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LIABILITY FROM ADVISOR'S FAILURE

A chapter advisor who fails to properly implement a national fraternity policy against hazing can be liable to a victim of hazing because he breaches his duty to the victim. This was the holding of the Superior Court of Pennsylvania (Court of Appeals) when it overturned a ruling of a trial court granting a motion for summary judgment in favor of the advisor. The court also held that a general fraternity has a duty under contract to take reasonable action to protect new members from hazing. In this case, Kappa Alpha Psi Fraternity, Inc. did not breach that duty.

Kappa Alpha Psi had chapters which had practiced a tradition of hazing. In 1949, Kappa Alpha Psi published guidelines against hazing. These were reiterated in 1988.

In 1994, a pledge died in Missouri in connection with a hazing problem. Immediately, the fraternity issued a directive imposing sanctions against those who participate in hazing or who participate in "underground pledging."

> A proactive policy to avoid dangerous situations for initiates and members of the fraternity is the safer course in the eyes of the Superior Court of Pennsylvania.

Santana Kenner attended an information session about membership at the Beta Epsilon Chapter of Kappa Alpha Psi at the University of Pittsburgh campus in 1994. Present was Kevin Clark, the Chapter Advisor. There were two later meetings where Kenner and members of the Chapter were present. Kenner was subjected to psychological and physical hazing, along with other initiates. On March 29, 1994, Kenner was directed to go to the apartment of a chapter member. There he was struck over 200 times on the buttocks with a paddle. He was hospitalized and suffered kidney failure.

Clark did not attend the meeting at the apartment where the injuries happened.

Kenner sued Kappa Alpha Psi, Advisor Clark, and individual members of the Chapter who he alleged had participated in the hazing. The trial judge granted a motion for summary judgment finding that there was not sufficient evidence to impose liability on any of the defendants.

On appeal, the court determined that Kappa Alpha Psi had a contractional duty to protect new members from hazing, but that on the record before the court, there was no evidence that Kappa Alpha Psi breached its duty. It took proactive efforts to stop hazing. Because it did not breach the duty owed to Kenner, the trial court did not commit an error in finding for Kappa Alpha Psi. With regard to the other individual members of the Chapter, the court found that the Plaintiff had not provided sufficient evidence to show that they breached any duty to the Plaintiff.

On the other hand, the Court of Appeals found that the record before it showed that Kevin Clark, the Advisor, breached his duties. The court stated:

> Although Clark knew that the moratorium prohibited a 'membership meeting and intake process' meeting, he nonetheless indicated to Beta Epsilon members that an 'interest meeting' was permissible.

At the interest meeting, Clark did not discuss hazing or the Fraternity policies about hazing.

There was an expert witness who testified that Clark failed to inform himself, or to inform the new initiates of the proper intake process. The expert "opined that had Clark been more engaged in the membership process, Kenner would not have sustained his injuries."

The case was sent back to the trial court for further proceedings against Clark, the Chapter Advisor. If there is a trial, a jury will decide whether or not Clark violated his duty to the new member.

There has long been a dispute among managers of fraternities as to how proactive a fraternity's national leadership and local advisors should be. One school of thought is "boys will be boys" and the best thing the fraternity leadership can do is leave them alone. The theory is that to the extent the leadership attempts to guide the undergraduates away from dangerous conduct, they are creating standards that will impose liability upon themselves. There was a time when this attitude was widespread in Greek organizations and it still exists in some corners of the Greek world.

This case illustrates that a proactive policy to avoid dangerous situations for initiates and members of the

Editor: William A. McClain; Associate Editor: Gary E. Powell; Managing Editor: Jana M. Shaw; Contributors: Margaret A. Allen, Barbara Schwartz Bromberg (of Dinsmore & Shohl LLP), Timothy M. Burke, Gary Moore Eby, George Fabe, Matthew W. Fellerhoff, Rhonda S. Frey, Emily T. Gehlert, Robert E. Manley, Todd B. Naylor, Robert H. Mitchell, Gerald D. Prager, Fanon A. Rucker.

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fraternity is the safer course in the eyes of the Superior Court of Pennsylvania.

It is surprising that the court held that the general fraternity had a contractional obligation to protect the initiate, because the general fraternity usually does not have day-to-day management capabilities over a local chapter or its members. On the other hand, the court found that the general fraternity did not breach its duty because it took proactive measures to try to prevent hazing from happening. The proactive measures were various national guidelines to discourage people at the local level from engaging in hazardous activities. The court did not impose a duty on the general fraternity to put an overseer at every chapter event in order to prevent harm to the new member.

On the other hand, the court came down hard on the advisor who took a hands-off, look the other way approach. Had the advisor been more proactive in trying to prevent hazing, the Superior Court of Pennsylvania probably would have upheld the dismissal of Clark along with the other defendants.

Whether the argument is to a judge or to a jury, it is always better to be able to show that the responsible leaders and advisors have taken reasonable proactive steps to protect initiates and members of a chapter from reckless conduct of other members of the chapter. The "boys will be boys" approach that causes leaders to look the other way invites liability. This case illustrates that fundamental principle.

• Robert E. Manley

SPREADING LIABILITY FOR HAZING

The Florida Third District Court of Appeals recently ruled that the Kappa Sigma Fraternity and its Epsilon Beta Chapter could not be sued in the State of Florida as an unincorporated association.[1] That result signals the potential for greater liability for individual members of the Chapter.

The suit grew out of the death of Chad Meredith, who drowned in the early morning hours of November 5, 2001, while attempting to swim across Lake Osceola on the University of Miami Campus. Meredith was a pledge of Kappa Sigma. He and two of the fraternity brothers attempted to swim the lake at a time when there was a warning in effect that Hurricane Michelle was approaching. Meredith, who, according to one of his friends, couldn't swim very well because he had a bad shoulder, didn't make it to the other side.

> Individual chapter members can be liable for their own wrongful acts and perhaps those of their fellow members as well.

After divers pulled his body from the lake, according to press reports, he was found to have a blood alcohol level of 0.15, nearly double the legal limit in Florida.

The police investigation found that there was no hazing involved. *The Miami Herald* reported that a Miami-Dade homicide detective said, referring to the swimmers "They said they were drinking. There was no hazing or initiation going on."

In spite of that, the parents of Chad Meredith filed suit against the chapter president and the rush chairman, both of whom successfully swam the lake, as well as against the fraternity. The recent Court of Appeals decision, recognized that it was "undisputed that Kappa Sigma and Epsilon Beta are voluntary, unincorporated associations. Thus, the Trial Court erred in denying the motion to quash service of process because such an association must sue or be sued in the names of the individuals composing it rather than its firm name."

The court went on to say that "unlike some other jurisdictions that permit an unincorporated association to sue or to be sued in its own name, Florida does not have such an enabling statute. The question whether these associations should be amenable to suit in Florida is within the province of the legislature, not the judiciary."

The fact is that in most states, unincorporated associations are able to go to court or be brought to court in their own name. What this decision means in Florida though is that if a fraternity or one of its chapters which is unincorporated is to be sued for the actions of some of its members, all of its members will have to be named and served as defendants in the lawsuit. This has enormous potential to spread the liability for the wrongful acts of a few to the pocketbooks of the many.

The *Palm Beach Daily Business Review* reported that the attorney representing the Meredith family regarded the decision as "only a minor setback." He argued that the Chapter President and the Rush Chairman were acting in their capacity as officers of the chapter at the time they swam the lake with Meredith. Therefore, the attorney argued, that "what they were doing was fraternity-related. That triggers coverage under the insurance company of the National Fraternity."

Whether, indeed, the actions of the swimmers were fraternity-related, is something a jury will ultimately decide. In the meantime, the Meredith case ought to be yet another warning to fraternity chapter members, or especially those in Florida, that there is no corporate veil to hide behind and individual chapter members can be liable for their own wrongful acts and perhaps those of their fellow members as well.

• Timothy M. Burke

[1] *Johnston v. Meredith*, 2003 Fla. App. LEXIS 1373., 3rd Dist.), February 12, 2003.

GRANT AGREEMENTS BETWEEN FRATERNAL ORGANIZATIONS AND AFFILIATED FOUNDATIONS - THE TEN MOST COMMON MISTAKES

Introduction:

Everyone reading this article is probably familiar with the general guidelines that have been well known in the fraternal organization world since the issuance of the Excerpts from the Phi Gamma Delta case several years ago, to the effect that when a charitable foundation affiliated with a fraternal organization makes an educational or leadership grant to its affiliated fraternity, there needs to be a written grant agreement in place supporting such grant. Such grant agreements should be similar to those that would be entered into by an organization seeking a grant for a specific purpose from another non-related charitable organization. Therefore, such grant agreements, at a minimum, should contain a complete description of the program for which funding is sought, a budget for completion of the program, provision for followup reports, should be approved by both Boards and executed by both parties, and should provide for the return of any funds to the foundation that are not expended for the purposes of the grant. In reviewing numerous examples of grant agreements entered into between fraternal organizations and their related foundations, this author has seen certain errors that occur frequently in the drafting and implementation of such grant agreements. This article will highlight these types of mistakes and how they can be avoided.

10 Most Common Errors in Grant Agreements:

1. Using a grant agreement instead of a reimbursement agreement -- While grant agreements are the accepted form of documenting an educational or leadership grant to a fraternal organization from its related foundation, there are some situations where they should not be used. For example, when a foundation is paying its fraternal organization for salaries or other overhead expenses that it has obtained from the fraternity, no grant agreement is necessary. Rather, these types of reimbursements should be covered under a written reimbursement agreement. Similarly, when scholarships or grants are made to individuals or to other Code Section 501 (c)(3) organizations, no grant agreement is required (although it may be optional or other types of documents may be used).

2. Too many grants covered by one grant agreement -- This is a very common error. It is this author's suggestion that there be one grant agreement for each grant. While it may well be *possible* to have a grant agreement that clearly sets forth several different grants and includes all of the required documentation for each grant, it is much more likely that the grant agreement will be insufficient if it contains several types of grants. It is also important to separate the grants into individual grant agreements for ease of understandability. Therefore, unless there are very special circumstances, it is best not to group different grants in one grant agreement.

3. Grant agreements should be in place for all grants to non-Code Section 501(c)(3) organizations -- Another commonly made mistake is for an organization to ensure that it has proper grant agreements to cover all grants made to its related Code Section 501(c)(7) organization, but fails to do so for grants that it makes to other non-Code Section 501(c)(3) organizations. This would include local chapters or house corporations as well as unrelated non-Code Section 501(c)(3) organizations. The guideline as to the necessity for such grant agreements is also valid as to non-related non-Code Section 501(c)(3) organizations as well.

4. Complete explanation of educational purposes -- This author has reviewed numerous grant agreements where the "nuts and bolts" of the grant are clearly and sufficiently described -- e.g., how many persons will attend an event, where a conference was to be held, the dates of the conference and the like, yet the basic educational purpose of the grant was not explained at all or not explained adequately. An example would be where the rationale for the grant did not contain an explanation of the topics to be covered at a conference and how these topics would help educate the membership or chapters of the organization. It is important to remember that the Internal Revenue Service, while wanting to see the supporting information as to logistics, is more interested in the underlying educational purpose of the grant.

5. Amendments -- It is often the case that after a grant agreement is entered into between the two organizations, an additional need relating to the original grant becomes apparent. Therefore, the organizations wish to change the original grant, either to increase the funding or in some other fashion. It is acceptable to have an amendment to a grant agreement as long as such amendment follows the same rules and format as the original grant agreement. However, when drafting such amendments, it is important for the organizations to clearly explain the relationship between the amendment or subsequent grants to the first grant so that a question does not arise as to why the entire situation was not covered in one grant agreement.

6. Board approval and execution -- as indicated above, is very important that each Board approve the entrance into a particular grant agreement and that such approval appears in

the corporate minute book of each organization. The authorized officer of each organization should then execute the grant agreement on behalf of his or her respective organization. An execution copy of each grant agreement should be retained in the records of each organization.

7. Recoupment of unallocated expenses -- As indicated above, it is important that such grant agreements provide that if the fraternal organization does not expend all of the funds granted in achievement of the grant purposes, any excess will be refunded to the foundation. Whenever this occurs, such funds should actually be returned to the foundation, not carried over to the next year or applied to another grant.

8. Follow-up reports -- As indicated above, all grant agreements should have incorporated therein a provision requiring follow-up reports, whether quarterly or one time, depending upon the nature of the grant. Probably the most common error that I have seen in the course of my review of such grant agreements is that complete follow-up reports are not obtained for each and every grant. This is very important.

9. Avoiding the use of internal terms -- While it is understandable that in preparing grant requests and rationales, the organizations may employ internal terms for items or use acronyms for programs, they should bear in mind that an important purpose of the grant agreement is to describe the substance of the grant to a third party who has no prior knowledge of the organizations. It is therefore always best to avoid use of such terms or acronyms and when they must be used, to explain them fully.

10. Supporting information -- Most grant agreements require additional grant supporting documentation other than the request rationale and a budget. For example, if a request is made by a fraternal organization to its affiliated foundation for funding for a certain program which is designated by the fraternity to be 50% educational in content, there must be an explanation and supporting documentation as to how this percentage was reached. Such supporting documentation might include counsel's opinion, a summary of time logs, or other data, but this is a very important item to be attached to the grant documentation.

Conclusion:

As indicated above, these are some of the most commonly made errors in drafting and implementing grant requests between fraternal organizations and their related foundations. Since these comments are necessarily somewhat general, it is recommended that each organization consult with its own advisors for guidance in preparing and implementing its grant agreements or for specific advice with reference to particular issues as they arise.

• Barbara Schwartz Bromberg

FIRST AMENDMENT BATTLE WAGES IN COURT

A First Amendment battle between a religious student group and university officials just began in the United States District Court of New Jersey. On December 30, 2003, the Philadelphia-based Foundation for Individual Rights in Education (FIRE) filed a lawsuit against Rutgers University at New Brunswick on behalf of a Christian student group, the InterVarsity Multi-Ethnic Christian Fellowship. The federal suit alleges that Rutgers, a public university, revoked the group's recognition, blocked access to campus facilities and stripped its funding because the group selects its leaders based on their religious beliefs. InterVarsity alleges that the University's actions violated its local chapter's First Amendment rights of freedom of association, speech and religion.

Rutgers University requires every undergraduate student to pay a "student fee" which in part provides financial support for University-recognized student groups, including until recently, InterVarsity.

Rutgers has a mandatory nondiscrimination policy, which states that "Membership shall be open to all Rutgers University students and must comply with federal laws prohibiting discrimination on the basis of...religious affiliation. Compliance with these means membership, benefits and the election of officers will not be made on the basis of these factors." Before a group can be registered, receive funding and utilize campus facilities, each student group must submit a constitution to the University which specifically includes the non-discrimination policy.

InterVarsity alleges that the university revoked the group's recognition because InterVarsity's leadership policy, consistent with its constitution, does not comply with the university guidelines on nondiscrimination. InterVarsity allows anyone to become a member of the organization; however, its charter states that only those "committed to the Basis of Faith and the Purpose of this organization are eligible for leadership positions." The University has stopped funding the group but denies suspending the group or preventing it from using the campus facilities.

According to InterVarsity's attorney, David A. French, the issue is whether organizations can choose their own leadership. Mr. French stated in the January 7, 2003 *Washington Times* that there is no New Jersey or federal law which requires the fellowship to allow individuals as leaders who do not subscribe to the fellowship's basis of faith. InterVarsity argues in its lawsuit that since membership is open to all Rutgers students, the Fellowship deems it necessary "if it is to maintain its distinctly evangelical Christian identity" for leadership to be reserved for those individuals who are committed to their basis of faith. The complaint also alleges that Rutgers' policy on student groups discriminates on the basis

of religious and political viewpoints and imposes unconstitutional conditions on the receipt of state benefits.

InterVarsity has run into similar problems at other schools, including the University of North Carolina at Chapel Hill, where InterVarsity has been an active student group for over fifty years. Chapel Hill officials, in threatenng to de-recognize InterVarsity unless it allowed non-Christian students to serve as officers, stated that the University wanted to ensure that its resources are not used to foster illegal discrimination.

Dr. Mike Adams and Charlton Allen, Esq, wrote in an Internet article entitled "God and Man at Carolina," "Is it really possible for college administrators to be so uneducated in the basics of civics that they would fail to recognize that the First Amendment to the United States Constitution trumps their school diversity policies?"[1] Other student groups on UNC's Chapel Hill campus also received letters threatening revocation of university recognition. These student groups included Alpha Epilson Pi Fraternity (for limiting its membership to any male student...who believes in God).[2] Chapel Hill officials finally decided that InterVarsity could remain an official student organization.

While the lawsuit at Rutgers does not directly include fraternities and sororities, implications of a decision in this suit could have long-lasting effects on first amendment associational rights of many student groups, including Greek organizations.

• Mackenzie Becker

1 http://www.breakpoint.org/breakpoint/channelroot/featuresgroup/onlinefeatures/God+and+Man+at+Carolina.htm, January 13, 2003

2 See *Id.*

UNIVERSITY OF ARKANSAS CLARIFIES POSITION

The January 2003 issue of *Fraternal Law* reported on the development of a Relationship Statement at the University of Arkansas put together by a university task force which included 26 male fraternity members and no female Greek members. In response to that article, the Vice Chancellor for Student Affairs sent an open letter to sorority/fraternity executive directors.

Dr. Johnetta Cross Brazzell, the Vice Chancellor for Student Affairs, offered the following clarification:

> "A year ago, the Chancellor appointed a Task Force for the Enhancement of Greek Life to specifically look for ways to improve the fraternity system at the University of Arkansas. Our fraternity community has witnessed a steady decline in the number of men going through Formal Rush and the condition of many of the chapter houses had deteriorated to a point where the safety of the students was quickly becoming a concern. While addressing these issues the university also wanted to offer its assistance to these groups in the form of scholarship, and management support options.
>
> "As this committee was in the process of being formed, our staff met with the Panhellenic Executive Board to outline the process for examining fraternity life on this campus and to discuss a plan in which sororities' concerns would be addressed. With the exception of the recommendations surrounding the recruitment process, we were and are attempting to bring our fraternity community in line with the best practices of sororities over many years. Time and again, the sororities were held as the standard to which other groups should aspire. The recommendations that were accepted by the Chancellor are denoted by an asterisk indicating that the sororities would be discussing the specifics of these recommendations in the future.
>
> "A few days before the *Fraternal Law* article was released, sororities on campus held their first meeting to discuss forming a Task Force and the reasons for doing so. Each chapter was asked to appoint their chapter president and chapter advisor as representatives to this group. Since our sororities are already in full compliance with the vast majority of recommendations for fraternities, it was assumed that they would concentrate their efforts on the recruitment aspects of the Task Force Recommendations.
>
> "I have asked the sororities to strongly consider moving to a delayed recruitment process since the university is attempting to provide a "common experience" for all incoming students. A delayed recruitment schedule by our sororities will help to ensure the success of the First Year Experience activities along with numerous other positive outcomes."

The position taken by the University of Arkansas is obviously well-intended, but it may well be frustrating to women's groups. Even the statement by Dr. Brazzell recognizes that the women's groups on campus at the University of Arkansas are the standard setters. Yet in order to provide the University with desired improvements in the men's groups, the women are being asked to change their recruitment activities in spite of the fact that they weren't the problem.

• Timothy M. Burke

A CALIFORNIA VERSION OF WEST SIDE STORY

It is bad enough when irresponsible behavior, started because it was "meant to be fun," leads to tragic consequences. It is yet another thing when, like something from the script of *West Side Story*, rival fraternities meet for a midnight rumble on a darkened basketball court. Yet that is exactly what happened on January 22, 2003, when members of Lambda Phi Epsilon and Pi Alpha Phi confronted one another in San José's Flickinger Park.

The brawl was planned with such advance knowledge that police were warned of the fight an hour before it occurred. Unfortunately, the police checked the park and left the scene before the rival combatants showed up. In the aftermath, Alam Kim was dead, from a stab wound to the heart. Four other members of Lambda Phi Epsilon were hospitalized, three with stab wounds.

Robert L. Caret, the President of San José State University, made it clear that the University would not "tolerate thugish or gang-like behavior" and the school acted promptly to suspend both fraternities.

The *San José Mercury News* reported that Kim was a 23-year old junior at San José State University and quoted Christine Choi, a little sister of the Lambda Phi Epsilon Chapter at the University of California-Davis as saying Kim "was the most loyal person I know. He was so loyal to the Lambdas and he would do anything for those brothers." In the end, he appears to have died for them. A truly wasted and senseless death.

The story of college students acting like street gangs has attracted substantial media attention. One *San José Mercury News* front-page story focused on the "competitive culture" that exists in the Greek world and headlined the question, "Is Violence Inevitable with Rival Fraternities?"[1] The story detailed a history of violent clashes between rival fraternities including:

- a fight between Kappa Sigma and Sigma Kappa Rho members at the University of California-Davis that included the use of a bat and a samurai sword.
- a Washington State University battle between Delta Tau Delta and Phi Delta Theta which hospitalized several members after a battle with golf clubs, flash lights and sticks.
- a battle four years ago between Sigma Alpha Epsilon and Phi Delta Theta members at the University of Michigan.
- another University of California-Davis confrontation when Lambda Phi Epsilon members broke into Pi Alpha Phi's house.

These incidents each constitute criminal misconduct of the highest order. Whoever stabbed Alam Kim was guilty of homicide. The fact that some newspaper articles imply that the culprit may not have been a member of either rival fraternity, but rather a "hired mercenary" does little to eliminate the responsibility of the members themselves. This was a crime and a tragedy that should have never happened.

Consider that when violence occurs, the consequences will not just be felt by the injured and the arrested. Innocent members of the fraternity are likely to suffer as well. Chapters are likely to lose recognition, they are probably going to be suspended by their national, and chapter houses may be lost in the process. The image of the entire Greek world is tarnished.

All the good works that both chapters engaged in, including a long history of community service activities, including such things as bone marrow drivers, AIDS walks and the hosting of multi-cultural events were quickly forgotten in the furor over Kim's death. The lives of the members of both fraternities will forever be impacted. Criminal charges are likely to be brought against many of the participants, and bright young students, looking forward to completing their college degrees, may be facing jail.

No doubt there are spirited rivalries that exist between fraternity chapters on many campuses. It is important that those rivalries be channeled through appropriate activities on the athletic field, in competitive charity drives, or in collecting votes for homecoming queen or student body president. The bond of brotherhood in each fraternity and their friendly competition with other groups should never be the spark setting off a later day version of the Jets against the Sharks. If it does, there is little that anyone other than a criminal defense attorney can do to help those charged with the criminal acts.

Fraternities face a difficult enough task in today's society to remind many opinion leaders of all of the good that fraternities and sororities do for their members, their colleges and their communities. Some campuses need little more excuse to attempt to eliminate fraternities and sororities entirely.

The fraternity experience ought not include spreading the ashes of a departed member, who died in a violent fight over chapter "honor," on a California mountain top; yet that was one of the first consequences of Alam Kim's death.

• Timothy M. Burke

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[1] *San José Mercury News*, January 26, 2003, by John Woolfolk and Tracy Kaplan with contributions from Staff Writer Becky Bartindale and News Researcher Leigh Poitinger.

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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