



# FRATERNAL LAW

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## DEATH LEADS TO CHARGES AT UTAH STATE

The death of Michael Starks, an 18-year old freshman at Utah State University, has led to criminal charges against two fraternity chapters and 12 Greek members who are alleged to have been involved in his death. According to an affidavit filed in support of the information which issued the charges, Michael died of acute alcohol poisoning, his blood alcohol content being measured at .373.

Michael and one of his fellow Sigma Nu pledges, the affidavit states, were taken by Sigma Nu brothers to the Chi Omega House "under the guise of assisting the Sorority to move some furniture." Once there, members of Chi Omega "captured" them, took them to the residence of a Sigma Nu officer where the captured pledges were asked to strip to their underwear. They were painted blue and white (Utah State colors) and during that activity, Michael Starks and the other pledge were offered vodka.

The affidavit goes on to describe that ultimately, the pledges were "rescued" by their fellow Sigma Nu pledges and returned to the Sigma Nu House. There, they were cleaned up and then put to bed. While the affidavit acknowledges that Starks was monitored by members of Sigma Nu, at approximately 3:45 on the morning of November 21, 2008, members of Sigma Nu discovered Michael had stopped breathing. Neither the CPR done by one of the members, nor by emergency services, was able to revive him and he was pronounced dead by the treating emergency room physician.

The "Chi Omega Sorority Logan, Utah Chapter Association," and the "Sigma Nu Fraternity Logan, Utah Chapter/Association," have both been charged with a third degree felony for violating Utah's Anti-Hazing Statute. Four members of Sigma Nu and eight members of Chi Omega have been charged with misdemeanor violations of Utah's Hazing Statute. One member of Sigma Nu has been charged with obstructing justice and a member of Chi Omega charged with "supplying alcohol to a minor." The conviction of a third degree felony in the State of Utah carries with it a possible sentence of up to five years in prison. Of course an association cannot be put in jail, but it can be fined. In this case, a fine under Utah law could be as much as \$20,000. Conviction of misdemeanor hazing carries with it a sentence of up to one year in prison, as does obstruction of justice and supplying alcohol to a minor. Fines for the misdemeanor violations by the individuals could be up to \$2,500.

Bear in mind that mere charges alone do not make either the chapters or the 12 individuals guilty; just the opposite, they are each presumed innocent until proven guilty. The criminal prosecutions are only beginning.

The indictment of the two fraternity chapters is highly unusual, but not unprecedented. In 1998, the District Attorney in Boston, Massachusetts indicted the Phi Gamma Delta Chapter at Massachusetts Institute of Technology. The Chapter was charged with one count of manslaughter and one count of hazing following the death of Scott Krueger. Rather than pursue any criminal charges against any of the individuals involved, only the fraternity chapter was charged. Shortly thereafter, the chapter was disbanded, leaving no entity to be prosecuted in the Massachusetts case. More recently, as reported in the last issue of *Fraternal Law*, criminal charges involving hazing and alcohol violations were filed against the Phi Mu Delta Chapter at the University of New Hampshire. Those charges remain pending in spite of the fact that the national organization has revoked the Chapter's charter.

The Utah case is particularly disturbing because of the death of Michael Starks and because both Chi Omega and Sigma Nu have strong national policies against hazing and have been leaders in that area. Like virtually every national and international Greek organization, they have taken steps to halt hazing activity. When hazing is identified, they have every reason to deal with it from a disciplinary standpoint. More importantly, both have programs designed to educate their members against hazing.

On January 6<sup>th</sup>, the Cache County Attorney issued two letters. The first went to the President of Utah State University and the Executive Directors of Chi Omega and Sigma Nu. In that letter, the County attorney made it clear that he was not considering any charges against the Univer-

### NEWS

Timothy M. Burke, the President of Manley Burke, publisher of *Fraternal Law*, has been appointed by Governor Ted Strickland as a member of the Ohio Board of Regents. The nine-member Board advises Chancellor Eric Fingerhut in overseeing the University System of Ohio. The system includes Ohio's 14 public state universities, 24 branch campuses and 23 community colleges with a total of over 380,000 full-time equivalent studies.

sity or the two national fraternities. He said:

There is no evidence that would justify such considerations. Just the opposite is the case. The charged activities of the two local chapters are in express violation of the student code of the University and the policies and rules of the two fraternal organizations. We recognize that all of your organizations have made and continue to make significant efforts to curb the ongoing and endemic problem of alcohol and substance abuse among college students. These problems are recognized to include not only hazing violations, but binge drinking, public inebriation, minors with alcohol, drug use, etc.

The County Attorney went on to say that his office concluded that the two local chapters charged "were intent on conducting these hazing activities away from the USU Campus for the precise reason that if the University ... [or] local advisors or the national organizations learned of these violations, there would be sanctions and penalties against both the individuals and the chapters."

A second letter was issued to the social clubs, organizations, fraternities and sororities on the Utah State University campus. That letter clearly put student organizations on notice that their activities would be monitored for criminal violations. The County Attorney discussed rumors that

... there is surveillance and infiltration of other campus organizations and social clubs and that informants are being used to attend, monitor and make reports about on and off campus parties, social gatherings, etc. You may have heard that some individuals having substance abuse issues are being given the opportunity to obtain leniency in return

for their ongoing participation. Further, that those individuals may even be carrying cameras and/or are wired.

Let me confirm your suspicions and disregard. All of the things you think might be happening are indeed happening and will continue to happen.

He warned that organizations should "respond by making absolutely sure that your organization is not participating in any inappropriate conduct or condoning the same."

He advised that "if some of your members cannot control their risky behaviors, you may wish, for the sake of your organization, to separate such persons from your organization."

He concluded saying "the tragic Michael Starks death is more than enough for this community. I do hope you will find this memorandum threatening."

Law enforcement agencies appear to be looking more and more to use criminal sanctions against organizations whose members violate hazing laws.

When combined with alcohol, as it is alleged to have been in the Utah case, hazing can lead to tragic consequences. Even when alcohol is not involved or no injury occurs, hazing is antithetical to the very purposes of the promotion of brotherhood and sisterhood that Greek organizations promote. But it is unfortunately equally true that some people just don't get the message. When a tragedy happens, it can be anticipated that criminal actions will follow, even though the entire activity was initially intended to be "fun." In this instance, not only has a promising young life been lost, but the futures of 12 other young people are now very clouded. Not only do they and the chapters face criminal trials, but civil litigation can also be anticipated.

• Timothy M. Burke

## Default Judgment In Texas Set Aside

As reported in the November 2008 issue of *Fraternal Law*, in October, a Travis County Texas Trial Court judge had issued a \$16.2 million default judgment against both National Sigma Alpha Epsilon and its chapter at the University of Texas. The Court has now reversed that decision. That judgment occurred in a case which grew out of the death of Tyler Cross, who died from a five-story fall from a balcony. When the fraternity and chapter failed to respond to the complaint filed in the case, the request for default judgment was filed by the plaintiffs.

After the default judgment was entered, Jim Ewbank, a Texas attorney who has previously written for *Fraternal Law* and who has handled numerous fraternity matters, was brought into the case. He filed a motion, which was granted, asking the judge to reverse his October decision and allow the fraternity and its chapter to file an answer and proceed to defend the case.

In a statement issued by Ewbank after he successfully reversed the default judgment, he explained that "the two Sigma Alpha Epsilon defendants put on evidence that showed their failure to file an answer to the lawsuit was an accident and there were meritorious defenses to the family's claim . . . the defendants will have their day in court to prove that Tyler Cross' death was an unfortunate accident."

The Austin American-Statesman had reported that Cross died when he fell from an off-campus dormitory and "investigators have said that the night before his body was discovered, he and other pledges were given half-gallon liquor bottles to drink. An autopsy report said Cross had a blood alcohol level of more than twice the legal limit for driving in Texas."

The case will now proceed through discovery with all parties preparing for a trial that is likely to be many months in the future.

• Timothy M. Burke

## FRATERNITIES MUST NOTIFY MEMBERS AFFECTED BY COMPUTER SECURITY BREACHES

Many states and universities have enacted laws and policies, respectively, requiring computer owners to notify potential victims of identity theft when a security breach occurs. Student organizations, which oftentimes obtain members' personal information like credit card numbers for reasons from housing to dues to donations, should be aware of these requirements to better protect themselves from computer security breaches and to reduce the instances of their members suffering from identity theft.

A majority of states—at least thirty-five, according to a simple survey of state statutes—have laws requiring computer owners or operators to notify those people whose personal information might have been stolen by a computer breach. While some statutes apply only to government offices, the statutes more often apply to any entity storing personal information in the state. California's statute provides a good example of the requirement: "Any person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person."<sup>1</sup>

While at first blush, fraternities and sororities seem exempt from this statute, the notice requirement trickles down to them students via their university's policies. Staying with the California example, the state's university system has implemented the statute by requiring campuses to "notify California residents whose information is reasonably believed to have been acquired by an unauthorized person." Each campus, therefore, has policies requiring their computer network users to adhere to the statute. From the state to the state school to the campuses, the law eventually lands at each campus's network users, which includes fraternities and sororities.

The law holds computer owners who choose to collect others' personal information responsible not only for notifying those people of identity theft risk but also for keeping the personal information safe.

These state laws have one explicit requirement and one implicit requirement: notice and investigation. Ohio law provides another good example of the statute: "Any person that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system, following its discovery or notification of the breach of the security of the system, to any resident of this

state whose personal information was, or reasonably is believed to have been, accessed and acquired by an unauthorized person if the access and acquisition by the unauthorized person causes or reasonably is believed will cause a material risk of identity theft or other fraud to the resident."<sup>2</sup>

The main thrust of the statute requires computer owners to "disclose" security breaches to the people who could most be harmed by the breach. The implicit requirement of the statute is that those who hold personal information of others on their computers must be on the look out for breaches.

In sum, the law holds computer owners who choose to collect others' personal information responsible not only for notifying those people of identity theft risk but also for keeping the personal information safe.

Computer security breaches can result in legal action, as universities have discovered. For instance, two graduate students sued Ohio University over five security intrusions that breached 367,000 files containing personal information on a possible 173,000 people. The charges were ultimately dismissed as the two plaintiffs failed to prove they suffered compensable damages. But the case should serve as a warning light for fraternities and sororities with no computer security precautions.

Sororities and fraternities should take these laws' two instructions to heart. When collecting members'—or their parents'—personal information, including credit card numbers and social security numbers, exercise forethought and ensure that the information is stored securely. A small investment in anti-virus and security software, and a short conversation with campus IT managers about security, can prevent personal information from being stolen and drastically reduce the risk of identity theft.

Furthermore, preparing a standard notice to have on hand will ensure quick notice in the event security measures are unsuccessful. Notice to potential identity theft victims should inform the recipient about the risk and—though not legally required—should inform the recipient of how to monitor their credit scores to mitigate any effect of identity theft. These measures will not only bring fraternities and sororities in line with state law and university policy, they will also help the student organizations protect their members from identity theft and credit card fraud that could devastate the members' future.

• Adam J. Eckstein

<sup>1</sup> Cal. Civ. Code § 1798.82(a).

<sup>2</sup> O.R.C. § 1349.19(B)(1).

## GENDER THEN AND GENDER NOW: WHAT HAPPENS IF

It is not a topic that is often discussed at conferences or interfraternal gatherings. Yet, most chief executive officers and executive directors of men's national fraternities have encountered the situation in which an alumnus has written a letter to the headquarters to announce that he has undergone a gender change and is now legally recognized as a woman. The letter usually contains a request that the former alumnus be referred to by a woman's name and title in all future correspondence.

There are two questions for men's fraternities. Should we continue to recognize this individual as a member regardless of gender? If we do, will that compromise our single sex status?

An informal survey of several chief executive officers and volunteers of men's national fraternities revealed that each had encountered one if not more situations in which an alumnus had undergone a transgender procedure and subsequently notified the headquarters of the change and requested that the records be changed to reflect that fact.

The responses were generally consistent. Without exception, those fraternities continued to recognize the member and made the appropriate change in name and title as requested. Several of those contacted made the point that a request of this nature would be granted because the request was not considered a significant issue. Others noted that every effort should be made to avoid an emotional or visceral response to the request.

Two points to consider in assessing a request of this nature are:

- 1) The individual had been initiated as a male. The national bylaws or other documents that control single sex status are generally silent as to whether

maintaining one's status as a male following initiation is required. Under that logic, a transgender change later in life was not construed by the fraternities that were contacted as a violation of those laws or rules.

- 2) Do the operating documents of the national organization provide a basis for expulsion of the individual for "Conduct unbecoming a member"? If so, does a transgender procedure fall within the purview of, "Conduct unbecoming"? One person noted that if litigation resulted from a decision by a national fraternity to expel the individual as a member, it would be relatively easy to document a number of examples of alumni who had been convicted of felonies and yet remained members, ostensibly in good standing.

It is clear that these requests will in all likelihood be made from time to time. The requests should be examined as other questions involving the law and fraternity should be examined. What do our operating laws and policies require or permit? What do we gain or lose by a particular decision? Finally, are we analyzing or evaluating a decision or course of action in a calm and logical manner without allowing emotion or strong feelings to influence an outcome?

• David L. Westol

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## JUICYCAMPUS.COM CREATES QUESTIONS, AND HEADACHES

A relatively new website is generating increasing concerns on campuses across the country. Juicycampus.com, officially launched on October 24, 2007, states that its seemingly harmless "simple mission" is "enabling online anonymous free speech on college campuses. Today it is a forum where college students discuss the topics that interest them most, and in the manner that they deem most appropriate."

However, not all students, administrators and Greek organizations find the site so harmless. In fact, some universities have blocked access to the site, while students and organizations are left wondering what can be done to stop juicycampus. A short stop by the site quickly shows why so many are concerned. Topics of discussion include the

"worst frat on campus," "ugliest girl on campus," and the "biggest cocaine users." These are in fact some of the milder topics.

The welcome page on the site says that, "Juicycampus is the world's most authentic college website, with content generated by college students for college students. Just remember, keep it Juicy!" In short, the site provides anonymity for posters to discuss whatever is on their mind. It seems that rumors of sexual exploits, drug use, fraternity and sorority rankings and the like are on the mind of the vast majority of the site's posters.

The site now claims to be on more than 500 campuses, with the goal of being on every campus in the country. Matt Ivester, a recent Duke graduate, who was the president

of this fraternity chapter while at Duke, started the site. In an article by Bella English in the Boston Globe, Mr. Ivester defended the site, claiming that he loved gossiping with his fraternity brothers. "So why not have a place where you could share ridiculous, hilarious, entertaining high jinks of campus life?"

Because posters are not required to register to use the site, no personal information, such as name, address, phone number, or email address is collected. This makes it very difficult, if not impossible in some cases, to determine the identity of the posters. That said, what can be done about juicycampus and other similar sites that currently exist or are sure to follow in the future? Specifically, what remedies are available if a poster defames an individual or organization?

An initial thought is of course to sue Ivester, juicycampus and Lime Blue, Inc., the corporation that technically owns and runs the site. However, the chances of success may not be great. That is because Section 230(c) of the 1996 Communications Decency Act appears to provide protection from liability. Specifically, Section 230(c) states, in part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." Courts have traditionally viewed Section 230(c) as providing immunity to websites such as juicycampus. However, in a March, 2008 case, the 7<sup>th</sup> U.S. Circuit Court of Appeals in Chicago stated that Section 230 (c) "as a whole cannot be understood as a general prohibition of civil liability for website operators and other online content hosts."<sup>1</sup>

While this case perhaps opens the door for liability,

the greater weight of cases indicates that Section 230(c) does provide immunity to sites such as juicycampus.

Though the site may be immune, posters are not. A person who posts an outright lie about another is liable in a defamation suit. However, many obstacles exist. First is the anonymous nature of the site. Without names, email addresses or other poster information, it is very difficult to accurately pinpoint the true identity of posters. However, a person could issue a subpoena to juicycampus to learn the IP address of the poster. The website must comply with the subpoena. Once that information is obtained, the victim would then have to attempt to get the true identity of the poster from the poster's service provider. The second obstacle is the uncomfortable and often uphill battle to win a defamation suit. Further, damages must also be proven. Any case against a poster is likely to take a considerable amount of time, money and emotion.

While the internet obviously offers many amazing benefits, it also comes with drawbacks. On the one hand, it opens many doors for communication, research and information; on the other hand, it also opens the door for gossipy sites such as juicycampus. Sites like juicycampus are a reality now. While it is important for chapters and members to be aware of these gossip sites, the best course of action is to ignore them. This is easier said than done, but with little legal recourse available, this is the best option.

• Daniel J. McCarthy

<sup>1</sup> *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist*, No. 07-1101 (7th Cir., March 14, 2008).

## ARGUMENT HELD IN U. OF FLORIDA CHRISTIAN FRATERNITY APPEAL

The 11<sup>th</sup> U.S. Circuit Court of Appeals held oral argument on December 10<sup>th</sup> in *Beta Upsilon Chi v. Machen*.<sup>1</sup> The case involves whether the University of Florida must recognize the Christian fraternity as an official student organization. Like several similar cases from around the country, UF refuses to recognize Beta Upsilon Chi (also known as "Brothers Under Christ" and "BYX") as a "registered student organization" because the fraternity only draws its members from those who share a Christian faith. UF stated that the fraternity's membership policy violates university policy banning religious discrimination by student organizations.

The fraternity sued the university in federal court during the summer of 2007, alleging that it has a right to the benefits and privileges of recognition. The district court denied the fraternity's requested injunction, but the fraternity promptly appealed to the 11<sup>th</sup> Circuit Court of Appeals and requested an injunction pending appeal. In a one-

sentence opinion on July 30, 2008, the Court of Appeals granted the fraternity's "Time Sensitive Motion for Injunction Pending Appeal." As a result, UF was ordered to recognize BYX pending the outcome of the case on the merits.

The argument in December was on the merits of the case. BYX, relying on *Boy Scouts v. Dale*<sup>2</sup> and *Rosenberger v. Rector*,<sup>3</sup> argued that it has a right to discriminate against potential members whose status would undermine their Christian message and that UF cannot discriminate in viewpoint in generally available student group funding programs. UF argued that the chapter can exist as a student organization, but it cannot be recognized as an official student group because of its membership policy. In short, UF argued that it is not required to subsidize the expressive association rights of BYX or any other student organization. Further, UF argued that it has a compelling interest in preventing discrimination on campus.

At oral argument, the Court seemed particularly

interested in the hardships a lack of recognition creates on BYX and student organizations. As noted in an article on the argument in the A.P., Chief Judge J.L. Edmondson asked, "Is it not true that they are disadvantaged in significant ways?" He went on to say, "The policy here concerns me deeply as a matter of constitutional law." The Supreme Court acknowledged the numerous benefits that official rec-

ognition carries in the landmark case of *Healy v. James*.

• Daniel J. McCarthy

1 *Beta Upsilon Chi v. Machen*, (11<sup>th</sup> Cir., Case No. 08-13332-EE).

2 *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

3 *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

## PENN STATE SUES TO PURCHASE FORMER PHI DELTA THETA CHAPTER HOUSE

On November 25, 2008, Penn State sued the former Pennsylvania Theta Chapter of the Phi Delta Fraternity and its current house corporation, 240 North Burrowes Road Alumni Association, in the Court of Common Pleas of Centre County, Pennsylvania.<sup>1</sup>

As detailed in the September 2008 issue of *Fraternal Law*, Phi Delta Theta suspended the charter of its former chapter at Penn State in December of 2007 following a string of violations of the fraternity's Alcohol-Free Housing Policy. After first placing the undergraduate members of the former chapter on alumni status, Phi Delta Theta ultimately expelled the bulk of the students for violating terms and conditions outlined by the national organization. Six of the former members of the chapter sued Phi Delta Theta, seeking, among other things: 1) the return of Pennsylvania Theta Chapter's Charter; 2) a reversal of the individual expulsions; and 3) a declaration that Phi Delta Theta improperly adopted its Alcohol-Free Housing Policy. The trial court ruled in favor of Phi Delta Theta on all points.

The former chapter house is still being used for members of the former Phi Delta Theta Chapter, as well as for another fraternity at Penn State.

One of the reasons the plaintiffs cited for their need for an injunction against Phi Delta Theta was a clause in the 1905 deed from Penn State that transferred title to a plot of land where the former Phi Delta Theta Chapter's house still stands. Specifically, the deed provides the following:

...AND WHEREAS the lot of fround [sic] herein described is conveyed to the party of the second part for the express purpose of erecting thereon a fraternity or chapter house for the use of the members of The Pennsylvania Theta Chapter of the Phi Delta Theta Fraternity at the Pennsylvania State College, AND WHEREAS a building for the purposes herein referred to is now being erected upon the said land, it is distinctly understood and agreed that the said building and the premises hereby conveyed are to be used and exclusively for the uses and purposes of the said fraternity and of the members thereof, now and at all times hereafter; and if,

for any reason, the said premises should cease to be used as a chapter or fraternity house for the use, benefit and behoof of said party of the second part hereto, then and in that event the said party of the first part reserves the right to purchase the said premises at any time within five years at two-thirds of the actual cost of the building now being erected upon the lot herein conveyed, and after the period of five years, at a price which may be agreed upon by the party of the first part and the party of the second part hereto, their successors and assigns, respectively; or, in case the said parties cannot agree upon a price for the same, the same to be fixed and determined by arbitrators mutually agreed upon by the parties hereto, their successors and assigns....

Penn State now argues that because the subject property is no longer a chapter of Phi Delta Theta, it "has the right to repurchase the premises at a price mutually agreed to by the parties, or in the alternative, should the parties be unable to agree on a price, to have the purchase price set by arbitrators mutually agreed to by the parties." Penn State alleged that litigation was necessary because the defendants have refused to sell the house back to the University. Penn State is asking, "that the Court direct the premises described in the Deed of 1905 be transferred to Penn State and that the Court appoint one or more arbitrators to determine the sale price for a transfer of the premises at issue or by such other method as the Court may direct."

As of press time, the Defendants have not yet filed a response or answer to the complaint. Look for updates in future issues of *Fraternal Law* as the case proceeds.

• Daniel J. McCarthy

<sup>1</sup> See *The Pennsylvania State University v. The Pennsylvania Theta Chapter of the Phi Delta Theta Fraternity and 240 North Burrowes Road Alumni Association*, Common Pleas Case No. 08-5203.

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