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Texas Campus Carry and Greek Organizations

On August 1, 2016, every public university in the State of Texas will be required to allow persons who hold a concealed handgun license (CHL) to carry a handgun both on the grounds and in their buildings, subject to "reasonable rules and regulations." Senate Bill 11 was passed by the Texas Legislature despite near universal opposition by leadership of major schools, both public and private, including UT Chancellor William McRaven, former head of Joint Special Operations Command. Nationwide, all 50 states have CHL provisions; 19 ban concealed weapons on college campuses; 23 leave the decision to ban or allow to the college; 8 states allow campus carry (Texas, Colorado, Idaho, Kansas, Mississippi, Oregon, Utah and Wisconsin). Long guns (rifles and shotguns) have always been allowed in Texas.

SB 11 allows private schools to opt out, and 25 out of 38 (13 undecided) have opted out. Each public university system has created a Task Force to develop a Campus Carry Policy for the grounds and buildings. Already, the prophesied backlash is occurring from faculty, and UT has lost several distinguished scholars, teachers and Deans who have announced their departure due to the Campus Carry Act. Texas also passed an "Open Carry Act," but it expressly excluded institutions of higher learning, so there is no "Open Campus Carry" - yet.

So, how does the Campus Carry Act impact fraternities and sororities at public schools? First of all, if your group has a house that is not on university property and is held by a house corporation (not university-owned), Campus Carry does not apply. Texas Penal Code 30.06 (appropriately named for a popular rifle bore) and 30.07 allow private businesses and residences to ban concealed handguns and open carry weapons from their premises, but only if approved notice/signage is posted at all entrances. Failure to strictly comply with those posting provisions means you cannot enforce the trespass laws, so a cottage industry of sign-makers has grown up to ensure compliance (English and Spanish). I strongly recommend you request all House Corporations in concealed weapons states to post these notices.

For those groups which either have houses or meeting rooms on public campuses, you need to obtain a copy of the Task Force policies adopted by each university. So far, policies have been adopted by the University of Texas system, University North Texas system, and the Texas State University system; the University of Houston system has issued a draft policy, and Texas A&M will issue theirs by April 30, 2016.

These policies may vary slightly from system to system, but the core context is the same: universities may regulate the carrying of handguns in University housing, and weapons may not be banned from classrooms. Generally, the Texas schools are adopting policies for on-campus residence halls and University apartments that I believe will be extended to chapter houses and meeting rooms on campus: (1) concealed carry of handguns should be generally prohibited in on-campus residence halls, including chapter houses, with 2 exceptions: (a) a resident's parents with CHL should be permitted to carry while visiting their child, and (b) concealed carry will be permitted in common areas of on-campus residences, such as lounges, dining areas and study areas; (2) any resident with a CHL must store their handguns in gun safes that meet certain University-specified standards (essentially, print/palm recognition or 5-code ID metal safes). The University of North Texas will provide these safes.

If a student is a licensed holder (must be 21 and go through the State-approved course), and they want to carry a handgun on campus, it must be carried "on or about" their person at all times or secured in a locked

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More details to come.

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vehicle. "On or about" means the handgun can be carried in a backpack or handbag, but it must be within reach at all times. The handguns must be holstered, covering the trigger and trigger guard. Semiautomatic handguns must be carried without a chambered round of ammunition.

Practically speaking, most of the residents at chapter houses will be under 21 and not eligible for a CHL; thus the population in these residences should be small.

As to meeting rooms on campus – these would appear to be common areas, not residences and CHL holders will be allowed by State law to carry a concealed handgun during those chapter meetings.

The question then becomes one of membership – can and should organizations require their members to not carry weapons in on-campus (or off-campus) chapter houses and/or meeting rooms? To do so adds another layer of control by National, although you could argue to do so is within the authority of defining membership requirements. Because the population of students in Greek organizations living in chapter houses or public campuses eligible for CHL (21 years or older) and actually hold those licenses, is so small (less than 1%, according to Texas DPS and UT data), I recommend that National organizations not change their membership requirements on Campus Carry, and educate their members on the effect of the law and cross their fingers. Mixing handguns, young men and women and alcohol is rarely a great combination.

• Jim Ewbank

Attorney at Cokinos, Bosien & Young in Austin, Texas. Jim frequently represents fraternal organizations in litigation.

Federal Suit Filed Against MSU and Kappa Sigma

The Michigan State University Board of Trustees, two university officials, and Kappa Sigma Fraternity, face a federal court lawsuit.[1] Four female students from Michigan State claim the University failed to appropriately investigate and respond to complaints each of them made after being sexually assaulted on campus. One of the plaintiffs makes a specific claim against Kappa Sigma Fraternity.

The claims against the University largely revolve around lengthy delays in considering complaints of sexual assault. In the first case, the University took approximately 200 days to conduct the initial investigation; in the second case it was over eight months; in the third -- 13 months; and in the final one – 4 months.

The plaintiffs also complained that they were not advised of their rights to appeal certain decisions, and were denied accommodations or the enforcement by the University of no contact orders.

The claim against Kappa Sigma involves one of the plaintiffs who alleges she went to the Kappa Sigma Fraternity House to "hang out" with one of the members. The complaint states she was given alcoholic drinks by the member identified only as John Doe. According to the complaint:

> "At one point during the night, and the next day, [the plaintiff] could only recollect flashes of the evening. The next day, John Doe informed [plaintiff] that they had engaged in sexual intercourse, one time at the fraternity house, one time in her dormitory room at Case Hall, and one time in his dormitory hall in Case Hall."

The plaintiff promptly filed a complaint with the University. The Plaintiff claims that Kappa Sigma was negligent in failing to protect the plaintiff as "an invitee" to the Chapter House. She argues that the fraternity should have known of John Doe's "dangerous and exploitive propensities." According to her, the fraternity breeched it's duty of care "by allowing John Doe to come into contact with [plaintiff] without supervision" and "by failing to warn [plaintiff] that John Doe posed a risk of sexually assaulting female students." Nothing in the complaint explains what, if any, knowledge the fraternity had that John Doe had a history of such conduct.

The complaint details the impact the alleged assaults had on the plaintiffs -- drops in GPAs, inability to sleep, withdrawal from social activities, dropping of classes, leaving classes in tears, moving back home, missing classes, and so on.

The 26-page, 150 paragraph complaint seeks damages from all the defendants. The claims against the University and its officials are based on violations of Title IX (20 USC 1681), the Federal Civil Rights Act (42 USC 1983) and the Michigan law against sex discrimination (MCL 37.2101 and 2301). The sole claim against the fraternity is based on negligence.

The fact that claims are made in a complaint does not make them true. They need to be proven in court. But if the claims of great delays in the University's consideration of sexual assault reports are accurate, the University may be hard pressed to justify those acts.

• Timothy M. Burke

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1 *Kollaritsch, et al. v. Michigan State University Board of Trustees, et al.*, U.S. District Court, Western District of Michigan, Southern Division, Case 1:153-CV-0091.

Georgia Tech Reverses Suspension of Phi Delta Theta

Last month, the President of the Georgia Institute of Technology (Georgia Tech) lifted a "suspension held in abeyance until August 9, 2016" that had been imposed on the Phi Delta Theta Chapter on campus, after an appeal reviewed by the retired Chief Justice of the Georgia Supreme Court.

The unusual appeal grew out of two racial incidents that were alleged to have occurred in the summer of 2015. The first, in July, involved a claim that members of the Phi Delta Theta Chapter refused to allow admission to the Chapter House to a group of 20-30 students who were a part of Georgia Tech's Summer Challenge Program. It was alleged that multiple individuals at the house yelled racial slurs at the Challenge Program students. In a second incident, in August, a University employee alleged that three individuals were sticking their heads out of a chapter house window yelling racial invectives at her as she got into her car and drove away.

The University's Office of Student Integrity ("OSI") brought charges against the Chapter; never against any individuals.

The Chapter vigorously denied the allegation in a hearing in front of the University's Undergraduate Judiciary Cabinet (UJC). The UJC held that both incidents had occurred but that the Phi Delta leadership was not complicit in the events. That last determination proved to be crucial in the appeal.

Following the hearing, the University formally notified the Chapter of its responsibility only for the second incident. Curiously, it was that incident for which the chapter offered the strongest defense, producing, among other things, photos of the windows from which the complainant said the yelling occurred. In one case, there was an air-conditioner in the window, so it couldn't be opened. In another case, there was a bunk bed against the window, so people couldn't stick their heads out of the window.

The Chapter's appeal of the determination was based on numerous factors. The Chapter argued that the hearing was not conducted fairly or in conformity with the University's own published procedures; insufficient evidence to support the decision; new information that had not previously been available and the sanctions were not appropriate. Worth particular consideration is how the former Chief Justice reviewed the "fairness and conformity of the hearing."

The Chapter underscored, with significant support from a report by the Working Group commissioned by the University President that was given the responsibility to review the processes for investigating, charging and resolving violations, that the University official who filed the charges and provided a summary of his investigation did so without ever speaking with Phi Delta Theta. The President's "Working Group" noted that the "pre-charge investigation was one-sided" and "based only on one side of the story," and yet that investigation was submitted as evidence in the hearing, compounding problems by the fact that it contained "information from undisclosed and unidentified witnesses whom the fraternity was unable to cross-examine."

In addition, the Chapter established that it did not receive notice of the hearing five business days in advance of the hearing as the University code required. Nor was the Chapter provided with the identity of all witnesses who would testify against the Fraternity in advance, as also was required by the Code.

The former Chief Justice's report agrees that there were problems with the proceedings. The report states:

> "We agree with the working group that where a pre-charge investigation is conducted, OSI should 'talk with all parties and even-handedly consider evidence submitted by all parties' prior to making a determination as to whether to bring charges. We also concur with the working group that 'pre-charge investigation reports should not be used as evidence in student panel hearings where facts are in dispute'."

The Chief Justice's Report also agrees with the argument made by the Chapter that the two charges should not have been aggregated and brought together before the panel because doing so "may 'alter the perception of the fact-finder'" and "increase the likelihood of a guilty finding."

The Report also acknowledges that procedural safeguards provided by the University's regulations concerning pre-hearing notice, exhibit submission, witness testimony and deliberations "were not adhered to precisely."

In spite of all those problems with the process, the Report concludes with regard to the procedural issues that "we do not believe that Phi Delta Theta was deprived of due process in this matter." The justification for reaching that conclusion, in spite of all of the problems with the process, is that the Chief Justices observes "that due process rights in higher education proceedings are not identical to those in a court of law." That is certainly true, yet as we've reported in previously in *Fraternal Law*, when due process rights are violated by failing to conduct a fair hearing or allowing the opportunity to cross-examine witnesses, courts will overturn a university's decision.

The Chapter also argued the insufficiency of evidence. Some of the evidence presented by the Chapter

with regard to the second incident, the allegation that three people stuck their heads out of a window in the house and yelled racial epithets, was impressive. Even the Justice's Report notes that "It is true that the volume of the evidence presented by Phi Delta Theta was greater than that offered by complainant."

The report accurately describes the role of the fact finder in a situation in which there is a conflict of evidence. While in a criminal proceeding, the standard of proof is, beyond a reasonable doubt, in the university setting, the typical standard of proof is referred to as preponderance of the evidence. The Chief Justice's Report describes it this way:

> "Under a preponderance of the evidence standard, all that is required is that the panel find that 'it is more likely than not' that the fraternity was responsible. In a 'he said-she said' situation such as this, finding one party to be more credible than the other satisfies this standard...."

Even though the appellant review did not overturn the finding that the second incident had occurred, the only incident for which the Chapter had been held responsible, it did conclude that the Chapter was not responsible. Georgia Tech's Code specifically provides that a student organizations may be held responsible only "when violations of the Code by those associated with the organization, have received the consent or encouragement of the organization, or of the organization's leaders or officers." As the appellate Report stated, "that is to say, there must be some evidence that the fraternity itself was culpable, not just individual members." The hearing by the UJC panel had specifically concluded that "Phi Delta Theta leadership was not complicit" and "was unaware of the events in question." The UJC panel held "that it 'did not find substantial evidence that the leadership of Phi Delta Theta condoned, encouraged or whitewashed a culture of exclusion."

The acts which the panel had concluded had in fact occurred were described by the panel as "undertaken by individuals 'under their own will'." As a result, the Report concludes that "we find that based on the evidence in the record, there is no sufficient evidence to find Phi Delta Theta responsible as an organization." The appellate review recommended that the original determination by the UJC panel be reversed and the sanctions be lifted.

On February 24, 2016, G.P. "Bud" Peterson, the President of Georgia Tech, issued a letter vacating effective immediately the sanctions against Phi Delta Theta. In many ways, this was a curious proceeding. While the failure to comply with the University's own published procedures and the failure to provide minimal due process rights such as the right to confront and cross-examine witnesses, might have been viewed far more negatively by a Court than the University's appellate review viewed it, given the ultimate decision which lifted the sanctions, there will be no court review of this determination.

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Equally curious is the fact that the 30-page report and recommendation signed by retired Chief Justice Leah Ward Sears, authored with the assistance of her appellate team, including three other lawyers from the Atlanta law firm of Schiff Hardin, LLP, went out of its way to include in its report a lengthy footnote detailing allegations of other racially-motivated incidents alleged to have involved Phi Delta Theta at other universities, which began by noting that these incidents were "obviously not a factor in our determination." If so, why include them at all? In spite of that, both the Report and its two-page summary conclude with a recognition of both the importance and responsibility of fraternities:

> "We believe it is crucial to call attention to the importance of fraternities policing the behavior of its members. Fraternity men have made up eighty-five percent (85%) of U.S. Supreme Court Justices since 1910; sixty-three percent (63%) of all U.S. Presidential Cabinet members since 1900, and, historically, seventy-six percent (76%) of U.S. Senators and eighty-five percent (85%) of Fortune 500 executives. And there is no indication that this trend will change anytime soon. With this great power comes great responsibility: To ensure that all brothers are good and fair people, willing to go beyond that which is required of them, desirous of treating others the way they want to be treated, and willing to learn from their mistakes."

This decision is particularly valuable in its recognition that even if there were three members of the chapter whose conduct was improper - something very much in dispute-it does not make the chapter responsible. Unfortunately too many other schools would rather blame and punish an entire chapter rather than identify and punish those individuals who actually engaged in improper conduct.

- Timothy M. Burke

Kappa Delta Rho—Penn State University Litigation Update

As reported in the June 15th issue of *Fraternal Law*, a lawsuit was filed in Philadelphia last year against Penn State University, the Kappa Delta Rho Chapter there, the Penn State Interfraternity Council, and the Campus Panhellenic Association. The suit grew out of reports that members of the fraternity were alleged to have shared nude photos of unsuspecting and un-consenting women on a secret Facebook page. The suit wasn't brought by the women whose photos were allegedly shared, but instead by a former member of the chapter who claims to be a whistleblower who was badly hazed. The suit alleges that the University did not appropriately responded to his complaints.

In late January, Judge Arnold L. New of the Philadelphia Court of Common Pleas granted the motion by Penn State requiring the case to be transferred.

Both the fraternity and Penn State argued that the case did not belong in Philadelphia. The plaintiff did not live there. No witnesses were there. None of the actions complained of in the complaint took place in Philadelphia. Penn State's main campus, where the events occurred, was located some 190 miles away. The court ultimately agreed.

The Court gave the plaintiff the option of refiling the case in either Centre County, where Penn State is located, or Dauphin County, where the state capital Harrisburg is located. The plaintiff's attorney, whose offices are in Philadelphia, has opted to proceed in Dauphin County and has posted on his website the statement "We are confident that the story Mr. Vivenzio will tell about the outrageous conduct inside a Penn State fraternity, with hazing and violence and sexual misconduct, will be just as compelling in Harrisburg as it would have been in Philadelphia."

That remains to be seen.

• Timothy M. Burke

Federal Court: George Mason University Violated Accused Student's Due Process and Free Speech Rights

A federal district court has ruled that George Mason University violated the due process and free speech rights of a male student accused of sexual assault.[1] The plaintiff, John Doe, had been expelled from the university after being found responsible for violating GMU Student Code of Conduct provisions related to sexual assault and threatening communications.

Shortly after enrolling in the university in the fall of 2012, Doe began a romantic relationship with a female student from a different university, Jane Roe. The relationship included sexual practices known collectively as "BDSM."[2] Their routine involved the use of an agreed upon "safe word" to indicate that sexual activity should stop, rather than simply saying "no" or "stop." The two would engage in these practices in Doe's dorm room. On October 27, 2013, Doe and Roe were engaged in sexual activity in his dorm when at one point Roe pushed Doe away, but he continued the sexual activity. At another point, he asked her if she wished to continue, and she responded, "I don't know." Since she did not use the agreed upon safe word, Doe continued with the activity.

The Court found that GMU deprived Doe of a constitutionally protected liberty interest without adequate process.

A few months later, the two ended their relationship. Following their breakup, Doe occasionally attempted to communicate with Roe, including one attempt where he threatened to shoot himself if she did not respond. Roe eventually reported incidents of harassment and allegations of sexual abuse to GMU, including incidents apart from the October 27 incident.

Furthermore, the Court found that Doe was not given a meaningful opportunity to be heard during the appeal because the administrator handling the appeal admitted that he "had prejudged the case and decided to find [Doe] responsible" for sexual assault before Doe had even presented his defense.

Charges under GMU's Student Code of Conduct were eventually filed against Doe. He was found not responsible, but Roe appealed this decision. The university reversed course and found Doe responsible for sexual misconduct and threatening communications, expelling him from the university. Doe filed claims against the university alleging violations of his rights to due process, free speech, and sexual liberty.

The Court found that GMU deprived Doe of a constitutionally protected liberty interest without adequate process. It first found that GMU did not provide Doe with adequate notice of the charges against him. GMU's communications with Doe identified the October 27, 2013 incident as the basis for the charges, yet GMU

admitted that Doe was expelled for sexual misconduct occurring on other dates as well. Noting that due process requires a public university student to have notice of the "specific" charges against him, the Court found that GMU had not given Doe proper notice that events other than the October 27 incident were at issue.

The Court noted that while "it may well be that plaintiff deserves to be expelled . . . the Constitution requires that if behavior is to be sanctioned, then the state must ensure the soundness of the decision it reaches as the situation requires."

The Court also found it problematic that university administrators had several off-the-record and *ex parte* meetings with Roe during the appeals process, citing Fourth Circuit law requiring that the accused be given an oral or written report on the facts to which a witness testifies if the accused is not present for the testimony. Furthermore, the Court found that Doe was not given a meaningful opportunity to be heard during the appeal because the administrator handling the appeal admitted that he "had prejudged the case and decided to find [Doe] responsible" for sexual assault before Doe had even presented his defense. The Court also noted that GMU deviated from its own policies and procedures in adjudicating Doe's case.

The Court stressed the "narrowness" of its conclusion, stating that it was "simply that due process is violated where a state-run university (i) fails to provide notice of the full scope of the factual allegations in issue in a disciplinary proceeding, (ii) deviates from its own procedures in permitting an appeal of a finding of no responsibility, (iii) conducts a *de novo* administrative review of the charges without affording an adequate opportunity to mount an effective defense, including by holding off-the-record and *ex parte* meetings with the accuser, and (iv) fails to provide a basis for its decision such that meaningful review can occur." The Court did not hold that any *specific* actions were constitutionally required. The Court noted that while "it may well be that plaintiff deserves to be expelled . . . the Constitution requires that if behavior is to be sanctioned, then the state must ensure the soundness of the decision it reaches as the situation requires."

The Court then addressed Doe's free speech claim, which centered on GMU sanctioning Doe for threatening to kill himself if Roe did not respond to his text messages. The Court took issue with the broadness of the GMU code provision at issue, which prohibits "communicating . . . either directly or indirectly . . . by electronic or written communication in a manner likely to cause injury, distress or emotional or physical discomfort." The Court found that it was improper to punish a student for speech because of its intended emotive effect on the recipient. The Court rejected Doe's claim that GMU violated his sexual liberty, finding that Doe had no judicially enforceable fundamental liberty interest to engage in BDSM activity.

The Court ordered that Doe be reinstated as a student in good standing at GMU, but ordered further briefing on whether GMU should be allowed to pursue a new round of disciplinary hearings against Doe, and whether there should be any restrictions on how such hearings should be carried out.

• Colin P. Pool

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1 *Doe v. The Rector and Visitors of George Mason University*, No. 1:15-cv-209 (E.D. Va. Feb. 25, 2016).

2 An acronym for "bondage, discipline, dominance, submission, sadism, and masochism."

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