



## “Dear Colleague” Letter Creates Controversy

Some studies project that as many as 25% of female college students are victims of inappropriate sexual contact during their student years. Sexual assault can of course happen to a male, but the victim is far more frequently female. Recently, this troubling issue has received a tremendous amount of news coverage throughout the country. In Arizona, a new member of a women’s fraternity alleged she was raped in a fraternity house after she was slipped a date rape drug. She sued the alleged perpetrator, the fraternity chapter, and the university. The university responded in part, by telling the *victim’s* fraternity that if the university were found liable, the university would seek compensation from the women’s group. This despite the fact that the women’s fraternity was not a defendant in the lawsuit. On a North Carolina campus, a woman filed a complaint alleging that she was sexually assaulted. She courageously spoke out publicly about the incident. In response, the university charged her with violating its honor code because raising the issue publicly was “disruptive or intimidating.”

The Obama administration has increased its efforts to address sexual assault and sexual harassment on America’s college campuses. But those efforts have not been without controversy. In 2011, the Department of Education’s Office of Civil Rights (“OCR”) issued a “Dear Colleague” letter advising colleges and universities that compliance with Title IX necessitated the implementation of a “preponderance of the evidence” standard in disciplinary proceedings involving allegations of sexual assault or harassment. That standard has been described in a variety of ways. On a scale of 100% certainty, it is said to be 50% + 1. To put it another way, “preponderance of the evidence” means that it is more likely than not that the accused committed the alleged offense.

At the time of the “Dear Colleague” letter many schools were already using the “preponderance of the evidence” standard in their disciplinary proceedings. Others were using a “clear and convincing” standard, which requires a higher degree of proof but is still well short of the criminal standard of “beyond a reasonable doubt.”

When facing a college disciplinary proceeding, some students may wish that the “beyond a reasonable doubt” standard applied. However, the consequences of a college disciplinary proceeding differ greatly from the consequences of a criminal conviction. Still, some have criticized what they perceive to be a violation of the due process rights of the accused on college campuses by subjecting the accused to a lesser standard of proof, and therefore making it

easier to find the accused “guilty” and subject to discipline.

A more recent “Dear Colleague” letter has created additional controversy. On May 9, 2013 the Office of Civil Rights sent a “Dear Colleague” letter to the University of Montana. The letter, thirty-one single-spaced pages long, outlined how universities are to treat victims and the accused in sexual assault and sexual harassment matters. The greatest controversy has surrounded language that the Foundation for Individual Rights in Education (“FIRE”) argues is a violation of the First Amendment. The letter found that speech that makes a member of the opposite sex uncomfortable because of its sexual connotation could constitute sexual harassment and should be treated that way by the host school.

In response to concerns, OCR issued a follow-up letter on May 29, 2013 pointing out that, “sexual harassment is unwelcome conduct of a sexual nature but that sexual harassment is not prohibited by Title IX unless it creates a ‘hostile’ environment – that is, unless the harassment is sufficiently severe, pervasive or persistent such that it denies or limits the students’ [victims’] ability to participate in or benefit from the school’s program.” The OCR further stated that it was “important that students are not discouraged from reporting harassment because they believe it is not significant enough to constitute a hostile environment.”

The August 12, 2013 issue of the Chronicle of Higher Education carried a front-page headline story, “Quiet no longer, rape survivors put pressure on colleges.” With the Center for Disease Control reporting that 19% of undergraduate women experience attempted or completed sexual assault while in college, the headline is not surprising.

The Fraternity and Sorority Political Action Committee and the related Fraternal Government Relations Coalition are among those critical of the OCR’s standard of proof decision and the sexual harassment language. Still, the fact remains that college women, including members of women’s fraternities and sororities, are far too frequently the victims of sexual assault or harassment. Greek women, and indeed all students, are deserving of the ability to complete their college experiences without being degraded and victimized by unwelcome sexual conduct—many Greek groups already have strong policies and programs in place to prevent such conduct. But, if anything, perhaps the priority for both men’s and women’s groups should be to stand together to confront the problem even more strongly, rather than fighting with those who are attempting to do so.

• Tim Burke

## ***Kubert v. Best*; You Now Have A Duty Not To Text Message . .**

The New Jersey court of appeals just handed down a decision that significantly expands the concepts of foreseeability and duty of care. The case involved high school students and, as such, does not directly implicate Greek letter organizations. However, the decision clearly affects our members and should be duly noted, particularly by our members in the State of New Jersey.<sup>1</sup>

In essence, the New Jersey court of appeals established a new duty of care when sending a text message. If you send a text message to someone you know to be driving, and you are aware that the recipient will read the message while driving, then you, as the remote sender, have breached your duty of care to other motorists. Accordingly, you can be held liable for damages resulting from an accident arising from the negligence of the recipient in reading your text message while driving.

On September 21, 2009, David Kubert was riding his motorcycle, with his wife, Linda Kubert, riding as a passenger. As they rode around a curve, a pick-up truck driven by eighteen-year-old Kyle Best crossed the double center line, striking the Kuberts and their motorcycle. Mr. Best called 911 seeking emergency assistance at 5:49:15 pm. As a trained volunteer firefighter, Mr. Best provided emergency assistance until paramedics arrived. Notwithstanding those efforts, each of the Kuberts both lost their left leg in the accident.

The Kuberts filed an action against several parties including Mr. Best. During discovery, it became clear that Mr. Best was texting while he was driving that day, a violation of New Jersey law. He was texting with a social friend, Shannon Colonna. In fact, through phone records, the Kuberts were able to demonstrate that Colonna and Best had an ongoing text messaging conversation for several minutes prior to the accident. They were also able to prove that Colonna sent a text to Best 1 minute prior to the accident, a text to which Best responded 17 seconds prior to his 911 call. As a result of these records, the Kuberts were able to prove that Best sent this text immediately prior to the accident. Best settled out of court.

If you send a text message to someone you know to be driving, and you are aware that the recipient will read the message while driving, then you, as the remote sender, have breached your duty of care to other motorists.

However, after learning of the text messages, the Kuberts also filed suit against Colonna. The theory of liability against Colonna was that she had distracted Best by virtue of her text messaging. Because there is a duty to refrain from distracting drivers while driving, the Kuberts argued that Colonna was also responsible for their injuries. Moreover, the Kuberts argued that by sending these text messages, Colonna was electronically present in the car, thus aiding and abetting

Mr. Best's violation of the anti-texting law.

Ms. Colonna likely did not help herself in her deposition. In her deposition, Colonna acknowledged that it was her habit also to text more than 100 times per day. She said: "I'm a young teenager. That's what we do." She also testified that she generally did not pay attention to whether the recipient of her texts was driving a car at the time or not. She thought it was "weird" that plaintiffs' attorney was trying to pin her down as to whether she knew that Best was driving when she texted him.

Notwithstanding this testimony, the trial court granted summary judgment in favor of Colonna. On appeal, the court of appeals affirmed summary judgment *based on the facts* adduced in the record. Notably, the court found that Colonna *did have* a limited duty to the general public, and that if more facts were developed below, Colonna likely would have legal responsibility for the Kuberts' injuries. Specifically, the court wrote as follows:

Our conclusion that a limited duty should be imposed on the sender is supported by the "full duty analysis" described by the Supreme Court . . .

When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle. As we have stated, a passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.

When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public.

So, if the Kuberts had demonstrated that (i) Colonna knew that Best was driving when she sent the text, and (ii) that Best would immediately view the text, then she would have violated her duty to the general public to refrain from distracting a driver. In this case, however, the Kuberts had not developed facts sufficient to demonstrate the Colonna knew Best was driving. Accordingly, summary judgment was appropriate here.

We will monitor the progress of the case, particularly whether the New Jersey Supreme Court accepts further appeal, and update as events warrant. For now, we should advise our members, particularly those in New Jersey, of their new duty to refrain from texting drivers.

• Sean P. Callan

<sup>1</sup> <http://www.judiciary.state.nj.us/opinions/a1128-12.pdf>

## National Hazing Prevention Week: Know. Decide. Act.

National Hazing Prevention Week (NHPW) doesn't officially start until September 23, but organizer HazingPrevention.Org (HPO) is already out of the gate with this year's event.

The 2013 Planning & Product Guide and planning webinar, "Know. Decide. Act." have been available for free to download since March, and the 2013 Resource Guide, filled with articles and intended for use by organizations and campuses to spur discussion about hazing prevention, is due for release soon. In addition, the #40 Answers campaign on Twitter started August 14 and has already engaged hundreds of followers in the conversation. Sigma Nu Fraternity collaborates with HPO on this annual campaign.

HPO also released this year's "best-of" webinar series for NHPW in the HPO Online Store. For \$100, individuals, organizations and campuses can purchase and download four recorded webinars to present at any time during the year in

their community. The package includes "What is Hazing Anyway," "Students Leading Change," "What's the Problem," and "Knowing What To Do," the two-part series on bystander behavior.

As students return to college and university campuses throughout North America, HPO will increase promotion of NHPW, the organization's major advocacy effort designed to raise awareness about hazing and hazing prevention all year long.

To learn more about NHPW, download free materials, order the NHPW webinar series package, learn about this year's contests and awards, submit your organization or campus NHPW activities and events information and much, much more, visit [www.NationalHazingPreventionWeek.com](http://www.NationalHazingPreventionWeek.com).

- Michelle Terhune

## Chapter Suspended for Facebook Posts

Like many other fraternity and sorority chapters around the country, the Kappa Gamma Chapter of Pi Kappa Alpha at Florida International University utilized a Facebook page to facilitate member communications. The page included the fraternity mission statement: "Pi Kappa Alpha is dedicated to developing men of integrity, intellect, and high moral character and to fostering a truly lifelong fraternal experience."

However, the posts on the Facebook page by the individual members of this chapter failed to live up to the ideals of the mission statement. Instead of using the Facebook page as a vehicle for organizational and fraternal communications, the members used the page to sell drugs, to coordinate hazing of new members, and to share nude photographs.

While the Facebook page has since been deleted, members of the media obtained screenshots of the previous postings. Filled with detail, these posts describe a number of illegal activities. One post advertises the sale of marijuana cookies. Another discusses the sale of prescription narcotics from one member to another. The posts also describe hazing activities referred to as "pledgicide" and include the expression "hazing is amazing." Finally, the page contains several posts of non-consenting nude women. One of the pictures was captioned "I think she was 17 at the time of the... pics LOL."

According to an FIU spokesperson, the University acted swiftly. "Earlier this week, the University was made aware of Facebook postings which appear to be linked to the Pi Kappa Alpha Fraternity Kappa Gamma Chapter and members of the Fraternity. The University is taking this information very seriously because it suggests possible Student Code of Conduct violations. The University took prompt action and placed the Fraternity on interim suspension pending the out-

come of investigations by appropriate University departments, including the police."

The International Fraternity added that "[it] had no previous knowledge of this Facebook group and was informed of its existence on Tuesday, August 20, 2013. The International Fraternity has been assured of the Chapter's full compliance with the temporary suspension and subsequent investigation." In addition to the Chapter suspension, individual members of the Fraternity could face criminal charges as a result of their Facebook posts.

There is no question that social media sites such as Facebook, Twitter, Instagram, Flickr, YouTube, and LinkedIn can have a profound effect on fraternity and sorority chapter operations. However, this impact can be profoundly positive or profoundly negative depending on how these tools are utilized. Constant education is necessary to remind young adults that even just one unwelcomed social media post from a member of the organization can be sufficient evidence to suspend the chapter and to bring criminal charges against the individual.

For this reason, *Fraternal Law* encourages the growing trend of fraternities and sororities implementing and enforcing social media guidelines. This can be achieved in the same manner that these organizations implement and enforce other standards of conduct and risk management procedures with the chapters. This is a clear example of when an ounce of prevention is worth a pound of cure. Social media guidelines can help ensure that fraternity and sorority chapters and their members uphold the values of their national and international organizations.

- Micah Kamrass

## 2013 Fraternal Law Conference Includes National Panel

**Mark your calendars!** Fraternal Law Partners, a division of Manley Burke, LPA, is pleased to announce that the Fraternal Law Conference will be held on November 8-9, 2013. 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.

Once again, the Fraternal Law Conference will offer a dual-track format. One track will address the inner workings of fraternities and sororities, while the second will be targeted specifically to the unique needs of foundations. There will also be a number of shared sessions that will benefit all attendees.

Here are the essential details of the 2013 Fraternal Law Conference:

**When:** Friday, November 8, 2013 from 8:00 a.m. to 5:00 p.m. and Saturday, November 9, 2013 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.

**Speakers:** The 2013 Conference includes a national panel of fraternal experts discussing the most pressing and cutting edge issues in the Greek world. Speakers include Tim Burke, Sean Callan, John Christopher, and Dan McCarthy of Manley Burke and Fraternal Law Partners; Mark D. Bauer, Professor of Law, Stetson University College of Law; Dianne Bailey from Robinson, Bradshaw & Hinson in Charlotte, North Carolina; Jim Ewbank from Ewbank & Harris in Austin, Texas; Scott Himsel from Faegre Baker Daniels in Indianapolis, Indiana; Professor Laura Rothstein, from Louis D. Brandeis School of Law at the University of Louisville; Beth Stathos, General Counsel to Chi Omega; Pete Smithhisler, President and CEO of the North American Interfraternity Conference; Patrick Alderdice, the President and CEO of Pennington & Company; Douglas G. Smith, from Jackson Lewis in Pittsburgh, Pennsylvania; and Professor Gregory Parks from Wake Forest University School of Law.

**Cost:** Each registration is \$395 and includes the conference, all conference materials in electronic format, breakfast on Nov. 8 and 9, lunch on Nov. 8 and a cocktail reception on Nov. 8. Hard copies of conference materials are available for an additional \$150.00. Travel and accommodations are separate. For the convenience of attendees, a block of rooms has been reserved at the Westin Cincinnati. Group rates are available at the hotel until October 8, 2013, so please be sure to book ahead!

**How to register:** Registration is open at [www.FraternalLaw.com](http://www.FraternalLaw.com).

**For more information:** Visit [www.FraternalLaw.com](http://www.FraternalLaw.com) for information on speakers, topics and additional details related to the Fraternal Law Conference. This site will be consistently updated as new information is received, so attendees are encouraged to check the site often. You may also contact Dan McCarthy at [dan.mccarthy@fraternallaw.com](mailto:dan.mccarthy@fraternallaw.com) or John Christopher at [john.christopher@fraternallaw.com](mailto:john.christopher@fraternallaw.com).

## ***Smith v Delta Tau Delta: Fraternal Law Partners Files Amicus Brief on behalf of NPC Organizations***

Fraternal Law Partners filed an Amicus Brief with the Indiana Supreme Court on behalf of 23 women's fraternal organizations in the *Smith v. Delta Tau*

*Delta* hazing case.<sup>1</sup> The case involves a wrongful death claim against Delta Tau Delta national fraternity, among others, after the alcohol-related death of a Delta Tau Delta pledge at Wa-

Wabash College. Procedurally, the trial court granted Delta Tau Delta's motion for summary judgment that (i) Delta Tau Delta did not assume a duty of care to the plaintiff and (ii) no agency relationship existed between Delta Tau Delta and the Wabash chapter. The Indiana Court of Appeals reversed relying on evidence that Delta Tau Delta "promulgated rules and enforcement procedures focused on hazing and alcohol abuse". *Smith v. Delta Tau Delta, et al.*, 988 N.E.2d at 337. For more information regarding the Court of Appeals' decision please see the article titled "Smith v. Delta Tau Delta" in the May 2013 issue of Fraternal Law.

Delta Tau Delta is now seeking transfer of the case to the Indiana Supreme Court. Fraternal Law Partners filed the Amicus Brief in support of Delta Tau Delta's Petition for Transfer. As set forth in detail in the brief, the decision of the Court of Appeals breaks sharply from longstanding Indiana precedents defining the limits of assumption of duty and agency liability. At issue is the circumstance in which an organization may be held liable for the wrongful, tortious and criminal acts of its adult members. Until now, no Indiana court has ever held that by simply implementing rules, and enforcing those rules, that an organization somehow assumed liability for the actions of its members who violated those same rules. In

fact, another panel of the Court of Appeals recently disavowed such a rule of law, writing that "we recognize the untenable situation that can be created when colleges and fraternities attempt to deal with potentially dangerous activities by promulgating rules, only to have the enactment and enforcement of those rules thrown back at them as an assumption of duty." *Yost v. Wabash College, et al.*, 976 N.E.2d 724, 745 (Ind.Ct.App. 2013) (vacated).

In filing its Amicus Brief, the amici urge the Indiana Supreme Court to embrace longstanding Indiana precedent by reversing the decision of the Court of Appeals, while affirming that social clubs and other organizations may properly implement and enforce rules governing the behavior of their members.

We will continue to monitor the proceedings in this case, as the outcome could significantly impact the risk-management policies for national Greek organizations.

• Sean P. Callan

<sup>1</sup> In addition to the NPC brief, both the National Interfraternity Conference and Theta Chi Fraternity filed Amicus Briefs as well.

## Paddletramps Appeals to Supreme Court

The Paddletramps litigation (Fraternal Law – 9/12, 1/13 and 3/13), which upheld the ability of fraternities and sororities to enforce their trademark rights against vendors who decline to enter into licensing agreements, may not be over just yet. The injunction granted by the trial court was upheld by the United States Court of Appeals for the Fifth Circuit, but Paddletramps, which for years sold products bearing the trademarked images of numerous fraternities and sororities, has now appealed to the United States Supreme Court. Paddletramps argues that there is a conflict between the various federal courts of appeals in the United States over the issues that were involved in the Paddletramps litigation. Whether or not the court will buy that argument and accept the case for review is not likely to be known until later this fall. It is a very rare case which the United States Supreme Court agrees to hear. Even if the court should agree to consider the case, it doesn't necessarily mean that it is likely to overturn the decisions below. But until the court makes its determinations, the Paddletramps decision is not quite final.

• Tim Burke

## Judge Disregards Jury's Findings and Enters Judgment Against Kappa Alpha Order

As reported in the May issue of *Fraternal Law*, Kappa Alpha Order and other plaintiffs, including the Alumni Receivership Committee for the Omicron Chapter of Kappa Alpha Order, sued UT Texas Omicron, Inc., and other defendants, after the KAO's former chapter at the University of Texas attempted to break away from the national organization and form a local independent fraternity chapter. A jury heard the case from April 29 through May 10, 2013.

Prior to the jury trial, the judge had granted the defendants' partial motion for summary judgment, ordering that the plaintiffs take nothing on claims for recovery of damages

for alleged breach of contract and tortious interference. Ultimately, eight separate questions were presented to the jury. The jury found in favor of plaintiffs and against defendants on all eight questions.

But after post-verdict motions, the judge disregarded the jury's findings on two questions. The judge held that "a party cannot legally convert its own property or unjustly enrich itself." Accordingly, the court ordered that Plaintiffs "take nothing on all claims for recovery of damages against Defendants." The court further held that no enforceable trust existed to the chapter house property or the personal property

contained therein, that all such personal property is owned by UT Texas Omicron, Inc., and that the plaintiffs “have no right, title or interest in or to the real property at issue, which such real property is owned by UT Texas Omicron Educational Corporation.”

Texas Omicron is currently a recognized student organization at the University of Texas. On its webpage, Sammy Roy, the chapter’s president, issued the following statement:

The legal conflict between Texas Omicron and the national office of Kappa Alpha has ended—with very favorable results for Texas Omicron. Most importantly, the Court ruled that our alumni housing corporation is the undisputed owner of our House at

2515 Leon. On Sunday, July 28<sup>th</sup>, the housing corporation held a meeting of Alumni, in which almost 900 of our alumni voted. An overwhelming 90% of our alumni voted to continue supporting Texas Omicron, making our future secure.... Our chapter and alumni worked tirelessly and we have prevailed. Any legal uncertainty has been laid to rest.

This case provides further evidence of the legal troubles that can arise when a chapter, its alumni members, and its house corporation attempt to break away from a national organization. The legal fight over chapter property, both real and personal, can be very expensive and uncertain.

• Daniel J. McCarthy

## Anti-Hazing Hotline Returns for its Sixth Year



The collegiate Greek Anti-Hazing Hotline, launched in 2007, now has 39 national fraternity and sorority sponsors. The Hotline has proven a popular and effective hazing deterrent, as it provides an anonymous means for victims of hazing (or their friends, roommates, or family members) to report hazing.

The vast majority of the reports to the Hotline come through the toll-free phone number, 1-888-NOT-HAZE, but we are receiving more and more reports through the anonymous electronic option available at: <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. It is important to remember that Manley Burke is not responsible for the investigation or follow-up to the reports. It is strictly the responsibility of the national group involved in the alleged hazing to conduct its own thorough investigation.

The sponsors of the National Anti-Hazing Hotline are:

**Women’s Groups:** Alpha Chi Omega, Alpha Delta Pi, Alpha Epsilon Phi, Alpha Gamma Delta, Alpha Phi, Alpha Sigma Tau, Chi Omega, Delta Zeta, Gamma Phi Beta, Kappa Alpha Theta, Kappa Delta, Kappa Kappa Gamma, Omega Phi Beta, Phi Mu, Pi Beta Phi, Sigma Sigma Sigma, and Zeta Tau Alpha.

**Men’s Groups:** Alpha Chi Rho, Alpha Sigma Phi, Beta Theta Pi, Delta Chi, Delta Sigma Phi, Delta Tau Delta, Delta Upsilon, Kappa Alpha Order, Lambda Chi Alpha, Phi Gamma Delta, Phi Kappa Psi, Phi Kappa Sigma, Phi Kappa Tau, Pi Kappa Alpha, Pi Kappa Phi, Sigma Alpha Epsilon, Sigma Pi, Tau Kappa Epsilon, Theta Chi, and Theta Delta Chi.

For more information, contact Daniel McCarthy at Manley Burke, Phone 513-763-6442 or by email at [dmccarthy@manleyburke.com](mailto:dmccarthy@manleyburke.com).

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