ANTIDISCRIMINATION LAWS AND PENNSYLVANIA FREEMASONRY

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Background

According to Albert Mackey, “[i]t is an unquestionable Landmark of the [Masonic] Order, and the very first pre-requisite to initiation, that the candidate shall be ‘a man.’ This of course prohibits the initiation of a woman.” Although the Grand Lodge of Pennsylvania (“Grand Lodge”) does not record or recognize any list of Landmarks, but rather refers questions touching upon them to the Committee on Landmarks, we all know, at least, that the Grand Lodge requires that a candidate for a lodge working under its jurisdiction be a male.

Judicial decisions requiring the integration of other exclusively male memberships have made the headlines, leaving many Pennsylvania Masons asking whether the Grand Lodge will be forced to integrate its membership. This paper summarizes the relevant federal and Pennsylvania civil rights laws insofar as they affect the maintenance of exclusively male membership organizations for fraternal societies in Pennsylvania.

Freedom of Association

No federal or Pennsylvania law explicitly allows or prohibits the operation of an exclusively male membership organization as a general proposition. Instead, exclusively male membership organizations exist at the intersection of two major legal principles. The first of these principles is the freedom of association. The U.S. Constitution guarantees freedom of association to every citizen, and the freedom to associate has generally been said to include or imply a freedom not to associate. Accordingly, organizations are generally said to be free to select, or refuse to select, any individuals or class of individuals as members.

This freedom is not absolute, however. It is bounded by the second principle, the government’s power to intervene where freedom of association is being exercised in such a way as to work a significant harm. Since American law universally (although not uniformly) recognizes discrimination against women as a significant harm justifying governmental intervention, this limiting principle is always at least potentially in play for exclusively male organizations. Most states, including Pennsylvania, have tied their intervention to the concept of public accommodation. They have said (in effect) that they will not generally interfere with an organization’s right to exclude women from membership, unless the rules of membership have the effect of denying women access to public accommodations. In Pennsylvania, this principle is codified in Section 955 of the Pennsylvania Human Relations Act.

That same section also includes a special exception for membership-based activities of fraternal associations. As a result, the bottom-line rule for Pennsylvania fraternal associations is that they are free to limit membership to men, and to conduct activities open only to members;

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1 Masonic Jurisprudence, Albert G. Mackey, M.D., Clark & Maynard Publishers, 1870 (p. 96).
2 Ancient Landmarks of Freemasonry, The Masonic Service Association, 1932 (p. 35).
3 The Ahiman Rezon, Article 13, Section 13.09.
however, to the extent they offer activities or facilities to the general public, they must do so on a non-discriminatory basis.

U.S. Supreme Court


The dispute underlying this case began in the early 1970s, when the Minneapolis and St. Paul chapters of the Jaycees began admitting women as full members in contravention of the Jaycees’ national bylaws. When the national organization moved to revoke the local charters, the chapters filed charges of discrimination under the Minnesota Human Rights Act. That Act, which is similar to many other state human rights acts around the country, provides that it is unlawful to “deny any person the full and equal enjoyment of the goods, services, facilities, privileges advantages and accommodations of a place of public accommodation because of… sex.” After losing before the Minnesota Supreme Court on all counts, including a claim that the organization did not constitute a “place of public accommodation” under the relevant state statute, the national organization went to federal court to press claims that the Minnesota Human Rights Act infringed on freedoms of association conferred by the U.S. Constitution.

The Supreme Court began by describing two distinct forms of constitutionally guaranteed freedom of association. “Intrinsic” or “intimate” freedom of association is the right “to enter into and maintain certain intimate human relationships.” “Instrumental” or “expressive” freedom of association is the right “to associate for the purpose of engaging in… speech, assembly, petition for the redress of grievances, and the exercise of religion.” The Court then considered separately whether the Minnesota statute infringed on either of these freedoms.

In regard to intimate association, the court reasoned that constitutional protection is highest where the relationships in question are relatively few in number, are formed and maintained with a relatively high degree of selectivity, and are carried on in relative seclusion from others. The Court found that the Jaycees were a large and essentially nonselective group that conducted no background checks on potential members, and rarely if ever rejected any applicant. Furthermore, the Jaycees allowed and indeed encouraged non-members (including women) to participate in a wide range of organizational meetings and programs. The Court concluded that the Jaycees lacked the characteristics that would warrant any significant degree of protection for the right of intimate association.

In regard to expressive association, the Court weighed the State’s interest in curbing discrimination against the magnitude of the actual infringement imposed upon the organization. The Court found that the State had a compelling interest in eradicating discrimination against its female citizens, and that it was rational and proper to consider leadership skills “goods” and business contacts “advantages” under the State Act in order to carry that compelling interest to activities such as those of the Jaycees. On the other hand, the Court found no basis for concluding that the inclusion of women would impede the types of expressive activities traditionally carried on by the organization. The Court specifically rejected the idea that the exclusion of women was, as a symbol in itself, a protected expression of the organization’s creed or identity.
Having thus found no undue infringement of either type of freedom of association, and having found that the Minnesota Act was a reasonable means of achieving a compelling state interest, the Court ruled in favor of the local chapters. This effectively struck the males-only provision from the bylaws of the national organization, at least in regard to operations in any state with a comparable anti-discrimination statute.

**Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987).**

Much like the Jaycees’ dispute, this case arose when a local Rotary chapter that had begun admitting women had its charter revoked by the national organization. The local chapter filed discrimination charges against the national organization, this time under the California civil rights act known as the Unruh Act. After losing before the California Supreme Court on all counts, including a claim that the organization did not constitute a “business establishment” under the Unruh Act, the national organization appealed to the U.S. Supreme Court on the theory that the Unruh Act improperly infringed on freedoms of association conferred under the U.S. Constitution.

The Court closely followed the reasoning and structure of its previous Jaycees decision. In regard to intimate association, it found that Rotary chapters deserve no particular protection because (i) they are relatively large, with anywhere from 20 to several hundred members; (ii) they are relatively unselective, despite certain rules for qualification, with local chapters being instructed to admit all fully qualified applicants within their respective territories; and (iii) instead of “carrying on their activities in an atmosphere of privacy,” the clubs actively seek publicity and the participation of non-members in a range of core activities including chapter meetings.

In regard to expressive association, the Court found no evidence that the admission of women would impair the members’ ongoing expressive activities, and noted in particular that as a matter of policy Rotary clubs do not take positions on political or international issues. Having thus found no undue infringement, the Court once again upheld the State statute and effectively removed the males-only provision of the national bylaws as practiced in most jurisdictions.

**The Pennsylvania Human Relations Act**

The Pennsylvania Human Relations Act (43 P.S. § 951 et seq., the “Act”) provides a variety of protections against discrimination based on factors including sex. It is the Pennsylvania counterpart to the Minnesota and California statutes tested in the Jaycees and Rotary Club cases described above.

Section 955 of the Act enumerates a range of unlawful discriminatory practices, most of which involve employment- or housing-related practices. Section 955(i) enumerates two unlawful practices in regard to the operation of a “place of public accommodation.” Section 955(i)(1) makes it illegal to deny any individual, based on a range of factors including sex, access to “any of the accommodations, advantages, facilities or privileges” of any place of public accommodation. Section 955(i)(2) makes it illegal to advertise or otherwise publicize that any
person will be barred or discouraged, based on a range of factors including sex, from enjoying any degree of access to any place of public accommodation.

Section 954 of the Act defines “public accommodation” in relevant part as:

any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms or any store, park or enclosure where spiritous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth, non-sectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private.

None of the acts prohibited under § 955 apply to discrimination based on membership in a fraternal association, by virtue of an exception stated in the introductory paragraph of that section. In effect, that exception clarifies that an activity or facility offered only to members of a fraternity will not be deemed to have been offered to the “general public” within the meaning of the definition above, and will be deemed to be of a “distinctly private” nature. However, if a fraternity offers an activity or facility, and includes some participants and excludes others on a basis other than membership in the fraternity, then the exception for fraternal activities does not apply and an excluded individual may be able to bring an action for discrimination under § 955.

This dispute arose when the Pennsylvania Human Relations Commission attempted to exert regulatory jurisdiction over programs and billing practices of a public utility, pursuant to the Act, on the theory that some of the utility’s facilities constituted “places of public accommodation.” There was no nexus between the contested practices and the service offices that constituted public accommodations, except that both were maintained by the utility. The court found that the Act did not create such general jurisdiction, but that in crafting the Act “the Legislature means a place of public accommodation to be a physical location to which the general public is invited to do business,” and the Legislature does not intend for the Act to apply to “all activities of any person who maintains, without suggestion of discrimination, a place of public accommodation.”


This dispute arose when a member of Moose Lodge No. 107 brought an African-American guest into the Lodge’s dining facility, and the party was refused service. The guest sued under the Act, and the Pa. Supreme Court eventually heard the case to determine whether the Lodge’s dining room qualified as a “place of public accommodation.” The Court noted that members were free to bring any Caucasian guests, including women and children ineligible for membership in the Lodge, into the dining facility. The Lodge also routinely rented the facility to other organizations, regardless of any membership or other affiliation. The court found that these practices negated the private nature of the facility, and made it a place of public accommodation. The Court noted that the Act “does grant to fraternal organizations the right to discriminate on any basis upon which they desire to discriminate, but only when those actions are based on membership.” Having opened the dining facility to non-members, the fraternity could not do so on a discriminatory basis.


This dispute arose when two African-American children were barred, on the basis of their race, from participating in a youth bowling league operated by a Moose Lodge in its own facility. The Lodge had adopted written policies that African-Americans were not eligible for membership in the Lodge, and that the league was open only to children and grandchildren of Lodge members. In respect to the league, however, the policy had not been enforced for some time, and many of the participants were Caucasian children with no family affiliation to the Lodge. The court ruled that notwithstanding a written policy to the contrary, the Lodge had in fact offered the league to the public on a basis not connected to membership, thus making the bowling alley a “place of public accommodation,” and had done so in an illegally discriminatory manner.

In a distinct section of the ruling, concerning remedies available to the Human Relations Commission, the court overturned an order to the effect that the Lodge could not shut down the league, but must continue to operate the league as a public accommodation. The court found that
the Lodge had a right to shut the league down if it so chose, and that the Commission could intervene in the operation of the league only so long as it was an ongoing operation conducted in a discriminatory manner.

Recent Oregon Decision

The Court of Appeals of the State of Oregon has very recently ruled that the Fraternal Order of Eagles must accept female members in that state, pursuant to Oregon’s Public Accommodations Act. Lahmann v. Grand Aerie of Fraternal Order of Eagles, 99C-17528, A122320 (October 12, 2005). The Oregon dispute involved both law and facts that are clearly distinct from those relevant to the Grand Lodge’s activities in Pennsylvania. First, the Oregon law is quite unlike the Act, in that Oregon does not provide any statutory exception for fraternal associations in the general scheme of its discrimination law. Furthermore, the Aerie in which the dispute arose maintained a bar and dining facility which was frequented by both men and women, and the court appeared to view the operation of this facility as the Aerie’s primary activity. Given these key factors, it was a relatively straightforward matter for the Oregon court to conclude that the hall constituted a place of public accommodation, and that the Aerie was not exempt from the statutory requirement of providing access to that accommodation on a nondiscriminatory basis.

What was not straightforward was the court’s conclusion that a legal requirement to provide access to the dining hall on a nondiscriminatory basis necessarily involved the integration of the fraternity itself, including rituals and meetings that were not open to women or non-members. The Grand Aerie does not appear to have challenged the court’s logic in this regard. Given the breadth and showmanship of the public-policy rationales offered by both the majority and the dissent, this could be taken to illustrate how this type of dispute may involve more of an ideological shoving match than a careful reading of the law. Perhaps the Aerie will pursue a more measured defense if it succeeds in bringing the dispute to the Oregon Supreme Court.

Conclusion

Even under general principles of public accommodation law, and without the special protection afforded to fraternal associations under the relevant Pennsylvania statute, the Grand Lodge may be entitled to constitutional protections that were not available to the Jaycees or the Rotary Club. These come not in regard to expressive freedoms, since the Grand Lodge’s expressive activities are probably not significantly different from those of the other two organizations, but rather in regard to distinctive elements of intimate association that are characteristic of Grand Lodge activities. The Grand Lodge may be said to be a relatively exclusive organization. More importantly, and much more dramatically, the Grand Lodge have a diametrically different stance in regard to organizational privacy. Since non-members are barred from core fraternal meetings and activities, and indeed may not even learn of those proceedings indirectly, the Grand Lodge might rely on the Supreme Court’s own analytic language (from Jaycees) to claim that the relations they share are, in a constitutionally significant sense, uniquely intimate in nature.
Furthermore, Pennsylvania law appears to go further than the laws of Minnesota and California in providing that a place of public accommodation must be a physical location. This would appear to provide another layer of protection to a fraternal association as an organization, independent of its various places of operation.

While Grand Lodge practice and local law therefore provide several means of saving Pennsylvania Grand Lodge from the fate of the Rotary and Jaycees organizations, it is highly unlikely that Grand Lodge will need to resort to any such means in the foreseeable future. Current Pennsylvania law provides no apparent basis for a discrimination claim based on the exclusion of women from fraternal activities. Any activity or facility offered to members of the fraternity, but not to any others, appears to be well protected as being private in nature and not subject to the Act.

Of course Grand Lodge also offers a wide range of programs, activities and facilities to members of the public, and many of these offerings involve places of public accommodation within the meaning of the Act. So long as these are offered on a nondiscriminatory basis, and are kept clearly distinct from core activities of the fraternity such as meetings of the Grand Lodge and subordinate lodges, it does not appear that the Act provides any basis for attacking the all-male nature of the fraternity itself. Indeed, the Act provides that it is not to be used for that purpose.

Many of the programs and facilities offered to the general public by the Grand Lodge are offered in the context of charitable, rather than fraternal, activities. Since charitable activities are subject to a separate set of prohibitions against discrimination, and those prohibitions are based on entirely separate logic concerning permissible and impermissible distinctions between classes of beneficiaries, nothing in this memo should be taken to suggest that the Grand Lodge is free to exclude women as beneficiaries of its charitable undertakings.

Note also that this paper is limited to the law of public accommodations, and should not be taken to indicate that Grand Lodge or any of its affiliates or subsidiaries may be exempted from prohibitions on discrimination in employment or housing. On the contrary, Pennsylvania law is clear that fraternal associations are generally subject to prohibitions on discrimination in those regards.