. The organization can be in a unique position to follow up with local alumni for feedback on possible attorney selections.

**6. Involvement with, education of and expectations of local counsel**

It is important that the organization be involved with local counsel in the case. Case management can help control costs in the case. It also can help ensure that the case is on the right track in terms of its defense and in terms of its ultimate resolution. Cases that have client involvement with the attorney defending the case are generally those cases that are most successful in the defense of the case. The organization's general counsel and its insurance broker or claims adjustor can assist with case management and analysis matters.

**a. Your involvement with local counsel**

In many situations, the local attorney is actually employed by and paid by the insurance company (subject to self-insured retentions). Given this arrangement, local counsel sometimes has the propensity to communicate primarily with the insurance company as opposed to the organization. However, the client is the defendant that the attorney is representing. For example, if the national organization is a defendant, then the national organization is the client. That attorney-client relationship and reality gives the client the right to have as much involvement as the client desires to have.

**b. Expectations of local counsel**

It is not asking too much to have expectations of local counsel. The best situations are where there is a good working relationship between local counsel and the client. Both should assist each other in the defense of the claims.

Some counsel are better than others in timely advising and involving the client with respect to answers that are due, review of those answers with the client in advance of an answer date to make sure the answers are accurate from a factual standpoint, timely providing written discovery requests (such as requests for documents and interrogatories) to the client, and working with the client on a timely basis with respect to filings, discovery responses and other matters that will become due for the client.

**Appendix H** is a sample letter to local counsel. It addresses these points.

**c. Educating local counsel**

Education of local counsel at the outset of a case is critical. Do not assume that local counsel is as familiar with the relationships and nuances in the relationships between a national organization and a chapter (as an example) as are you. Some of the education points are set forth in the following subparagraphs **a** through **d**.

**i. Relationships between national organization, a chapter, and other defendants**

It is helpful to have a discussion with local counsel at the outset of a case on the relationships between a chapter and a national organization, and other relationships that may be involved in a particular case. A FIPG statement that addresses the relationship between a chapter and a national organization is attached as **Appendix B**. It is a good document to reference when discussing the relationships that are involved with the case and particular claims of the case. A copy of this document can be scanned and emailed to local counsel in advance of a telephone conversation when these relationships are discussed with local counsel. It is critical to the proper framing of a defense of a case to understand the nature of the relationships from the outset of the case. If counsel does not really understand the relationships the foundation of a defense and how it is put together can be undermined.

**ii. Available law on theories of liability alleged**

As discussed above, there is a significant body of case law that addresses claims that have been asserted against Greek organizations. This is a body of case law that continues to develop and evolve. It is

not necessary for local counsel to “recreate the wheel” by doing extensive research to determine and uncover this body of case law. Counsel who specialize in the representation of Greek letter organizations can provide local counsel with case law that might be applicable in the jurisdiction where the case is pending as well as case law available in other jurisdictions that can assist in the defense of the claim.

### **iii. Documents to be provided to local counsel**

Documents can be extremely valuable to an attorney in the defense of a claim and in determining the parameters for the defense of a claim. The organization and its general counsel are in a position to know what potentially helpful documents there could be. These can include risk management policies, membership forms signed by the members that acknowledge the existence of certain policies, educational documents, and other documents. Available documents should be discussed with local counsel and a copy of those desired by local counsel should be provided to him or her at the outset of a case. Positions are forged and defenses are developed based on what is known and not known by your local counsel.

### **iv. Facts known to the organization**

The facts as known to the organization should be provided to the local counsel. If there is an investigation that was performed, then the process should be put in motion to allow local counsel to obtain a copy of those documents and file. At times, these will need to be provided by the claims person who assisted the organization with an investigation.

### **d. Sample letter to local counsel**

A sample letter to local counsel is attached as **Appendix H**. It is suggested that this letter or a similar letter be sent by the organization to local counsel fairly soon after local counsel has been selected and retained. It accomplishes a variety of purposes. Those purposes can be determined by examining the sample letter that is attached as **Appendix H**.

## **7. Local counsel educating you on local characteristics involved with the case**

Local counsel can and should educate you on local characteristics involved in the case. This is not automatic. Ask your local counsel questions for the following areas. He or she will be impressed that you know enough to ask

these questions. These questions will also help you understand the local system as it pertains to the case.

**a. Court system and case management system utilized by the court**

Different courts have different case management systems. Some courts issue a scheduling order that requires the parties to complete certain tasks by certain specified deadlines. Examples are discovery deadlines, deadlines for the listing of witnesses and exhibits, deadlines to amend pleadings and add parties, and other deadlines.

Some courts do not use scheduling orders and are less formal in their case management system.

Knowing the type of system employed by the involved court can help you know what is possible, what might or will occur from a case management perspective, and how fast the case might proceed to a trial. This knowledge assists the case analysis and case management processes.

**b. Judge assigned to the case**

The types of judges assigned to a case are as varied as personalities themselves. Getting a feel for the judge assigned to the case and his or her propensities and reputations can help with the case management and the case analysis.

As an example, some judges will grant summary judgments (which are judgments based upon undisputed facts and the law) if a summary judgment is appropriate. Some judges are extremely reluctant to grant a summary judgment even if the summary judgment is sound and should be granted.

With some judges it is hard to get an extension of a deadline if the other parties do not agree to the extension. Other judges are more lenient. The same holds true for trial settings. Some judges will not allow a trial setting to be extended even if all the parties agree. Others are more lenient.

Knowing the judge assigned to the case helps with case management and with case analysis.

**c. Likely jury**

Local counsel can help advise you with respect to what a jury will likely look like in the jurisdiction where the court is situated. As examples, some jurisdictions have reputations for being pro-plaintiff. Some

jurisdictions have reputations for being very conservative. Some jurisdictions will have jurors consisting of people who have college degrees. Some jurisdictions will have jurors consisting mostly of people who do not have college degrees. Knowing the type of jury that is likely to be seated in a case can help in the analysis of the case.

## **8. Discussion of other potential defendants**

A discussion with local counsel, the organization's general counsel, the organization's claims adjuster and the staff member assigned to manage the case should occur early in the case to address whether there are other potential defendants that should be brought into the case. For example, if alcohol is provided to a person by an under-age member, and that under-age member purchased that alcohol at a convenience store, should the convenience store be brought into the case as an additional defendant? Should other participants in the event be brought in as additional defendants?

Adding additional defendants can assist in placing responsibility where it should be placed. It also can assist in the settlement or potential settlement of a matter as it can add additional sources of revenue for settlement purposes. Your local counsel, your general counsel for the organization and the organization's claims adjuster can discuss possibilities as they relate to the facts to determine if additional defendants are appropriate and possible.

## **9. Answer and affirmative defenses**

Assuming a case is not dismissed on a procedural ground (such as a lack of jurisdiction by the court over the defendant), an answer is filed on behalf of the defendant. The answer responds to the claims, admitting those allegations that can be admitted and denying allegations that should be denied.

A denial of claims and allegations necessary to a cause of action constitute a defense to the respective cause of action asserted in the complaint or petition.

The answer is also the pleading in which affirmative defenses to the claims are asserted. An affirmative defense is a defense on which the asserting defendant generally has the burden of proof. (The plaintiff generally has the burden of proof on claims the plaintiff asserts). Examples of affirmative defenses include assumption of the risk (that the plaintiff assumed the risk of the injury that occurred to him or her), negligence or contributory negligence by the plaintiff contributing to the injury, and lack of standing to bring the claim, among others.

Local counsel for the organization should have recommendations on affirmative defenses, if any, that should be asserted in the answer. General counsel for the organization can also assist with this analysis.

#### **10. Discussion of getting the national organization and perhaps other defendants out of the case**

The national organization is frequently made a defendant in a case. However, a true basis for liability against the national organization is often lacking.

House corporations are also sometimes joined as defendants in a case. Similar to national organizations, the claims against house corporations often do not have substantive merit.

A discussion of the basis or lack of basis for a claim against respective defendants should be discussed early in the case with local counsel, the organization's general counsel, the organization's claims adjuster and the staff member assigned to manage the case. This will help focus a proper analysis of the case. It also will help develop a case plan to potentially get defendants that should not be part of the case out of or dismissed from the case.

##### **a. Potential benefits of getting the national organization and other defendants out of the case**

If a defendant is in a case, plaintiff's counsel sees that defendant as a potential pocket for settlement purposes. Additionally, as long as a defendant is in a case, there is a potential for a verdict against that defendant.

Having the national organization in the case also has a "jury appeal" factor for plaintiff's counsel. It can be portrayed as the big corporation (even though it is not a big corporation) and a party that should have been a responsible party.

If the national organization is dismissed from the case, or summary judgment is granted in favor of the national organization on the basis that there is no claim against it based on the facts presented, then the tactical appearance of the case can change. It can become a case between a student and another student or student organization as opposed to a case between a student and a national corporation. This can impact the value of the case from a settlement perspective. It can impact the attractiveness of the case from a jury trial perspective. If the remaining defendants have no insurance, or possibly have no insurance coverage, or they have questionable assets of any significance, then the value of the case from a settlement perspective to the plaintiff can also be significantly reduced.

## **11. Coming up with a case game plan with local counsel and involving end goals in developing the game plan for the case**

It is generally important and beneficial to come up with a game plan with local counsel.

At times, the total facts are not known in a case until discovery in the case has progressed. Discovery is sometimes a process by which the plaintiff and his or her counsel learn more about their case and defendants' counsel and the defendants learn more about their case as well. In some cases, the facts are pretty well known fairly soon after a case is filed or when a case is filed.

If there is no case plan, the case can meander along. Local counsel can end up doing things and spending money on things that are not necessary or not do things that that would be helpful. Having a case plan can help educate locate counsel. It also helps the client and the local counsel work together on the management and development of the case.

As examples, if a defendant (national organization) should be out of the case or has a potential for having a summary judgment entered in its favor on the claims asserted against it, then this should be discussed and a time line for preparing and filing a motion for summary judgment discussed.

The resolution of a case through a settlement conference or a mediation is another topic that can be discussed with local counsel. At what part of the case will a mediation or settlement conference be potentially productive? If the facts are relatively known to both sides at the commencement of a case or soon thereafter, is there any benefit in delaying a mediation or settlement conference?

Sometimes a time line established for a case has strategy considerations involved with it.

### **a. Consideration of dispositive motions (summary judgment motions) and when they should be filed**

Dispositive motions (also known as summary judgment motions) are motions that ask the court to rule that, based upon the law and the undisputed facts, judgment should be granted in a favor of a defendant on the claims asserted against it.

The timing of a summary judgment motion (if such is a legitimate possibility in the case) should be discussed with local counsel.

Some judges are predisposed to allowing a party to conduct adequate discovery before having to substantively respond to a summary judgment motion, or before the Court rules on a summary judgment motion. Other judges will entertain the motions early in a case if it appears clear from the motion that no discovery is needed for the matters addressed in the summary judgment motion. Local counsel can advise you on the propensities of the judge assigned to the case. Cases where pertinent facts need to be developed for a claim against a particular defendant are frequently cases where a summary judgment motion will be filed after a sufficient time and opportunity for discovery has passed.

## **12. Involvement of organization's general counsel with discovery that creates a lasting record**

There are at least two types of discovery that create long-lasting records. One is depositions. This is testimony taken under oath before a court reporter. The other is interrogatory answers. These are answers to written questions signed under oath.

When depositions are taken of the executive staff of a national organization, or when interrogatory answers are given by or on behalf of a national organization, these documents can appear in other later cases. Plaintiffs counsel do contact other plaintiff counsel who have filed similar cases in other jurisdictions to obtain depositions and interrogatory answers previously provided by or given by a national organization.

Also, notwithstanding education efforts, local counsel may at times miss a point or nuance concerning the relationships involved with a Greek organization. As a result, answers to questions can be given that are inaccurate. (Inaccurate answers can be corrected at a deposition if they are noted during the course of a deposition). These can impact later cases. They also can impact the pending case.

For these reasons, it is suggested that the general counsel for the national organization be involved in reviewing interrogatory answers before they are finalized and signed for a national organization. It is also suggested that consideration be given to having general counsel for the national organization present during the preparation for and at the deposition of any executive staff member who is deposed in the case.

## **13. Potential insurance coverage issues for defendants potentially insured under the organization's policy**

A particular claim against a particular defendant may not be covered by an insurance policy. An example would be an intentional act. Most policies do not include coverage for intentional acts.

If there is a coverage issue, the insurance company can deny coverage for the asserted claim. Coverage for a claim also includes a duty by the insurance company to defend the claim. If an insurance company denies coverage for a claim, it generally will include a denial of the defense of the claim.

Instead of an outright denial of the claim, insurance companies sometimes issue a reservation of rights letter. In general, the letter provides that the insurance policy may not provide coverage for a claim asserted and that any defense of the claim provided by the insurance company is without waiver of its rights to deny coverage for the claim asserted.

**a. Potential benefits if there are coverage issues**

If a potential defendant does not have coverage for a claim or may not have coverage for a claim, this can in some situations assist in the resolution of the case. As set forth Part I, section A of this handbook titled “The Anatomy of a Successful Tort Claim,” for a claim to generally be worth pursuing there must be an ability to collect any resulting judgment. An example of how an insurance coverage issue can be a potential advantage is the following scenario. Assume there is a claim against a national organization and a claim against chapter, the national organization has no liability, and the national organization has a potential for the entry of a summary judgment in its favor on the claim asserted against it. Assume the chapter may have no insurance. This could impact the value of the claim in the eyes of the claimant and the claimant’s counsel. This is because, if the national organization gets out of the case on motion, and the chapter has no insurance coverage, a question arises on the extent to which any judgment against the chapter could be collected.

Any potential insurance coverage issues are something that should be discussed with the organization’s claims adjustor or insurance broker and the organization’s general counsel in the early phases of the litigation.

**14. Possible conflicts that can arise with the same attorney representing more than one defendant**

Generally an attorney cannot represent different parties in a lawsuit if the representation of the interests of one of the defendants could be to the detriment of the representation of the interests of another defendant. Such situations are called conflicts of interest.

If a conflict of interest arises, local counsel acting as defense counsel may advise that he or she cannot represent or does not feel that he can represent both defendants or one of several defendants. In such situations, it may be necessary for separate counsel to be retained to represent the other defendant or defendants.

At times it is possible for the same attorney to proceed with the representation of two or more defendants when a potential conflict of interest situation exists if the parties are adequately advised, agree that the attorney can presently represent both parties, and agree on what will happen if an actual conflict is subsequently deemed to exist that cannot be rectified. Any such understandings and agreements should be placed in writing by the attorney and sent to the respective involved defendants. It is not always possible to resolve potential conflicts of interest in this way. Attorneys have ethical standards they are required to follow. Conflicts of interest and potential conflicts of interest can therefore at times necessitate separate counsel for various parties to a case.

#### **15. Analysis of the case for whether there is a potential benefit in having an expert witness**

In general, an expert witness is someone who has a specialized knowledge not generally known to a jury or other finder of fact (such as a judge in a case tried to a judge) and which specialized knowledge can assist the fact finder in determining an issue involved in the case.

Expert witnesses are sometimes needed in a case to properly present the case. Accident reconstruction experts and medical personnel are examples.

The local counsel for the organization will generally be familiar with the expert witness needs for a case. An exception is when there is a possible need for an expert in some facet of the operations of or the organizational relationships involved with Greek letter organizations. This is more fully discussed in the following subsection.

##### **a. Assisting local counsel in identifying an appropriate Greek letter organization expert witness if one could be beneficial to the defense of the case**

In some cases, it could be helpful to the defense of the case to identify and use an expert witness with respect to the relationships involved with Greek letter organizations or operational standards. An example could be a claim that a national organization should have closed a chapter because something occurred in the past. A person with experience in this area could potentially qualify as an expert witness to review the records and

other information in the case and, based upon that review, opine that the decisions made were compatible with industry practice and were supportable by the record.

Identifying expert witnesses with some expertise in the area of Greek letter organizations is a potential that local counsel may not be aware exists. It is something that can be a part of discussions between the organization, local counsel and the organization's general counsel where appropriate. The organization's general counsel can also help local counsel identify such experts when the need exists.

## **16. Frivolous Claims**

People hear stories about frivolous claims. True frivolous claims are probably, from a legal perspective, thought by the public to be more wide spread than they actually are. A plaintiff's attorney who takes a claim on a contingency fee basis (which means he or she gets paid a percentage of any recovery) looks at a case to see if it is worth his or her time. The summary judgment process also provides some protection against frivolous claims.

However, there are occasions when a frivolous claim is filed. Additionally, a claim has the potential to become "frivolous" after its filing. An example would be a claim that the attorney believed had merit when he or she filed it, and which the attorney subsequently finds does not have merit because some essential fact element is not present for the claim.

In Federal court, there is a mechanism set forth under Rule 11 of the Federal Rules of Civil Procedure to address frivolous claims. A copy of this Rule is set forth in **Appendix I**. Pursuing a frivolous claim can result in sanctions including an award of attorney's fees against the party or attorney who pursued a frivolous claim. Most states have rules similar to the Federal Rules of Civil Procedure Rule 11.

### **a. Possibilities for addressing frivolous claims and examples of such**

If a frivolous claim has been asserted, your local counsel can notify opposing counsel of his or her belief that the claim violates Rule 11. Alleged Rule 11 violations can also be pursued by motion.

There is case authority for the position that a Rule 11 violation can occur subsequent to the filing of a case and even if the initial filing of the claim was not a Rule 11 violation. *Warner v. Hillcrest Medical Center*, 1995 OK CIV APP 123, ¶ 24, 914 P.2d 1060, *cert denied*, 519 U.S. 861 (1996) (maintaining a claim in a case after it is apparent that there is no basis for the claim is a violation of Rule 11).

## **17. Resolution potentials and analysis of the case for this possibility**

Most cases do not end up going to trial. Most cases are resolved prior to trial by a settlement, by the granting of a dispositive motion, or by a dismissal of the claim by the plaintiff.

As discussed above, discovery is a process by which both parties learn about their case and their opponent's case. In some cases, the facts are pretty well known when the case is filed or shortly after the case is filed. In such situations, an early effort to determine if the case can be resolved by settlement can be a cost effective process. In other cases, either plaintiff's counsel or defendant's counsel, or both, and their clients may be less willing to settle a case because they believe their particular case is stronger than what the other side believes the case is, or that things still need to be learned before a proper evaluation of the value of the case can be determined.

There are various mechanisms that can be used to resolve or potentially resolve a case.

### **a. Possible resolution methods that are available**

One possibility is simply to have offers go back and forth between the attorneys for the parties. This method can be particularly useful in a case where the value is fairly minimal.

On occasions, the clients can communicate between themselves with respect to the potential resolution of a case. It is suggested that, if this avenue is undertaken, this be done with the knowledge of your counsel.

Mediations are another resolution avenue. A mediation is conducted by a trained mediator. The trained mediator is often an attorney. A mediator generally develops a reputation for how good he or she is as a mediator. The quality of the mediator can be important in terms of whether or not a mediation is successful or useful.

A mediation can take a half day or an entire day. Most do not last longer than a business day. The parties and their counsel are present. The mediator generally places the parties in separate conference rooms after an initial joint meeting. The mediator then goes back and forth with information and offers and counteroffers.

Some courts schedule settlement conferences. A settlement conference scheduled by a court often has a judge or magistrate assigned as the settlement person. That person often serves in a capacity similar to that of a mediator.

Your local counsel can assist in suggesting appropriate mediators. The potential for a mediation or settlement discussions and the timing of these resolution avenues is something that can be discussed with local counsel and the organization's general counsel at the beginning of a case, and as the case progresses.

**b. Global versus non-global settlements and considerations involving these possibilities**

If there are numerous defendants in a case, it is possible at times to have a settlement with one or less than all of the defendants. It is not necessary to the settlement of a claim that all other parties to the case also settle their claims or the claims against them. However, care should be taken to make sure that, if a settlement is reached for the organization but other claims will remain pending or not be resolved, such will not have the potential to bring the organization back into the case or subject the organization to claims by others. Local counsel and the organization's general counsel should be consulted with respect to any settlements that are not global settlements (i.e. deposing of all parties and potential claimants).

**18. Court record**

The "court record" consists of what has been filed in the case with the clerk of the court. It also can include transcripts of proceedings before the court that were taken before a court reporter. For example, if there are oral arguments presented to a judge and those oral arguments are not "on the record" before a court reporter, then those arguments are not part of the court record. A trial of a case is generally on the record (i.e. in front of a court reporter).

**a. Summary Judgment motions and record on appeal**

The record on a summary judgment motion (including the response to the summary judgment motion) generally consists solely of the motion, the exhibits attached to that motion, the response brief, the exhibits attached to the response brief, and any reply briefs.

Some courts do not entertain or accept oral arguments on motions for summary judgment. They base the ruling solely on what is filed of record with respect to the motion for summary judgment.

If a summary judgment is granted, and that summary judgment is appealed to the next highest court (generally a court of appeals or the Supreme Court of the state, or a Circuit Court of Appeals for Federal courts), the only thing that the appellate court will generally see for the appeal will be

the record on appeal. The record on appeal consists of those portions of the trial court record that were designated by the parties to be part of the record on appeal. Oral arguments can be requested on appeal. However, oral arguments on an appeal are generally exceptions as opposed to a general occurrence.

## **19. Reported case law**

Trial courts issue decisions on motions. In state courts those decisions are generally not “published” decisions. In federal court, some district court decisions are published. A published decision is one that can be found by legal research, generally appears in some published source, and can be cited in a brief as precedent for a position being asserted.

Appellate court decisions are at time reported decisions and at times are not.

Most reported decisions are a result of a published opinion by an appellate court, a state supreme court, a Federal Court of Appeals, or the United States Supreme Court.

### **a. Importance of involvement by the organization’s general counsel in matter in which a reported decision might be issued**

Reported decisions can establish law in a particular state or jurisdiction. They also have the potential to set precedent to persuade a trial court judge that he or she should rule a certain way.

It is suggested the organization have its general counsel involved in at least a “behind the scene” fashion in any case that has any significant potential to result in a reported decision. The interests of the organization may be sufficiently represented by the organization’s local counsel. However, when the potential for a reported decision exists, the involvement of the organization’s general counsel can help insure that the trial court record that will be created is sufficient, that applicable case authorities applicable to Greek letter organizations have been adequately considered, that position statements made for any court record (such as a motion and brief) are accurate, and that other any judicial policy considerations that might be applied with respect to a legal position or question have been adequately addressed.

Note: Summary judgment motions filed by a national organization are examples of matters that have the potential to result in reported case law. If the motion is granted, and the summary judgment for the national organization is appealed, the potential exists for a published opinion by the reviewing appellate court.

## **20. Appeals and importance of court record**

While attorneys appear before a trial court and often respond to questions by a trial court judge with respect to pending motions, a face-to-face appearance by counsel in an appellate court is not an ordinary occurrence. Most frequently, the entire appeal is presented based and decided on briefs. The appellate briefs must be limited to facts or supporting materials or allegations that are of record in the trial court and which record has been submitted to the appellate court.

Due to an appeal being limited to the written record (which record can include transcribed testimony and arguments taken or made before a court reporter), it is important for the record to reflect what counsel for the organization believes it needs to reflect if the matter ends up on appeal. The organization's general counsel can assist local counsel in developing what the record should include should there ever be an appeal in the case.

### **a. Potential use of amicus curiae (friend of the court) briefs**

If a matter being submitted to an appellate court has potential significance beyond the confines of the pending case, then a friend of the court brief (called an amicus curiae brief) is a possibility.

Amicus curiae briefs, when filed, are often filed by or on behalf of organizations or associations that represent industry interests or industry members.

The North-American Interfraternity Conference and the National Panhellenic Conference are example organizations that might file an amicus curiae brief in a particular matter. FIPG, Inc. is another example organization. An amicus curiae brief generally tries to impress upon the appellate court how the issue in front of the court is important from an industry perspective and what the appellate court should consider in deciding the issue.

If a matter is of first impression in the particular jurisdiction (i.e. there is no reported case on the point of law that is being addressed in the state or particular jurisdiction) and the decision by the appellate court could be important to the industry, then an amicus curiae brief and the solicitation of it from an appropriate industry wide organization should be considered.

**Disclaimer:** *These materials provide general information for educational purposes. They are not intended to provide legal advice or be a definitive statement of the law. These materials discuss only some aspects of the subject topics. They do not attempt a complete legal analysis of the topics or how they might apply to any particular set of facts. Each organization, person and event has unique situations and facts that can affect what is best for the organization or him or he or it. Legal advice from a qualified attorney should be obtained prior to taking any action based in whole or in part on these materials. Neither Arthur F. Hoge III nor the firm of Mee, Mee & Hoge, PLLP assumes any liability whatsoever in connection with these materials or the statements made at any seminar at which they are presented.*

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## APPENDIX “A”

### Glossary of Terms

**Answer:** A defendant’s first pleading in a lawsuit that responds to the Plaintiff’s claim, and which claims are set forth in a Complaint or Petition, usually by denying the plaintiff’s allegations.

**Breach of contract:** Violation of a contractual obligation by failing to perform one’s own promise or by rejecting it.

**Breach in tort:** Violation of a duty that the law imposes on persons who stand in a particular relation to one another, other than a contract, by which a remedy may be obtained, usually in the form of damages.

**Civil action/Civil claim:** An action brought to enforce, redress, or protect a private or civil right.

**Claimant:** One who asserts a right or demand (also see plaintiff).

**Client:** The person or entity who or that retains an attorney for legal advice or assistance.

**Complaint:** The initial pleading that starts a civil action and states the basis of the court’s jurisdiction, the basis of the plaintiff’s claim, and the demand for relief, requested of or from the defendant. In some jurisdictions it may be referred to as a Petition.

**Counsel:** An attorney who represents a person or entity is sometimes referred to as counsel, as, for example, counsel for defendant.

**Defendant:** The entity or person against whom the plaintiff files his or her complaint in a civil action.

**Deposition:** Verbal questions and verbal answers to same given under oath, under penalties for perjury, and before a court reporter. These questions and answers are generally subsequently transcribed.

**Discovery:** The act or process of finding or learning something that was previously unknown. Compulsory disclosure, at a party’s request, of information that relates to the litigation. The process by which information that is relevant to a claim or that is reasonably calculated to lead to the discovery of admissible evidence is exchanged between the parties to the claim.

**Dispositive motion:** Also called a motion for summary judgment. It is a written request (motion) filed with the court seeking a final determination about a deciding fact or factor in a claim.

**Duty of care:** A legal relationship arising from a standard of care owed by one individual to another, the violation of which subjects the actor to liability for any damages caused as a result of the violation of that duty.

**General counsel for an organization:** A lawyer or law firm that represents the organization on an ongoing basis in all or many of the client's legal matters, and who sometimes refers specific matters to other lawyers.

**Interrogatories:** A written series of questions submitted to an opposing party in a lawsuit as a part of discovery, requesting the other party to provide specific answers to those questions in order to obtain information.

**Lawsuit:** Any proceeding by a party or parties against another in a court of law.

**Liability theories:** The legal premise or set of legal principles upon which the claim or legal position is based.

**Local counsel:** An attorney retained to represent a client for a specific matter and generally a matter that is pending or that concerns matters in the geographical area where the attorney practices law.

**Martindale-Hubbell Law Directory:** A series of books published annually, containing a roster and ratings of lawyers and law firms in most cities of the United States, corporate legal departments, government lawyers, foreign lawyers, and lawyer-support providers, as well as a digest of the laws of the states, the District of Columbia, and territories of the United States, and a digest of all the laws of many foreign jurisdictions, including Canada and its Provinces.

**Mediation:** A form of negotiation involving a third party (generally a person trained in mediating disputes) who assists the disputing parties in an attempt to reach a mutually agreeable solution before the dispute is decided by a court or a jury.

**Party:** A person who takes part in a transaction, for example, a party to a contract or a defendant/plaintiff in a legal claim.

**Petition:** See Complaint.

**Plaintiff:** The party who files the initial complaint with a court seeking relief for injuries/damages allegedly caused by the defendant or who seeks some other type of relief through the court system.

**Plaintiff's counsel:** One or more lawyers who represent a plaintiff (the individual seeking recovery) in a specific claim.

**Pleading:** A formal document in which a party to a legal proceeding sets forth or responds to allegations and claims, and which includes denials and defenses to the claims. Any formal document filed with the court during the course of a claim.

**Retained:** An attorney is retained and once retained represents the person or entity who or that retained the attorney. Generally, an attorney is not "retained" until the attorney agrees to represent the person or entity and fee arrangements have been agreed to and, if applicable, satisfied.

**Request for Admissions:** In pretrial discovery, a party's written factual statement served on another party requesting the other party to admit or deny the content of statements set forth in the requests for admission.

**Request for Production:** In pretrial discovery, a party's written request that another party provide specific documents or other tangible things for inspection and copying.

**Service/Served:** The formal delivery of a legal notice, such as a pleading. To present with notice or process as required by law. To make a legal delivery.

**Subpoena:** An order issued by the court, or an officer of the court, requiring a person to produce specified documents or records or appear as a witness at a deposition or in court at the time of trial.

**Summary Judgment:** A judgment granted by the court on a claim or defense about which there is no genuine issue of material fact and upon which the party seeking the motion is entitled to prevail as a matter of law, and without the necessity for a trial on the matter addressed by the summary judgment.

**Written Discovery Requests:** Discovery requests that are submitted in written form such as requests for documents, interrogatories, and requests for admissions.

## APPENDIX “B”

### Federal Rule of Civil Procedure 26(b)(3)

**(3) Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

## APPENDIX “C”

### DESCRIPTION OF RELATIONSHIP BETWEEN INTERNATIONAL ORGANIZATION AND COLLEGIATE CHAPTERS/AFFILIATES

\* Fraternity, Inc. is a non-profit corporation. It is incorporated under the laws of the State of \*. Its offices are located in [City, State].<sup>1</sup>

\* as a non-profit corporation for the purposes of fostering fraternity, and as an educational and service resource for collegiate chapters of \*, and for persons associated with those chapters. \* Fraternity, Inc. has a limited staff. It has limited funding sources which necessarily limit the size of its staff.

\* Fraternity, Inc. maintains and processes membership and other records for collegiate chapters associated with it. These chapters are located in Canada and throughout the United States. These chapters have in excess of \* undergraduate members.

\* Fraternity, Inc. also serves as an educational resource and service organization for collegiate [and alumni/alumnae] chapters, members associated with those chapters, and for local alumni who volunteer their time on an independent basis to assist a collegiate chapter and its associated collegiate members. \* Fraternity, Inc. provides education through conferences, written materials, and periodic consultant visits to collegiate chapters. Consultant visits result in advisory recommendations for chapter operations. \* Fraternity, Inc. strives through these educational efforts to enhance life skills, leadership skills and ethical traits for those who take advantage of these

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<sup>1</sup> If the national organization is not an incorporated entity, but a national, unincorporated association, “association” can be substituted in place of “corporation” and the “Inc.” designations deleted.

educational opportunities, and to assist through education and consultant recommendations the success of chapters associated with it.

No chapter of \* and no member of any chapter of \* is an agent of \* Fraternity, Inc. No chapter and no member of any chapter has been appointed as an agent of \* Fraternity, Inc. \* Fraternity, Inc. is not involved in the day-to-day activities of a chapter. \* Fraternity, Inc. does not and cannot control or supervise the day-to-day operations or activities of a chapter.

Each collegiate chapter of \* Fraternity, Inc. is a self-governing, financially self-sufficient association comprised of students of the institution at which they are enrolled. [Each alumni chapter of \* Fraternity, Inc. is a self-governing, financially self-sufficient association comprised of alumni members residing in a specific geographic location.] Under the [Constitution and General Statutes of \* Fraternity, Inc. – insert appropriate title of governing documents], each collegiate chapter of \* Fraternity, Inc. selects and initiates its own members, elects its own officers, establishes its own rules, operates and determines its methods of operation, and governs its own affairs, subject only to those rules and operations being in harmony with the policies, [Constitution and General Statutes of \* Fraternity, Inc. – insert appropriate title of governing documents] of \* Fraternity, Inc. The autonomy of a collegiate chapter in organizing, determining and conducting its own operations through a democracy is part of an educational process which association with the chapter adds to collegiate life and to the development and refining of life skills.

If a collegiate chapter's operations are not in harmony with the policies, [Constitution and General Statutes of \* Fraternity, Inc. – insert appropriate title of

governing documents], \* Fraternity, Inc. has the right after the fact to determine whether that chapter will continue to be recognized by \* Fraternity, Inc. as a chapter associated with it. In some situations, after an action by a chapter has occurred that is not in harmony with the policies, [Constitution and General Statutes of \* Fraternity, Inc. – insert appropriate title of governing documents], a probationary status may be implemented for the chapter by \* Fraternity, Inc. In probationary situations, the chapter continues to be a self-governing, financially self-sufficient association of collegiate students. If a chapter ceases to be recognized by \* Fraternity as a chapter associated with it, but that group of collegiate students nonetheless continues its operations, they do so without any affiliation with \* Fraternity.

\* Fraternity, Inc. does not have the right to suspend or affect the membership status of a collegiate student associated with a chapter other than in those situations and in accordance with the procedures specifically set forth in the [Constitution and General Statutes of] \* Fraternity, Inc.

Note: This is only a suggested document in response to a survey undertaken by the FIPG Legal Affairs Committee to determine issues and needs of member organizations. Your organization may use it, amend it, or disregard it, though the committee does recommend that each inter/national Greek organization have documentation that sets out the relationship between the inter/national, local chapters and individual members. It must be emphasized that these are merely suggestions and do not constitute legal advice. Any use of this document should be undertaken only after consultation with legal counsel. It is possible that a recommended provision may not be effective in a given state.

Revised May 2005

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**APPENDIX “D”**

Chapter President  
Address

**Re: Incident occurring on or about (date)**

Dear \_\_\_\_\_:

Please be advised that [pursuant to (applicable code provision)] the charter of the \* Chapter has been temporarily suspended pending an investigation of possible violation or violations of [state applicable policy or code provision] of [name of organization].

The terms of the temporary suspension are as follows: [insert terms].

The cooperation of the Chapter is an essential ingredient to these issues being resolved. Should you have any questions or concerns regarding these matters in the interim, please do not hesitate to contact me.

Fraternally,

Name  
Title

c: Chapter Advisor  
House Corporation President

**APPENDIX “E”**

(Date)

Chapter President  
Address

**Re. Incident occurring on or about (date)**

Dear \_\_\_\_\_:

As you are aware, the [name of the governing body] temporarily suspended the charter of \* Chapter on (date) pending an investigation of possible violation or violations of the [state applicable policy or code provisions] of [name of organization]

Having further reviewed the events in question, a plan of action is appropriate to support the growth and development of \* Chapter. This plan of action includes the following:

[This portion of the letter includes items that will be required by the chapter and conditions for the chapter that do not necessarily require some further report from or program to be completed by the chapter.]

With respect to the Chapter’s acceptance of and its compliance with these terms, the Chapter should accomplish the following:

[This portion of the letter includes items or programs that will require follow-up by the chapter. For example, “The Chapter is to draft and ratify a Chapter mission statement that reflects \*, this to be accomplished and submitted to the General Headquarters by \*.” “The Chapter is to sponsor and hold an alcohol education program for \*, and by \*.”

Please signify the Chapter’s acknowledgment of and acceptance of these terms by signing in the place below and returning a signed copy to me at the above address.

Fraternally,

Name  
Title

c: Chapter Advisor  
House Corporation President

Above terms and conditions acknowledged and agreed to by the Chapter this \_\_\_\_ day of \_\_\_\_\_, 200\_, on behalf of \* Chapter.

---

Chapter President

**APPENDIX “F”**

(Date)

Chapter President  
Address

**Re. Terms and Conditions Set Forth in Letter Dated \***

Dear \_\_\_\_\_:

The documentation by \* Chapter with respect to its satisfaction and completion of the terms set forth in our letter dated \* has been received. We thank the \* Chapter for its attention to these matters.

[If the Chapter was placed on probation, add the following: Completion of these terms has removed the probationary status of \* Chapter.]

As always, the General Fraternity stands ready to assist \* Chapter. Please do not hesitate to contact us when we can do so.

Fraternally,

Name  
Title

c: Chapter Advisor  
House Corporation President

**APPENDIX “G”**

(Date)

Chapter President  
Address

**Re. Incident occurring on or about (date)**

Dear \_\_\_\_\_:

A preliminary investigation regarding the incident that occurred on or about (date) has been conducted. As a result of the preliminary investigation, and pursuant to (state applicable fraternity code or policy sections), effective (state effective date), (state action that is being taken such as charter suspension or revocation). This action is based on the following: (state applicable facts).

Please be advised that this action is considered temporary until (date). During this period, (state what the chapter is or is not allowed to do). Please be also advised that the chapter and anyone affected by this action is invited to show cause why, after (date), this action should not continue. Any reasons why this action should not continue after (date) should be received in writing by the General Headquarters by (date).

Please be advised that, if no such written positions are received by (date), the temporary status of this action will be removed and, effective (date), (state action that will then be in effect). If any such written positions are received, [name of organization] will consider them and then notify (chapter name) of the decision and further action, if any.

An extra copy of this letter is enclosed. Please post the copy on the chapter bulletin board.

Sincerely,

Name  
Title

c. Chapter Advisor  
House Corporation President

## APPENDIX “H”

(Date)

Name of Attorney  
Address

**RE: (Case Name and Case No.) (Example: Smith v. XYZ Fraternity, Inc.,  
Case No. CJ-2006-2199, District Court of \* County, State of \*)**

Dear (name of attorney):

It is my understanding that you have been retained to represent (organization name and include “Inc.” in the organization’s name if appropriate) in the referenced lawsuit. I will be the primary contact person at (name of organization) to assist you and to work with you on this matter.

We do believe that it will help us and that it will be beneficial to the defense of this case for you, me and the general counsel for (name of organization), [name of general counsel], to discuss the organizational relationships that may be involved in this case, case law that may be available to assist you in the defense of this case, an analysis of the claims asserted, possible defenses to the claims asserted, and any files and documents we might have or which can be made available to you that could be pertinent to the claims and the defense of the claims. [If there was an investigation, add: There was an investigation concerning the matter that is the subject of the Complaint.] Please contact me so that we can schedule a time when you, I and [name of general counsel] can discuss these matters.

There is a body of available case law regarding claims against Greek letter organizations. There is also other case law that is or can be pertinent to the claims asserted. [Name of general counsel] can provide you with this case law so that research costs otherwise needed to locate this case law can be avoided.

When we speak, we can discuss strategy in connection with defending this case and in bringing it to a satisfactory resolution. Any resolution suggestions you might have as the case develops, including the timing of resolution possibilities, would be appreciated.

When we speak we also can discuss the possibility of any motions for total or partial summary judgment that might be appropriate.

Please keep us timely advised of all developments in this case. Included in this request are the following specific requests.

1. Please allow us to review any draft answer prepared for (name of organization) in advance of the answer date so that we can help ensure the accuracy of any admissions contained in the answer.

2. Please send us a copy of all status reports.

3. Please forward to us upon receipt all written discovery requests which are for or directed to (name of organization). Please provide us with draft responses to written discovery requests well in advance of the due dates of those responses, and allow us the opportunity to review and work with you on the responses to written discovery requests. [Name of general counsel] will want to review any answers to interrogatories for (name of organization) before they are finalized and served on behalf of (name of organization).

4. If you determine that an expert witness might be helpful in the defense of this case, we would be happy to discuss possibilities with you.

With respect to the organizational relationships that may be involved in this case, please find enclosed a copy of a FIPG paper that addresses the relationships that exist between a national fraternal organization and a chapter and its collegiate members. We can use it as a discussion point when we speak. (FIPG stands for Fraternity Information and Programming Group. Its membership consists of numerous national Greek letter organizations.)

We look forward to working with you on this matter.

Very truly yours,

Name  
Title

Enclosure

c. \*, Esq. [name of organization's general counsel]

## APPENDIX “I”

### **Federal Rule of Civil Procedure 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

**(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

#### **(1) How Initiated.**

**(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within

21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

**(B) On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

**(2) Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

**(A)** Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

**(B)** Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

**(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

**(d) Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.