

Upon Further Review: Are Chapter Designated Driver Programs Good in Theory But Bad in Practice?

The concept of a Designated Driver (DD) or “Delta Delta” program is a good example of first-echelon logic. The logic: Most chapter members will consume alcohol...that consumption will often occur at venues outside of the chapter house...that consumption will exceed what might be termed safe limits...and therefore, it is an act of sisterhood or brotherhood to provide those individuals who consume alcohol and especially those who choose to consume to excess with a safe ride. The intoxicated member is transported to home, wherever that may be, by a sober driver, in a safe manner. Everyone wins and the concept of members helping members is reinforced in a practical way.

In theory.

In practice, a number of concerns have arisen regarding DD programs. Those include:

- **The Intern Effect.** Who gets the coffee? Who runs to the FedEx or UPS station at 4:59 p.m.? It is usually The Intern—the person who is least experienced in company or office culture and has the smallest amount of political capital, much less the moxie to say, “A failure to plan on your part does not constitute an emergency on my part.” Application to men’s and women’s fraternities and sororities relating to DD programs? Pledges or new members are usually saddled with DD duties even if the original plan calls for all members to participate as DDs.

Pledges will not protest the inequity or unfairness of the system because they believe it is part of “earning” their membership. Members will gladly assign away their responsibilities as Designated Drivers for the usual reasons including laziness, scheduling, and “Too tired/busy/involved/don’t have time/I want to party tonight.” Result: The least experienced and mature members of the chapter are dispatched to gather up drunken members and transport them to another location.

- **Mission Creep.** Theoretically, DDs pick up members who have consumed alcohol and transport them home. However, “Members” can be expanded to include picking up friends of members, some-

times without any members being present, and transporting them to other venues. It is another example of the Field of Dreams syndrome — in this case, “*If you make free on-call transportation available people will take advantage of it*” — FOB (Friends of Brothers), girlfriends, friends of friends...and the classic “*I can impress this woman by offering her a ride on my command!*”

- **Mission Creep II:** In theory, members who have consumed alcohol and need a ride receive a quick one-way ride from where they are to “home”. In practice, DDs find themselves transporting members to other venues including other emporiums of festive beverages or parties...playing the role of a taxi driver by waiting patiently for an intoxicated member who called for a ride but doesn’t really want to leave wherever she or he is...running errands for members prior to or during the ride including stops at fast food restaurants...bifurcated missions that include taking intoxicated members to another locale and then retrieving them and taking them home.

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- Daniel J. McCarthy
Editor, Fraternal Law

- **“I didn’t send my daughter/son to Old Siwash to be a taxi driver”** Parents are weighing in on the expense of DD programs especially when that involves the use of an automobile owned by or entrusted to the son or daughter. The complaints range from the upkeep of the vehicle to the cost of fuel—no laughing matter these days—to damage to the vehicle incurred at night on crowded, busy campus streets to the fact that intoxicated people sometimes regurgitate inside the automobile.
- **Is a DD program hazing?** It certainly can be perceived as hazing if pledges assume anything more than a *pro rata* share of the responsibilities. Why require the least experienced and mature members of the chapter to undertake a disproportionately large role in the transportation of older members? Response: Because they will do it, albeit reluctantly, compared to members. And please withhold the “It’s optional” or “They are ‘encouraged’ ” arguments along with, “Er, ah, some bros take part, too” “Some” is not “all”.
- **Whose car is used?** If the automobile used for rides is not owned or operated by the driver, several scenarios arise that may place the chapter, not to mention the national organization, in jeopardy of litigation. Is the driver familiar with controls and the driving characteristics of the vehicle? Which liability insurance policy applies? Is this transportation for hire?
- **Consider the context:** What policies, rules and procedures are in place to safeguard passengers as well as drivers? What if the passenger claims that she or he was subjected to inappropriate behavior by the driver during the ride? And, is the driver prepared to deal with two or more intoxicated persons whose behavior may place all involved at risk? In one case a men’s fraternity chapter utilized a 15-passenger van to transport people to and from a social event. The driver lost control of the van and it crashed. One person died and others were injured. The crash reportedly occurred because the driver was distracted by the behavior of passengers.
- **Is there a prohibition in place regarding the use of hand-held phones and text messaging by drivers while driving?** While this is a rapidly developing area of the law it can be argued that the use of a cell phone and/or text messaging while driving is another form of impaired driving.
- **Is the driver competent?** A Fairfax County, Virginia jury awarded an undergraduate woman \$575,000 in damages after hearing a case involving a “shuttle driver” for a chapter of a men’s national fraternity. The woman was seriously injured after being thrown from an automobile that rolled over while being driven by a member of the fraternity in February of 2009. The driver allegedly drove in a reckless manner and was speeding. The rides were provided by the fraternity to and from a social event.
- **Finally, are the drivers checked for sobriety?** That is “sober” as in, “No consumption of alcohol or other substances that might affect the ability of the driver to safely operate the vehicle regardless of the amount” When someone places her or his life in your hands, even one beer becomes significant. The definition of “sober” by a 19-year old may well differ from the legal definition.

Designated Driver programs have long been characterized as a reflection of sisterhood and brotherhood—that we are preventing drinking and driving, minor in possession, public intoxication and the other issues that go along with the use of alcohol by undergraduates. Upon further review, the unintended consequences of a “DD” program may outweigh the benefits.

PENN STATE FALLOUT

The fallout from the Penn State scandal is not over and it is not limited to the University, its officials and the victims.

Penn State’s Office of Fraternity and Sorority Life is now training Fraternity and Sorority advisors on the Cleary Act. That federal law requires colleges and universities to record and disclose statistics on crime on campus. All “Campus Security Authorities” are required to report knowledge of certain criminal conduct. Those “Authorities” are defined as “any person who has the authority and the duty to take action or respond to particular issues on behalf of the

institutions.”

While it is highly doubtful that the University would agree that the volunteer alumni advisors of Greek chapters have the authority to act on behalf of Penn State, the University is now telling those advisors that they are subject to the Cleary Act and will be treated as “Campus Security Authorities.” In that role the advisors have an obligation to report knowledge of an incident. The Security Authority is not obligated to reveal the name of an unwilling victim, but is expected to encourage the victim to report the crime to police and is required to record the information on a Campus Security

ty Authority Incident Reporting Form.

And the Fallout is spreading.

Robert Morris University has recently announced its intention to conduct background checks on alumni advisors working with fraternities and sororities.

As the University's Special Programs and Student Community Standards, Scott Irlbacher said:

"In response to recent events in higher education, we have decided to have closer contact with all volunteers working with our students and also conduct background checks to ensure these individuals will help us maintain our safe campus community."

Robert Morris is asking each Greek chapter and other clubs on campus to provide lists of their advisors. The University then intends to have its human resources department review the advisors' criminal record in order to determine their suitability. Advisors will also be required to accept the University's policy on "Ethical Practice."

The young adults in fraternities and sororities are in a much different position than the children abused by the former Penn State Assistant Coach; nonetheless it is not surprising that universities would be on a heightened state of alert. That is good, but a downside could be to discourage alumni advisor involvement at all. A result counter to the policy's intent, but yet a real possibility.

- Tim Burke

Paddletramps Trial Ends

The long-running Paddletramps trademark litigation¹ is over. At least until an appeals court finds otherwise. Both sides achieved some success.

This case was brought by Paddletramps, which had for years been producing and selling paddles with the Greek letters and crests of fraternities and sororities on them. Thirty-two fraternity and sorority organizations had sought to bar such sales unless Paddletramps entered into a licensing agreement with those groups. Paddletramps refused to do so and filed suit.

Trademarks are of substantial value. Colleges earn millions of dollars a year licensing their marks. Fraternities and sororities have the opportunity to do the same thing, but if they fail to enforce those rights, that opportunity can be jeopardized.

The litigation really involved two issues. First, did Paddletramps have any liability to the Greek organizations whose trademarked crests and Greek letters had been a source of significant income to Paddletramps during years past. On that issue, the Greek groups lost. As the court pointed out, the Paddletramps began operations in the 1960s and had a national presence by 1990, including a national website which began operation in 1997. The problem for the Greek groups is they did not pursue the infringement issue until 2007, decades after they learned of Paddletramps' conduct. As a result, the court found that the Greek groups had sat on their rights for too long to belatedly make a successful claim for damages.

But on the second issue, could Paddletramps continue its conduct, the Greeks prevailed. While the Greek groups were not entitled to damages for the past actions of Paddletramps, the court did find that the conduct of Paddletramps violated the protected trademark rights of the fraternities and sororities. Therefore, the court issued a permanent injunction

that prohibits Paddletramps from creating or using in its advertising or sales:

- The Greek letter combinations associated with those Greek organizations that were parties to the suit;
- The full names or nicknames associated with those Greek organizations; and
- Any crest, coat of arms, seal, flag, badge, emblem or slogan identifiable with any of the Greek organizations that are parties to the suit, including wood carved crests that had been previously produced and marketed by Paddletramps.

Paddletramps may continue to utilize licensed crest decals of the Greek organizations, may use the full name of Greek organizations to identify those decals to customer and may use wooden crest backing in the outline of the genuine licensed crest decal.

Several lessons can be learned from this litigation. First and most importantly, when trademark infringements are identified, they should be acted on with deliberate speed. The infringer should be notified to cease and desist. If the action continues, litigation may be necessary.

Trademarks are of substantial value. Colleges earn millions of dollars a year licensing their marks. Fraternities and sororities have the opportunity to do the same, but if they fail to enforce those rights, that opportunity can be jeopardized.

- Timothy M. Burke

¹ *Thomas Kenneth Abraham d/b/a Paddletramps Mfg. Co. v. Alpha Chi Omega, et al.*, United States District Court, Northern District of Texas, Dallas Division, Case No. 3:08-CV-570-F (Order Granting Various Motions for Judgment on the Verdict and Injunctive Relief, May 7, 2012, advisory clarifying the scope of injunction, June 4, 2012).

IRS Written Determination 201219026 The Charitable House Corporation Remains Elusive

We are often asked why charities cannot (or should not) own chapter houses. The question usually dovetails with an emphasized assertion “other groups are doing it and nothing has happened to them.” The primary benefit, of course, of being a charity is that contributions are deductible by the contributors for Federal income tax purposes. The IRS has recently provided an interesting example of why we counsel charities against owning chapter houses.

Our advice is, and continues to be, that fraternity housing is simply not a charitable activity. As to the often heard assertion that “other groups are doing it and nothing has happened to them,” we believe that is a circumstance of luck and timing.

On May 11, 2012, the IRS released Written Determination 201219026 revoking the existing tax exempt status of a nonprofit corporation that owned and operated a chapter house. In this case, the “house corporation” had been granted, and for many years had operated under, an IRS determination letter recognizing it as a tax exempt charity. In its application for exemption, the house corporation fully described the housing activities in which it would engage. So, even though the house corporation was doing exactly what it told the IRS it would be doing in its approved application for exemption, the examinations division of IRS nevertheless revoked its charity status.

Since as early as 1964, in Revenue Ruling 64-118, the IRS has taken the position that owning and operating a chapter house is not a charitable activity. As a result, house corporations are normally recognized as being exempt under either Section 501(c)(7) (as a social club) or Section 501(c)(2) (as a title holding corporation). According to the revocation determination, the unit that issued the letter recognizing the house corporation as a charity simply failed to grasp the point that house corporations could not be charities.

For its part, the unit issuing the letter recognizing the house corporation as a charity was provided some compelling

facts. For example, when seeking its charity status the house corporation committed to forbidding the use of the chapter house for social and fraternal purposes. The implication, of course, is that the house would not be a typical fraternity house but would be more akin to an honors dorm.

Additionally, the house corporation (and all other privately owned chapter house corporations) was subject to a “Standard Policy for Non-University owned Fraternity Chapter Houses.” This policy required the non-university owned chapter houses be comparable to university owned student housing in terms of safety, security, maintenance and technology. The university would not permit students to reside in any chapter house that failed the comparability standard.

In its defense, the house corporation argued that since the university effectively had a veto right over whether the chapter house could be used as such, then the house corporation was subordinate to the university and was essentially an instrument of the university in fulfilling the university’s educational mission. In support of its argument, the house corporation pointed to IRS authority for the idea that if a university is unable to provide housing (e.g., financially unable to do so), then a privately established charity can do so in some circumstances. While the house corporation’s argument in this regard is compelling, the IRS was unmoved.

Despite the compelling arguments advanced by the house corporation, the IRS’ decision to revoke is not surprising and but rather is in keeping with its prior positions. What is surprising is that the IRS granted charity status in the first instance. Again, our advice is, and continues to be, that fraternity housing is simply not a charitable activity. As to the often heard assertion that “other groups are doing it and nothing has happened to them,” we believe that is a circumstance of luck and timing. In this case, the IRS even first approved the house corporation activity as charitable. However, that initial approval did not stop the IRS from revoking the exemption when an enforcement agent reviewed the file. Eventually, these things have a way of sorting themselves out.

• John E. Christopher

\$7.2 Million Verdict Obtained Against Fraternity

In May, a jury in the Putnam County Circuit Court in Tennessee delivered a total verdict of \$8,000,000 in favor of a student who was injured at a recruitment event at the Phi Gamma Delta’s Tennessee Tech chapter house. The jury held the plaintiff 10 percent at fault and the fraternity 90 percent at fault, reducing the award to \$7.2 million.

Samuel Dowlen was injured in August of 2009 when he attempted to use a giant slip and slide. According to published reports, the slip and slide ran down an embankment next to a parking lot. At the bottom of the embankment, a wooden ramp was set up, leading to an inflatable pool.

Mr. Dowlen slid down the slide, went up the ramp and landed in the pool. According to his lawsuit, upon land-

ing, Mr. Dowlen was not able to move from his neck down. He ultimately underwent a spinal fusion surgery and months in physical rehabilitation. He has since regained some mobility and has reenrolled at Tennessee Tech.

Mr. Dowlen sued the local chapter, the Phi Gamma Delta national organization, and the chapter housing corporation. While the housing corporation was not found liable and the national fraternity was not found directly liable, the local chapter was found liable and the local chapter was found to be the national fraternity's agent.

The factual situation in this case resembles the Matt Fritzie case. (See the January 2011 issue of *Fraternal Law*). In that case, Mr. Fritzie was injured when he dove into

a temporary swimming pool at the University of Kansas chapter of Phi Gamma Delta. Mr. Fritzie broke his neck and became paralyzed.

These cases should stand as a stark reminder of the danger of makeshift "fun" devices, such as pools and slip and slides. However, following the Lambda Chi Alpha case at Elon University reported in this issue, it is difficult to connect liability to the national organization for cases such as this. This is a developing issue and look for more updates on this case in future issues of *Fraternal Law*.

- Daniel J. McCarthy

ANTI-HAZING HOTLINE ADDS SPONSORS, DEDICATED WEBPAGE



The collegiate Greek Anti-Hazing Hotline, launched in 2007, now has 38 member fraternities and sororities representing more than 35% of all undergraduate Greek letter members.

The Hotline welcomed its newest member, Omega Phi Beta, the first member from the National Association of Latino Fraternal Organizations. National President Monserrat Cabral states, "Omega Phi Beta is proud to be the first NALFO group to partner with the Anti-Hazing Hotline. Through this partnership, we strengthen our commitment to combat any activity that promotes or puts at risk the physical, emotional and mental health of any individual. We strive to provide our current and prospective members with an outlet for positive self-expression and growth, as we believe that true sisterhood is nurtured in an atmosphere where social and moral responsibility is emphasized and valued."

In addition to the telephone hotline, there is a new web page with the ability to report hazing anonymously through the site. The link is <http://fraternallaw.com/contact/anti-hazing-hotline>.

All calls and online reports are sent to the Manley Burke law office in Cincinnati, Ohio. The hazing reports are then relayed immediately to the headquarters of the group allegedly involved together with a summary of the hazing law in the jurisdiction of the report. Typically, the headquarters of the fraternity or sorority will immediately call the chapter and send an officer to investigate. If the caller reports a Greek organization that is not a hotline member, a club or athletic team, the report is forwarded to the Greek organization or to the institution.

The sponsors of the National Anti-Hazing Hotline are:

Women's Groups

Alpha Chi Omega	Gamma Phi Beta
Alpha Delta Pi	Kappa Alpha Theta
Alpha Epsilon Phi	Kappa Kappa Gamma
Alpha Gamma Delta	Omega Phi Beta
Alpha Phi	Phi Mu
Alpha Sigma Tau	Pi Beta Phi
Chi Omega	Sigma Sigma Sigma
Delta Zeta	Zeta Tau Alpha

Men's Groups

Alpha Chi Rho	Phi Kappa Sigma
Alpha Sigma Phi	Phi Kappa Tau
Beta Theta Pi	Pi Kappa Phi
Delta Chi	Sigma Alpha Epsilon
Delta Sigma Phi	Sigma Pi
Delta Tau Delta	Tau Kappa Epsilon
Delta Upsilon	Sigma Pi
Kappa Alpha Order	Tau Kappa Epsilon
Lambda Chi Alpha	Theta Chi
Phi Gamma Delta	Theta Delta Chi
Pi Kappa Alpha	Theta Xi
Phi Kappa Psi	Zeta Beta Tau

For more information, contact Daniel McCarthy at Manley Burke, Phone 513-763-6442 or by email at dmccarthy@manleyburke.com.

- Daniel J. McCarthy

Chapter and Individual Member Held Not to be Named Insureds

The United States District Court for the Middle District of North Carolina recently granted summary judgment, finding that a chapter and individual members were not named insureds because of their bad behavior and failure to follow Lambda Chi Alpha's national policies.¹ The original case stemmed from injuries John Lee Mynhardt sustained on February 3, 2007. Mr. Mynhardt, a student at Elon University, attended a party at the house of John Cassady, who was also the Vice President of the Lambda Chi Alpha Chapter on campus. Mr. Mynhardt suffered a broken neck when several attendees attempted to forcibly remove him from the party.

He filed suit against Elon, the national fraternity, the local chapter, and several chapter members, including Mr. Cassady, alleging negligence, willful and wanton conduct, and gross negligence. Several of the members settled, the national fraternity, Elon and one member were earlier granted summary judgment.

Liberty Corporate Capital, the insurer for the national fraternity, defended the chapter pursuant to a reservation of rights. Liberty also reserved its rights with respect to Mr. Cassady, but did not defend him.

Liberty then filed a declaratory judgment action, seeking a declaration that the chapter and Mr. Cassady were

not entitled to a defense or indemnity. The District Court noted that the insurance endorsement unambiguously covered local chapters and individual members only when they follow the national organization's policies and procedures, act within the scope of their duties, and on act on behalf of the national fraternity or chapter. A chapter or member is only an "insured" if all three requirements are met.

The Court held that neither the chapter nor Mr. Cassady could show that they were acting in accordance with the national's policies. Specifically, the Court noted that the party was open to the public, used a common container (a keg of beer), did not prohibit underage drinking, and did not provide professional security or party monitors. In denying coverage, the Court stated, "This was not a party that violated fringe or minor provisions of the Fraternity's policies; in throwing an open, unsecured party with unrestricted access to alcohol in bulk, the Chapter members blatantly violated numerous policies."

• Daniel J. McCarthy

¹ *Liberty Corporate Capital, Ltd. v. Delta Pi Chapter of Lambda Chi Alpha, et al.*, United States District Court for the Middle District of North Carolina, Case No. 1:09cv765.

Fraternal Law Conference Set for November 9th and 10th in Cincinnati

Fraternal Law Partners, a division of Manley Burke, LPA, is pleased to announce the return of the Fraternal Law Conference in 2012. The Fraternal Law Conference is the leading legal education event for fraternities, sororities and their related foundations, and will touch on a number of topics related to risk management and hazing, corporate governance and tax law.

Starting this year, the Conference will become an annual event. Additionally, 2012 is the first year the Fraternal Law Conference will offer a dual-track format. One track will address the inner workings of fraternities and sororities. Topics include hazing, internal discipline and membership reviews, social media, house corporation governance, a taxation update, additional insureds, and relationships between chapters and their host institutions. The second track will be targeted specifically to the unique needs of foundations. Topics include planned giving, state registrations and improving foundation-fraternity relationships, among others.

We will also have joint sessions, including Tim Burke's always-popular Problem Solving session and roundtable discussions for both lawyers and non-lawyers. For our luncheon speaker, we are fortunate to have David A. Brennan, the dean of the University of Kentucky College of Law join us. Dean Brennan is an innovator in the field of nonprofit law and he will share his unique experience and perspective on nonprofit organizations.

Here are the essential details of the 2012 Fraternal Law Conference:

When: Friday, Nov. 9, 2012 from 8:00 a.m. to 5:00 p.m. and Saturday, Nov. 10, 2012 from 8:00 a.m. to Noon.

Where: Downtown Cincinnati, Ohio, in the Westin Hotel.

Who should attend: The president, treasurer/finance officer, executive director, director of business operations, director of chapter services, attorney/legal counsel and risk management leaders at fraternities, sororities and related foundations. Leaders of host institutions such as deans of student life, directors of Greek life or other student life officers would also benefit from the Conference.

Cost: Each registration is \$395 and includes the conference, all conference materials, breakfast on Nov. 9 and 10, lunch on Nov. 9 and a cocktail reception on Nov. 9. Travel and accommodations are separate. For the convenience of attendees, a block of rooms has been reserved at the Westin Cincinnati.

How to register: Visit <http://fraternallaw.com/fraternal-law-conference-registration/>

For more information: Visit www.FraternalLaw.com for information on speakers, topics and additional details related to the Fraternal Law Conference. Interested individuals may also contact Dan McCarthy at dan.mccarthy@fraternallaw.com or John Christopher at john.christopher@fraternallaw.com with specific questions about the Conference.

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