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PHI DELTA THETA'S ALCOHOL-FREE POLICY UPHELD

A little over ten years ago, Phi Delta Theta took the dramatic step of adopting an Alcohol-Free Housing Policy, becoming the largest men's organization to prohibit alcoholic beverages entirely from its chapter properties.¹

The Phi Delta Theta policy was adopted by its General Council, the Fraternity's governing board, and made a part of Phi Delta Theta's Risk Management Policy. The alcohol-free requirement was adopted in 1997 and phased in with complete application beginning in 2000.

While the policy has not been free from controversy, Phi Delta Theta's enforcement of the policy has, according to Bob Biggs, its Executive Vice President, led to far fewer problems in fraternity houses, less damage to houses, fewer injuries, fewer insurance claims, better grades and higher recruitment numbers.

Recently, because of Phi Delta Theta's enforcement of the policy, the Fraternity found itself a defendant in a lawsuit brought by six members of the Pennsylvania Theta Chapter at Penn State University. Over the period of two and a half years, the Chapter had five separate violations of the Alcohol-Free Housing Policy. The National Fraternity tried various methods to secure compliance with the policy, even requiring all members to sign affidavits assuring that they would comply with the policy and acknowledging that any further violations could lead to a suspension of the Chapter's Charter. Within a short period of time after signing such statements, another significant violation of the policy occurred. After asking for and receiving a report confirming the facts, General Council acted to suspend Pennsylvania Theta Chapter's Charter. At that point, all of the members of the Chapter were made alumni members. Those alumni were advised that they could no longer function as a Chapter.

In spite of that, the Chapter continued to function, holding events, recruiting new members and even conducting "an informal" initiation. They also permitted the newly "initiated" members to sign the Bond Book, which contains the Phi Delta Theta Bond and the original signatures of all of the properly initiated members of the Pennsylvania Theta Chapter going back more than 100 years. When the continued operations were documented and confirmed, General Council then moved to expel all of those individuals who had been members of the Chapter at the time the Chapter was suspended. The Charter was suspended in December 2007. The dismissal of the members occurred in March of 2008.

With the General Convention of Phi Delta Theta just weeks away, six former members of the Chapter sued Phi Delta Theta and sought an immediate court hearing at which they requested preliminary injunctions reinstating their membership and lifting the suspension of the Charter. Following a two-day hearing, Judge Pamela Ruest issued a decision denying the preliminary injunctions, which was announced two days before the Phi Delta Theta convention began.

The Plaintiffs had argued that the Alcohol-Free Housing Policy was illegal and void. They claimed that only the Phi Delta Theta General Convention could adopt the statutes and laws for the Fraternity, and that the right of the General Council, the governing body, to adopt policy did not extend to something like the Alcohol-Free Housing Policy. The Judge disagreed with the Plaintiffs saying:

"... the General Council had the authority to establish policies for the Fraternity, including the Alcohol-Free Housing Policy. The constitution of Phi Delta Theta, Article III Section 7, provides that the General Council has the authority and responsibility to adopt policies 'to promote the general welfare of the Fraternity.' Promulgating a risk-management policy is part of this authority and responsibility. The Alcohol-Free Housing Policy is an integral part of the fraternity's Risk Management Policy. The Alcohol-Free Housing Policy was adopted by the General Council in 1997. It became effective Fraternity-wide in 2000. At the 1998 General Convention, a resolution was passed that acknowledged and endorsed the Policy."

The Plaintiffs had also argued that they and the Chapter had not been afforded due process when the disciplinary decisions were made to suspend the Chapter and later to expel the individuals as members.

In each instance, however, before the General Council acted, they gave notice that they were considering disciplinary action and asked for comment. In both the case of Chapter suspension and the expulsion of the member, the underlying facts were admitted in the responses provided to the General Council by the Chapter President and/or members. Judge Ruest recognized that courts refrain from injecting themselves into the internal disciplinary affairs of private social organizations:

“Private organizations are vested with broad discretion when making internal disciplinary decisions, and if such decisions are ‘made honestly and in good faith, [they] will not be reviewed by the courts’ on their merits.” (Quoting a prior Pennsylvania case.)

The court went on to say that:

“Plaintiffs were afforded notice and an opportunity to be heard. After five violations over a two-year period, Phi Delta Theta issued a ‘show cause’ letter to Pennsylvania Theta Chapter. As part of their response, all members of Pennsylvania Theta were required to acknowledge an affidavit reflecting their commitment to abide by the Alcohol-Free Housing Policy and their understanding that any future violations of the Policy could lead to the suspension of the Chapter’s charter and/or expulsion of the individual members. Six weeks after submitting their

response to the ‘show cause’ letter, the Chapter again violated the Alcohol-Free Housing Policy.”

The decision is good news for fraternities that find it necessary to take disciplinary action. It is critically important that such actions be taken in full compliance with the rules and procedures of the organization and that those rules provide basic fundamental fairness, notice and the opportunity to be heard, before disciplinary action is taken. If that is done, courts will almost never second guess the merits of such disciplinary decisions.²

• Timothy M. Burke

¹ Some men’s organizations do have restrictions on alcoholic beverages on their property, but not complete bans. Many women’s fraternities and sororities, on the other hand, have long had such prohibitions.

² See *Thomas et al. v. Phi Delta Theta Fraternity*, Centre County, Pennsylvania Court of Common Pleas Case No. 2008-1256. Email the editor of *Fraternal Law* for a copy of the decision at dmccarthy@manleyburke.com.

DECISION UPHOLDS RIGHT TO PRIVACY IN DORM ROOM

A court of appeals in the State of Washington recently issued a decision¹ which bodes well for the ability of students living in a fraternity house to protect their privacy while in the house.

A student at Washington State University was charged with residential burglary for stealing a guitar from another student’s room on a different floor of the dormitory in which he lived. He was arrested after a police officer walked the floor of his dormitory and listened at the door to conversations inside his room. The dormitory floor is generally off limits to all but residents of that floor unless they are guests of a resident. It required a key unique to that floor to enter. The police officer did not have the permission from any resident of that floor to be on the floor.

When confronted with the claim that the student had been arrested in violation of his Fourth Amendment rights against unauthorized search, the trial court found for the student and excluded all of the evidence seized in the student’s arrest and search of his room. In reviewing that decision, the Court of Appeals found that it required a two-part analysis:

“First, whether the individual has exhibited an actual subjective expectation of privacy, and second, whether the expectation is one society recognizes as reasonable.”

Noting that previous courts have found that there is a privacy interest in the interior of an individual’s home,

hotel room, motel room, room in a boarding house and dormitory rooms, the Court of Appeals found that the sixth floor hallway was also entitled to protection.

The Court cited with favor a federal court case from Illinois State University involving a fraternity house.² In that case, the court noted that “... fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building.” Unlike apartment dwellers who, according to the Federal Court, are “simply co-tenants sharing certain common areas,” fraternity members were more like “roommates in the same house.” The Washington Court ultimately held that the sixth floor hallway of the dormitory where the police officer had stood while listening at the door, was a private area. “Because of the intimate nature of the activities in the hallway – most remarkably towel-clad residents navigating the hallways to and from the shared shower facilities – it is reasonable to hold that this area is protected.”

It must be recognized that a member’s expectation of privacy in the common areas of a fraternity house can be lost by another member of the house inviting or authorizing entry into the Chapter House.

• Timothy M. Burke

¹ *State of Washington v. Houvener*, 186 P.3d 370 (2008).

² *Reardon v. Wroan*, 111 F.2d 1025 (7th Cir. 1987).

DETECTING HAZING: WHY THE HAZERS MAKE IT EASY FOR THE REST OF US

In our Greek letter community, hazing is near the top of the pyramid in terms of potential for criminal and civil litigation. Over forty states have hazing laws and several states have upgraded those to include felony status under specific circumstances. Nearly every academic year brings us the death of an undergraduate and injuries to others that generate lawsuits with significant financial repercussions for defendants.

One would therefore assume that those who practice hazing would spare no effort in attempting to hide or conceal the hazing. Yet in a practice that is heaped high with ironies, members of hazing chapters consistently and regularly provide many signs, indications and confirmation that hazing is occurring.

Rather than list a series of hazing practices, let us consider first what the practical aspects of hazing are and then how those are translated into hazing.

Hazing is usually — but not always — practiced and supported by those who your author refers to as, “Incomplete” people. They lack courage, fortitude and self-confidence. Their self-esteem is low. They use hazing as a means of justifying, ratifying and validating their perceived place in a group or culture. Some hazers consider it their designated role or calling to be a hazer (as opposed to being a treasurer or another leader) and make things difficult for pledges or new members (P/AMs)

Hazing focuses upon control, authority, domination and bullying a group of individuals, some of whom want to be hazed and who see hazing as a means of earning group approval. In order for serious hazing to occur later in the semester, hazing with a little “h” will begin immediately after pledging begins. This hazing is designed to establish the unquestioned authority of the hazers. Then, the hazing practices ratchet up week by week, to conclude with “hell week” or pre-initiation.

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Many of the hazing activities therefore emphasize pledge class unity and conformity, uniformity and obedience. In the book and subsequent movie, “All The President’s Men”, an unnamed and high-placed source in the Nixon White House tells a reporter to “Follow the money”. In identifying hazing chapters, follow the emphasis upon

pledge class unity, control, authority, uniformity and conformity. Those will in turn lead to specific activities designed to establish and maintain control and authority.

Fortunately, those who believe in hazing seem compulsive about revealing certain aspects of the hazing. Why else would hazing chapters demand conformity and uniformity in dress, appearance, behavior and demeanor from P/AMs that are easily perceived by others?

One answer is that members of those chapters with embedded hazing are anxious to maintain a perceived status—to let others know that joining their chapters is not



HAZING HOTLINE (1-888-NOT-HAZE)
ENTERS 2ND YEAR

The National Anti-Hazing Hotline (1-888-668-4293) is now entering its second year in existence. Twenty-seven national Greek organizations, including 17 men’s groups and 10 women’s groups, sponsored the first-year of the Hotline. All 27 original sponsors return as sponsors for the second year. New sponsors are welcome for the Hotline, which is monitored by attorneys at Manley Burke. The system received approximately 150 hazing calls in its first year, some of which were for information only, some were pranks, but many were serious calls. All calls are recorded and, when applicable, forwarded to the national organization involved. The national organization then investigates the hazing allegations. For more information or to learn how to become a sponsor, call Dan McCarthy at (513) 721-5525 or Norval Stephens, Chairman of the Delta Tau Delta Educational Foundation, who sparked the idea for the Hotline, at (847) 382-1588.

an easy task. It can also be asserted that hazers become arrogant and that arrogance leads to a lack of discretion.

As well, hazers are not trained CIA agents. They often will not think about the fact that the hazing is obvious to others. Contrary to their belief, the hazers cannot control everything that the P/AMs think or do. Finally, the hazers will use the public displays as a means of convincing the P/AMs that, "You've been through a lot already—don't quit now"

Watch and listen for the hazing. A very short list of examples:

- Conformity in dress and appearance ranging from the obvious such as bandanas, ribbons or the display of certain colors to the more subtle such as carrying backpacks or the P/AM manual in a certain way.
- Carrying a number of items: these may not be immediately apparent but will often make an appearance in unguarded moments, such as cigarette lighters in the dominant color of the organization or candy or snacks for members that are to be surrendered on demand.
- Frequent emphasis upon "pledge class unity." Hazers utilize pledge class unity so that the entire group can be punished for the errors or omissions of one. Pledge class unity also allows hazers to objectify the P/AMs—to treat them as a group rather than as individuals. It also allows the hazers to maintain an assured distance from their future sisters or brothers which enhances their ability to ridicule and denigrate the P/AMs.

- Demeanor: in a hazing chapter, P/AMs are treated as errant children. Many of the P/AMs therefore act like children, carefully navigating what seems to be never-ending series of no-win situations. Hazers often demand that P/AMs greet them in a particular way, use a particular entrance to the house, lodge or floor, to rise or to give up their chair if a member approaches.
- Nearly every hazing activity involves the entire P/AM class. The emphasis upon unity therefore leads to hazing practices such as "fun runs" on campus or requiring the P/AMs to wait outside the chapter house in inclement weather.
- Concealment: the use of paper, plywood, plastic trash bags or other items to cover the first floor windows of the chapter house during pre-initiation.
- Restricting communication by collecting the cell phones of P/AMs or prohibiting them from speaking to "Outsiders" during particular times.
- Unusual hours—meetings or events for P/AMs late at night or early in the morning.

The hazers give us a number of ways to detect the hazing. If we watch, listen, ask questions and remain diligent, we can often detect the hazing in time to intervene and ideally to change the culture of the chapter.

• David Westol

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RESULTS OF IN-DEPTH HAZING STUDY RELEASED

Two professors at the University of Maine, Drs. Elizabeth J. Allan and Mary Madden, recently spearheaded one of the most in-depth and thorough hazing studies ever conducted. The initial findings of the study, entitled, *Hazing in View: College Students at Risk*, were released earlier this year. The study was based on an analysis of over 11,000 survey responses from undergraduate students enrolled at over 50 colleges and universities and personal interviews with over 300 students and campus personnel at 18 of the schools. The initial findings included the following:

- 55% of college students who participate in clubs, teams and student organizations, including Greek organizations, experienced hazing in some form.
- Common forms of hazing include forced alcohol consumption, humiliation, isolation, sleep-deprivation, and sex acts.

- Pictures of hazing activities are posted to public web pages in more than half of all hazing incidents.
- In a very troubling sign, more students perceive positive outcomes from hazing than negative outcomes.
- Approximately 90% of students who experienced hazing did not consider themselves to have been hazed.

The report was the first of a planned series of reports detailing the data collected during the hazing study. The forthcoming reports will look at other aspects of the data in more detail. The initial report can be found at www.hazingstudy.org.

• Daniel J. McCarthy

SAE PREVAILS AGAINST COLLEGE ADMINISTRATOR

David Fiacco, in his role as the Director of the Office of Community Standards, Rights and Responsibilities oversaw the student discipline process at the University of Maine at Orono ("UMO"). In 2002, Fiacco's office started an investigation into Sigma Alpha Epsilon's Maine Alpha chapter for misconduct. In response, several current and former members of the chapter hired a private investigator to look into any evidence of bias that Fiacco might hold against SAE or Greek organizations in general. The investigation revealed that Fiacco had involvement in two previous legal issues: a conviction for Driving While Ability Impaired ("DWAI"), and a temporary restraining order against him by a past girlfriend. Because of the DWAI conviction, Fiacco departed from his previous position as Director of Public Safety at Fort Lewis College in Colorado.

The group of members and former members of the Chapter then distributed the documents to UMO officials and local newspapers with the following unsigned memorandum:

Enclosed please find newspaper articles and court documents detailing Mr. Fiacco's previous legal difficulties: DWI, Sexual harassment, and Domestic Violence. Is this honestly the best qualified candidate the University of Maine could find for the Office of Judicial Affairs?

In September of 2005, Fiacco sued SAE Nationals in federal district court (through diversity jurisdiction), claiming, among other things, intentional infliction of emotional distress. Fiacco claimed that he became distressed and withdrawn, experienced insomnia, nightmares and teeth-grinding because of the disclosure of the information by the members and former members of the Chapter.

The opinion also found that the members did not act with actual malice because Fiacco could not prove that the documents or memorandum included a false statement of fact.

In order to prevail on a claim for intentional infliction of emotional distress, a party must establish the following: 1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress could result from its actions; 2) the conduct was "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;" 3) the defendant's actions caused emotional distress; and 4) the emotional distress was beyond what a reasonable person could be expected to tolerate. Because of the First Amendment, where the distress is claimed to have been caused by published speech, public figures and public officials face an additional

burden in that they must prove that the publication was false and was made with actual malice.

After extensive discovery, SAE moved for summary judgment. The district court granted SAE's motion for summary judgment in April of 2007, finding that Fiacco was both a public figure and a limited-purpose public figure. Because he was found to be a public figure, Fiacco's intentional infliction of emotional distress claim failed because he did not establish that the memorandum that accompanied the documents was made with actual malice.

Fiacco appealed, arguing that the district court erred because he was not a public figure and because the statements were made with actual malice. The United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling in favor of SAE.¹ The Court of Appeals first held that Fiacco is a public official because, "[t]he inherent attributes of Fiacco's position as Director of the Office of Community Standards demonstrate that he exercises influence over issues of public importance." Further, the court noted that Fiacco had special access to the media and was mentioned, by name, numerous times during the previous year in both the student newspaper and the *Bangor Daily News*. This was significant because Fiacco "had special access to the media beyond that of an ordinary person; therefore, faced with the ... mailing, had he wished to defend his reputation in public, the media would likely have covered his story." Finally, the court found that Fiacco assumed a risk of diminished privacy when he became the Director of the Office of Community Standards.

The opinion also found that the members did not act with actual malice because Fiacco could not prove that the documents or memorandum included a false statement of fact. Actual malice requires a party to publish a statement about the other party "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." While the memorandum contained several misstatements, the court found them insignificant and not to rise to the level of actual malice.

In an article by Kelsey Beltramea in Student Press Law Center, Bernard Kubetz, Fiacco's attorney, said that they will not pursue further appeal. In that article, Kubetz also expressed his disappointment with the decision, "Strictly applying First Amendment principles, a national fraternity with a great deal of power was able to get away with what I would consider to be an affront to blackmail [Fiacco]." The decision did not address how Fiacco intended to hold SAE liable for the actions of several of its members in this case.

• Daniel J. McCarthy

¹ Fiacco v. Sigma Alpha Epsilon, 528 F.3d 94, C.A. 1 (Me. 2008).

DRUG BUST AT SAN DIEGO STATE

On Sunday morning, May 6, 2007, Jenny Poliakoff, a freshman member of Alpha Phi at San Diego State, was found dead in her apartment. The medical examiner subsequently found her death to be due to a combination of drugs and alcohol poisoning.

One year to the day later the results of a massive drug investigation triggered by Jenny's death were unveiled. 95 students were arrested; 33 charged with felonies. Several fraternity houses were searched. Drugs and even guns were confiscated from those houses. The University quickly moved to suspend six fraternities.

Only time will tell what impact this investigation and the arrests that followed may have. It is possible that the ownership of the fraternity houses from which drugs had been sold could be lost. Those houses could be seized by the federal or state law enforcement officials because the property was used in the commission of a drug crime. It has been done before. In 1991, three fraternity houses at the University of Virginia were seized by the United States government because of drug sales. The only way the fraternities recovered their houses was to buy them back from the federal government.

• Timothy M. Burke

LOSS OF CHARTER LEADS TO LITIGATION

The Sigma Sigma Sigma Chapter at Missouri State had been on campus there since 1945. In recent years, the Chapter had some problems, including a reported seven criminal reports from the House since October 2006, three of which were liquor violations. In the fall of 2007, the National Headquarters learned that in spite of past education, warnings and discipline, the Chapter engaged in a series of improper actions with its incoming new members: blindfolding them and taking them to a cemetery, requiring them to get a job application from a strip club, taking blindfolded women into a cave, to a basement, and providing alcohol to minors. When that misconduct was confirmed, National Sigma Sigma Sigma revoked the Chapter's Charter.

Members of the sorority argued in the press that they had been treated unfairly. One member, arguing that their conduct wasn't so bad, said "it wasn't like they had to jump off a cliff ... it was all in good clean fun." She went on to argue that they didn't consider what they did hazing because "no one complained." She also said "in our eyes, we tried to keep everything as clean as possible. We don't drink in the house or do anything in the house. All Greeks drink when underage. We never did it irresponsibly."

This spring, nine members of the Chapter who were initiated shortly before the Charter was revoked filed suit¹

against Sigma Sigma Sigma, the National Panhellenic Conference (NPC), Missouri State University and others. The suit, currently in its very early stages, claims that the new members had not been properly advised of the Chapter's past misconduct and the possibility that the Chapter could be stripped of its Charter, leaving them with no membership in a Greek social organization. They say that was particularly damaging since having been initiated in Sigma Sigma Sigma, they could not then join a different women's Greek social organization. The suit alleges that local and National Sigma Sigma Sigma, NPC, and Missouri State University misrepresented and concealed facts and negligently supervised the Chapter. The plaintiffs seek monetary damages because of dues and fees paid and because of the loss of the "opportunity to experience and enjoy the sorority experience during college and beyond."

At this writing, plaintiffs have filed their Second Amended Complaint, discovery is beginning and motions seeking dismissal or summary judgment of the case are anticipated.

• Timothy M. Burke

¹ *Walker, et al. v. Sigma Sigma Sigma, Inc., et al.*, Circuit Court of Greene County Missouri, Case No. 0831-CV06378.

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