



# FRATERNAL LAW™

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## Memo to Board Members: There are times when we must close—not continue with “conditions”—chapters

**F**iduciary duty: *The duty owed to a non-profit association, by its directors, to exercise reasonable care, prudence, good faith and loyalty to the best interests of the association.*

Black's Law Dictionary provides an additional definition to “Fiduciary” as in, “...trust...confidence...scrupulous good faith and candor”

We continue to hear about members of fraternal boards of directors—certainly not all or even a majority of members — who consistently oppose any decision to revoke the charter of an active chapter. Even when the facts regarding chapter member behavior and violations of policies are aggravated, these individuals will oppose the closing of a chapter. The reasons are neither new nor unique and usually include:

*“I was elected to the board to grow the fraternity/to increase our presence/improve our numbers”*

*“Our job is to open chapters, not to close them”*

*“There are some good members in that chapter! We just have to find them!”*

*“We're better off with this chapter active than inactive”*

*“The alumni will (a) revolt (b) stop donating (c) come together and help the chapter”*

*“Give them another chance”*

*“I will go there personally and talk with them”*

Board members serve in a fiduciary capacity. Great trust and confidence are placed in our volunteer leaders, who are most often elected at conventions, to lead our organizations guided by reasonable care, good faith and loyalty to the association.

Translation: There are times in every national men's or women's fraternity or sorority when a chapter must be closed. Usually, but not always, it is because of consistent violations of policy and procedure. Sometimes, it is because the chapter members have simply

surrendered to the forces of reality—our undergraduates are not enjoying their experience and they know that it isn't going to change. Sometimes, it is because of a one-time tsunami-level situation—a hazing death, for example—that calls for revocation of the charter. And on occasion, the undergraduate members themselves may candidly acknowledge that it is time to close.

Blind loyalty to the concept that a board of directors must stand by a group of undergraduates until all options have been exhausted and all alternatives have been tried does not meet the fiduciary duty test—prudence, good faith and loyalty to the best interests of the association.

A saying that has been employed by attorneys since judges and juries became triers of fact is, “When the facts are against you, argue the law. When the law is against you, argue the facts”

In cases involving the revocation of a charter, the facts are usually uncontested and abundant. Staff members and/or volunteers have provided ample information that will serve as a basis for the decision. No one has to remind the Chief Staff Officer that closing a chapter is serious business. She or he has compiled the information and prepared a recommendation—the facts.

But, the “law” in these cases is established by the members of the board of directors. And the authority of the board of directors to grant a charter carries with it the responsibility to determine when a charter must be revoked. The bylaws may address negative behavior in general terms, but it is the responsibility of the board to define those words and terms, and to then exercise its discretion when needed. That requires the very elements that define fiduciary duty: good faith, loyalty to the association, reasonable care...and courage.

In reality, boards of directors don't make the decision to revoke a charter. It is the undergraduate members of a chapter who make that decision. The board simply confirms the choice of the undergraduates.

While arguably no one enjoys preparing a recommendation for or deciding to close a chapter, it is an important aspect of the fiduciary duty of being a national officer. As one volunteer stated, “You have to be

a 360 degree national officer—not just a 180.” Translation: There will always be tough choices along with the easy and positive decisions. The litmus test for a CSO of a fraternal organization may well be, “Will I sleep more soundly tonight knowing that this chapter is inactive?” Sometimes, the answer is “Yes.”

- Dave Westol

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## Student Death Could Lead to Criminal Charges, Civil Suit, and Revised Laws

New York lawmakers are taking steps to strengthen the state’s anti-hazing laws after the death of a Baruch College fraternity member.

Chun “Michael” Deng died after sustaining a brain injury during a hazing ritual on a Pi Delta Psi trip to Pennsylvania. Deng was injured while participating in an initiation ritual with other pledges at a home in Tunkhannock Township, Pennsylvania. News reports have called the initiation the “glass ceiling,” a challenge in which pledges are blindfolded, required to wear backpacks weighted with 20-pounds of sand, and must try to reach a goal while other fraternity members attempt to prevent them. During the challenge Deng was knocked unconscious.

According to court papers, Pi Delta Psi members did not immediately dial 911, and instead Googled his symptoms, waiting an hour before they drove him to the local hospital. Police reports described the fraternity members as initially “evasive” with investigators. Police further allege Deng’s “big brother” called from the hospital to members of Pi Delta Psi still at the house, telling them to get rid of anything that would identify them as fraternity members. Police ultimately seized a heap of fraternity items, along with suspected marijuana, hallucinogenic mushrooms and paddles at the house.

The Luzerne County Coroner’s Office has ruled Deng’s death a homicide, meaning that the fraternity members involved may face serious charges. The Monroe County district attorney has indicated that he intends to file criminal charges.

Baruch College has responded by permanently banning the fraternity. A press release by Baruch College claimed the retreat was unsanctioned and violated the College’s anti-hazing rules along with the anti-hazing agreement signed by officers of Pi Delta Psi. Pi Delta Psi’s national organization also said the gathering was unsanctioned and in violation of its policies.

Pi Delta Psi, which described itself as an Asian cultural organization, recognized four pillars: Academic Achievement, Cultural Awareness, Righteousness, and Friendship/Loyalty.

New York assemblyman David Weprin has announced a bill dubbed “Michael’s Law” in memory of

Michael Deng. It aims to expand current anti-hazing statutes.

Hazing is already illegal in New York. Currently, a person is guilty of hazing in the first degree when “...in the course of another person’s initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.” N.Y. Penal Law §120.16

Weprin’s bill would expand NY’s current anti-hazing statute, which bans activities that can harm the body, to prohibit all “physical conduct and physical activities required from fraternities during the pledging ceremonies.”

While traditional civil actions may be available, it does not appear the expanded anti-hazing law would provide any new civil remedies. Some states, including Ohio, have adopted laws that specifically create a civil action for a person subjected to hazing.

The lawyer for Deng’s family has stated that there will be civil litigation directed at those responsible for Deng’s death.

- Danny Bradford

### Anti-Hazing Hotline Welcoming New Sponsors

The National Hazing Hotline (1-888-NOT-HAZE), which is monitored by attorneys with Fraternal Law Partners and Manley Burke, has recently welcomed several new sponsors, including Delta Delta Delta and Alpha Phi Alpha. The Hotline is now sponsored by 42 national Greek organizations.

For calendar year 2013, the Hotline received 161 total calls and 38 on-line submissions through the application available at <http://fraternallaw.com/contact/anti-hazing-hotline/>.

- Daniel J. McCarthy

## NPC Chair: “Let Our Voices Be Heard”

Far too often the important roles that women’s fraternities and sororities have played in securing and protecting the rights of women are forgotten or overlooked. In recognition of the fact that March is Women’s History Month, Jean Mrasek, the Chairman of the National Panhellenic Conference sent the following Chairman’s Message out entitled “Let Our Voices Be Heard.” It serves as a great reminder of the historic role that women’s fraternities and sororities have played, frequently paired with suffragists. In doing so, its recitation of history supports the legal arguments that women’s fraternities and sororities are expressive associations and also provides support for the legal argument that there is an important value to maintaining a single sex status of women’s fraternal organizations, and for that matter, men’s groups as well.

### LET OUR VOICES BE HEARD

“We shall someday be heeded, and ... everybody will think it was always so, just exactly as many young people think that all the privileges, all the freedom and the enjoyments which woman now possesses always were hers. They have no idea of how every single inch of ground that she stands upon today has been gained by the hard work of some little handful of women of the past.” -- Susan B. Anthony

Susan B. Anthony and Elizabeth Cady Stanton worked together for more than half a century to achieve basic civil rights for women. Upon hearing that her colleague passed away, Anthony wrote that it seemed impossible Stanton’s voice was hushed – the voice that she had known and trusted to help guide her own stance on issues.

The month of March is dedicated to women’s history. This month, let us pay tribute to those who came before us and worked for the rights and privileges that we enjoy today.

- We salute suffragists, such as Anthony and Stanton, who worked tirelessly to achieve voting rights for women.
- We recognize founders of our organizations who stepped up to establish women’s fraternities and sororities at universities during a time when very few women attended college and engaged in academic pursuits. Their courage amid adversity still inspires us today.
- We honor our early leaders who navigated the way to expand the reach of the sorority

movement by chartering new chapters on campuses from coast to coast. Their footsteps paved the way for generations to follow.

- We applaud strong female leaders – in business, education, medicine, civic affairs, the armed forces and cultural arts – who model the way and continue pressing forward. Their accomplishments raise us higher.

The National Panhellenic Conference (NPC) proudly partnered with the recent Take the Lead Challenge Launch event (see [www.taketheleadwomen.com](http://www.taketheleadwomen.com)), which featured a powerhouse women’s panel designed to inspire women to own their power and close income and leadership gaps. Take The Lead shifts the focus from problems to solutions. As one panelist noted: “Your voice is at the heart of your power.”

Indeed, the power of Panhellenic is unstoppable when we acknowledge that we are a unified coalition of women that can do great things together. We offer a world of support through friendships. We transform lives. We add value. A video about how NPC has added value to women’s lives for 112 years is available at: <http://bit.ly/1fCJOJ2>.

The NPC tagline is “The voice for sorority advancement.” We are charged to speak openly and loudly about our benefits so that others will hear our message.

It is important that the contributions made by generations of sorority women be shared as part of our remarkable story. As we press onward, we must not forget the voices from our past.

Stand tall. Wear your badge with pride. And let our voices be heard.

Interfraternally,

Jean M. Mrasek  
2013-15 Chairman

Particularly given the rash of terrible press about fraternities, not entirely undeserved, telling a positive story both of historical and current events is well worth doing.

- Timothy M. Burke

## Indiana Supreme Court Rules in Favor of Phi Kappa Psi

In a closely watched case, the Indiana Supreme Court affirmed summary judgment in favor of Wabash College and Phi Kappa Psi, dismissing all claims against these two defendants.<sup>1</sup> Brian Yost, a Wabash freshman and Phi Kappa Psi pledge, alleged that he was injured in September 2007 during a hazing incident inside the chapter house. Mr. Yost sued several parties, including the national Phi Kappa Psi fraternity. The claims against the national fraternity rested upon three theories of liability, namely (i) breach of a general duty of due care, (ii) breach of an assumed duty of care to protect its pledges and (iii) an agency theory by which the national fraternity could be held vicariously liable for the negligence of the chapter. Phi Kappa Psi moved for summary judgment.

### PROCEDURAL POSTURE

Yost resisted summary judgment asserting that because the national fraternity promulgated behavioral guidelines, engaged in educational outreach regarding alcohol abuse and hazing, and made efforts to discourage hazing, the national fraternity could be liable for Yost's alleged injuries. Specifically, Yost argued that Phi Kappa Psi's conduct standards and educational programs, together with the power of the national fraternity to suspend chapters, revoke chapters, and discipline individuals, formed the foundation of a finding that the national fraternity engaged in oversight of day-to-day operations of the chapter. Accordingly, Yost argued, these facts supported a finding that Phi Kappa Psi (a) had a general duty of care to him, (b) assumed a duty of care to him or (iii) was vicariously liable for the acts of its agent, the chapter. The trial court granted Phi Kappa Psi's motion for summary judgment, a decision upheld by the court of appeals.

The Indiana Supreme Court accepted transfer of the case. On February 13, 2014, that court unanimously affirmed summary judgment in favor of Phi Kappa Psi.<sup>2</sup> In affirming summary judgment, the Indiana Supreme Court followed a long line of Indiana cases refusing to hold national fraternities liable in similar circumstances. Specifically, the court confirmed that simply establishing accepted standards of conduct, educating members, and disciplining members and chapters that fall short of expectations does not create a duty of care on the part of a national fraternity. It is a decision resting on good commonsense; to hold otherwise would render the national fraternity a guarantor of its members' compliance with these aspirational goals.

### COURT'S ANALYSIS

In examining the question of the existence of a general duty of care, the Court looked at (i) the relation-

ship between the national fraternity and Mr. Yost and (ii) public policy concerns. With respect to the relationship question, the Court noted that the national fraternity lacked any direct oversight or control over individual members, had no employees present at the chapter and no day-to-day management control over chapter operations. The Court determined that "[d]espite the national fraternity's efforts to establish aspirational objectives and to promote their fulfillment, the relationship between the national fraternity and the individual student members was remote and tenuous". (p.12)

The Court also found that public policy considerations militate against holding Phi Kappa Psi liable in this circumstance. The Court explicitly noted that "the national organization . . . should be encouraged, not disincentivized, to undertake programs to promote safe and positive behavior and to discourage hazing and other personally and socially undesirable conduct". (p.13) Again, the Court showed a great deal of common sense in analyzing the law and facts of the case, ultimately finding that given the tenuous relationship between the plaintiff and Phi Kappa Psi, and the public policy consideration of encouraging national organizations to abandon educational outreach programs, the Court found no general duty of care.

The Court used a similar analysis in considering the assumption of duty claim. The Court began its analysis by noting that while an actor may be liable for negligence in the performance of certain services actually undertaken, such liability does not extend beyond the undertaking. Here, the Court determined that the only undertaking by the national fraternity was educational outreach to enhance proper behavior and to discourage hazing. The undertaking did not extend to actual oversight and control over the behavior of individual members. As Mr. Yost did not claim that Phi Kappa Psi was negligent in the formulation and dissemination of its educational materials, the specific services arguably undertaken by the national fraternity, there was no possible claim for breaching an assumed duty of care.

Finally, the Court disposed of the agency claim quickly as well. Again, the Court noted that there was no evidence that the national fraternity had control over the individual members, or that the chapter acted as the agent of the national fraternity with respect to the day-to-day operations of the chapter. Accordingly, there could be no agency or vicarious liability.

### GUIDANCE FOR GREEK LETTER ORGANIZATIONS

The Yost case is unsurprising on the surface as it is consistent with a long line of Indiana precedent. However, the decision is important in light of another pending Indiana case, *Smith v. Delta Tau Delta, et al.* In

*Smith*, a different panel of the court of appeals broke from Indiana precedent, denying summary judgment to Delta Tau Delta on very similar facts. The *Smith* panel held that educational programming and a hierarchical enforcement mechanism *could* create liability under assumption of duty and agency liability theories. Delta Tau Delta sought transfer of the *Smith* case to the Indiana Supreme Court, though the Court has not yet decided to accept the case. We will carefully monitor the proceedings in *Smith* as the outcome could significantly impact current risk management thinking for national Greek organizations.

Given the pronouncement of the *Yost* court, it appears that standards of conduct, educational outreach and a disciplinary enforcement scheme neither establish a duty of care nor provide evidence sufficient to support a claim of vicarious liability. **However**, Greek letter organizations should closely examine their outreach pro-

grams and materials. Specifically, care should be given to the timing and methodology of delivering this programming. The *Yost* case does appear to leave the door open to claims that the national fraternity is negligent in the *preparation or dissemination* of its educational materials. It is very likely that this kind of claim will begin to appear in the next generation complaint, at least in Indiana. All Greek letter organizations would be well served to closely examine the methodology of delivery of risk management training to its members.

• Sean P. Callan

<sup>1</sup> Click here for a link to the opinion: <http://www.in.gov/judiciary/opinions/pdf/02131401bd.pdf>.

<sup>2</sup> Justice Rucker filed a dissenting opinion as to summary judgment in favor of Wabash, but the decision in favor of Phi Kappa Psi was unanimous.

## Greeks Continue to Receive Poor National Press

National press for the Greek world has not been good the last few months. A series of Bloomberg articles highly critical of fraternities and the record of hazing and alcohol-related deaths culminated in a January 7, 2014 editorial entitled, as an homage to Animal House, “Dean Wormer’s Favorite Editorial.” Highlighting hazing-related deaths, the editorial concluded:

“At any rate, this much is clear: Too often fraternities are at odds with the mission of a college or university, focusing on that mission may be the best way for colleges and universities to see their way clear to the reform and when necessary, abolition of campus fraternities.”

Most recently, the cover story of the March 2014 *Atlantic Monthly* is a 20-page story entitled “The Dark Power of Fraternities.” The article details a series of injuries and deaths, falls from windows, fire escapes and other high places, hazing, drinking and assaults. It then purports to track how fraternities and sororities have sought to avoid liability for such injuries. First it highlights the use of self-insurance programs. Then criticizes practices designed to avoid liability entirely by imposing it on the wrongdoers. The author fails to recognize that the first step, self-insurance efforts, was put in place to ensure that there was an ability to respond and pay damages when the fraternity was responsible.

The criticism of seeking to impose liability on the wrongdoers is misplaced. Who else should be liable? National organizations ought not be liable when the national organization has adopted, promulgated and enforced standards that require members to act in a way

that helps avoid injuries or worse. When members have been taught that hazing and the consumption of alcohol by minor members is against the rules and standards of organization, when they have been reminded of those rules and taught the dangers of engaging in such conduct and yet they proceed to do it anyway, who is it that should be liable, other than the individuals who engaged in the wrongdoing? To date, most courts have recognized that a national fraternity that educates its members about proper conduct, has rules prohibiting improper conduct and enforces those rules when they know about violations, is not the party responsible for damage when that damage results from the conduct of members who elect to violate the rules and standards. Such a result was reached once again last month in the Indiana Supreme Court. See “Indiana Supreme Court Rules in Favor of Phi Kappa Psi” in this March 2014 issue.

There is no doubt that there are too many injuries and deaths (three deaths in 2013 alone) related to hazing and/or alcohol. Equally, there is no doubt that more needs to be done in an effort to eliminate these tragedies.

Sigma Alpha Epsilon took a courageous step in that direction when it announced on March 7<sup>th</sup> that it will end its pledge program entirely in hopes of eliminating that period when initiated members are tempted to engage in some type of physical test frequently including the consumption of alcohol, as a misguided bonding experience. Such conduct is hazing; it is illegal. It is dangerous and has led to far too many tragedies. Whether or not ending the pledge period will help to eliminate such tragedies or not remains to be seen. The SAE experience will be watched carefully, not only by SAE, but by the Greek world and obviously the press as well.

On March 16<sup>th</sup>, the *Washington Post* carried a guest opinion by Caitlin Flanagan, the author of the *Atlantic Monthly* article. She makes the point that hazing actually accounts for very few of the claims against Greek groups. But those claims and many others, such as assaults, falls and sexual misconduct, are often alcohol-related. While acknowledging SAE's decision deserves some congratulations, she makes it clear that the problem of alcohol must also be addressed. Her *Washington Post* piece concluded with these comments:

“But it is impossible to remove alcohol from life, for it is at the very center of the experience. Or is it?”

In 2000, another of the nation's major fraternities, Phi Delta Theta, made a dramatic change: Housing at its 165 chapters became alcohol-free. The change involved more than a grand pronouncement from on high, expected to be carried out mere weeks after it was delivered. Rather, the fraternity had given itself three years to fully implement the new policy.

Who would possibly want to join a frat without beer? Huge numbers of young men, as it turns out. In the years since the policy was introduced, Phi Delt's membership has increased by 25 percent. The number of men willing to join its alumni boards – to lead and advise undergraduate members – has increased more than 300 percent. “You've seen the movie ‘Home Alone’?” Phi Delt's longtime executive vice president, Bob Biggs, said of the role of the alumni board. “We don't believe in leaving very young men home

alone.”

Most dramatically, the number of insurance claims against the fraternity has dropped by 64 percent, and the financial severity of those claims has declined an astounding 94 percent. In addition to being one of the safest frats in the country, its reduced insurance liability has made Phi Delt the most affordable.

I asked Biggs what inspired the alcohol ban. “Every college president will tell you that the single biggest problem on campuses today is the misuse of alcohol,” he said. “We asked ourselves: ‘If we are an organization of leaders, why aren't we addressing this problem?’”

There is no word in fraternity life accorded more reverence than “leadership.” Phi Delta Theta has exemplified it. The organization took a wildly unpopular position, risked its very existence to uphold it and led thousands of young men to better conduct. Its record isn't perfect, but it's far better than that of any other social fraternity, and it reveals the essential truth of fraternity reform: Saving lives – and reducing the incidences of rape and serious injury – depends on taking alcohol out of the equation.”

It is no more realistic to think that alcohol can be entirely removed from college life than it is that we can remove all drunk drivers from our highways. But Flanagan is right. It is a problem that requires continued ... increased ... attention.

• Timothy M. Burke

## 2014 Fraternal Law Conference: November 6<sup>th</sup> and 7<sup>th</sup>

Fraternal Law Partners and Manley Burke will host the 2014 Fraternal Law Conference on November 6<sup>th</sup> and 7<sup>th</sup> in Cincinnati, Ohio. In a slight departure from previous years, this year we will host the Conference on Thursday afternoon and all day Friday.

Registration will begin in May. More information will be posted on [fraternallaw.com](http://fraternallaw.com) when available. You may reserve a room with our group rate at the host hotel, the Cincinnati Westin, by clicking here: <https://www.starwoodmeeting.com/StarGroupsWeb/booking/reservation?id=1403031276&key=1AB5A>.

Please submit any comments or suggestions you have on the Conference to our Conference Coordinator, Kathie Thomas, at [kathie.thomas@manleyburke.com](mailto:kathie.thomas@manleyburke.com) or to me at [dmccarthy@manleyburke.com](mailto:dmccarthy@manleyburke.com).

• Daniel J. McCarthy

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