



FRATERNAL LAW™

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DUTY TO SUPERVISE ON TRIAL

Four years ago, fire destroyed a substantial portion of a fraternity house in Syracuse, New York. Although owned by a women's fraternity, the house was rented to a sorority at the time of the fire. The legal repercussions of that house fire, as reported in the March 1986 issue of *Fraternal Law*, are only beginning to be felt.

In essence, the fraternity argued that it could not be held responsible for the acts of an individual member. The court disagreed.

Following the fire, the insurance carrier for the fraternity owner, acting under its subrogation rights, filed suit against the fraternity whose house was located next door and against one of its members. The suit alleged that the named member caused the fire by throwing fireworks into the house. The suit claimed that the fraternity had negligently supervised the individual member and that its failure of supervision was a proximate cause of the fire. (See *Pi Beta Phi Fraternity, Inc., et al. v. Tush Nikollaj et al.*, Supreme Court, County of Onondaga, State of New York, Judge Reagan, Index No. 85-3490.)

Last year, the Supreme Court of the State of New York for the County of Onondaga issued a decision on a motion for summary judgment filed by the defendant fraternity. (A motion for summary judgment is a request by one party to a lawsuit that the court declare as a matter of law that the party making the motion wins all or a part of its case without the necessity of a trial.) In essence, the fraternity argued that it could not be held responsible for the acts of an individual member. The court disagreed.

The court noted that the member's possession of fireworks was a violation of both Syracuse University regulations and New York State Criminal Law.

In its decision denying the defendant fraternity's motion for summary judgment, the court summarized the facts, in part, as follows:

"On the evening of the fire, a Bruce Springsteen concert was held at the Carrier Dome, located on the campus of Syracuse University. During that evening * * * a member of the defendant fratern-

ity living in the fraternity house, threw a smoke bomb-type incendiary device from his room, through an open window of the sorority house next door, igniting the fire."

In its defense, the fraternity argued that none of its other members knew of the individual's possession of fireworks and, even if they did, that knowledge did not require the fraternity to do anything about the situation. The plaintiff insurance carrier countered, arguing that:

"The defendant fraternity owed a duty of reasonable care to them, as a landlord or owner of property has a duty to supervise those on its property to prevent injury to others on or off its premises."

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The court found that the question of whether or not the fraternity knew that the member had possessed fireworks was a fact question that was in controversy. While the fraternity president had testified he did not know the member possessed the fireworks, a Greek adviser at Syracuse

1989 FRATERNAL LAW CONFERENCE

November 3-4, 1989

The Omni Netherland Plaza Hotel in Cincinnati, Ohio will be the setting for the fourth annual conference on the law as it relates to fraternities and their host institutions, November 3-4, 1989.

Plans for this year tentatively include another "problem solving" session (a resounding success at the 1988 Conference); the expanded tax session which many of you have requested; our usual selection of prominent guest speakers; and a special attentiveness to programs geared toward the student fraternity member (and a special student conference rate).

Subscribers to *Fraternal Law* will soon be receiving more information about the 1989 conference. If you know of others who would like to receive our mailings, please send their names and addresses to *Fraternal Law*, 4100 Carew Tower, Cincinnati, Ohio 45202.

University testified that the fraternity president had told her that he knew the member had fireworks prior to the day of the fire and that fireworks were used at the fraternity house during much of the day that the fire occurred. According to the court, the conflicting testimony presented an issue of fact for a jury to determine.

The court went on to acknowledge that the member's own negligence in throwing the fireworks appeared to be undisputed.

On the critical issue of whether or not the fraternity could be liable for the damage, the court stated:

"If it can be shown upon a trial that the fraternity members had prior knowledge of [the member's] possession of fireworks and knew of his use of them on the day of the fire, there is a question for the jury as to whether or not the failure to supervise [the member] or to remove the fireworks from the fraternity house was a proximate cause of the fire."

The court went on to acknowledge that the member's own negligence in throwing the fireworks appeared to be undisputed. The court recognized, though, that his negligence need not be the sole cause of the injury and that the criminal nature of his conduct did not, in itself, preclude a finding that the fraternity's negligence was also a proximate cause of the fire. The court discussed, without ultimately resolving, whether or not the fire in the sorority house was a foreseeable hazard to the fraternity.

As a result of the ruling denying summary judgment, if a jury finds that responsible members of the fraternity should have foreseen the possibility that the member's continual use of fireworks could have caused damage to persons or property of the sorority, they had an obligation to stop that conduct. In failing to do so, the negligence of the fraternity can become a proximate cause of the fire. As the court pointed out:

"It would not be unreasonable for a jury to find that a failure to remove illegal fireworks from the frat-

ernity house and to prevent [the member's] use of the fireworks was a proximate cause of the fire to the neighboring sorority house."

This case remains pending. The decision of the court to deny the fraternity's motion for summary judgment is not a finding that the fraternity was, in fact, negligent or that they should be held liable. It is, however, a determination that such a finding is possible if the evidence outlined by the court can be proven to a jury. For the purposes of the motion for summary judgment, the court assumes that certain facts may be true. Ultimately, a jury will decide whether or not they are true.

This case bears watching. The theory of negligent supervision carried to an extreme could have an enormous impact on the Greek world. In this instance, the conduct by the member actually occurred in the house. This close connection between the action which caused the damage and the fraternity makes it relatively easy to impute an obligation to supervise.

The theory of negligent supervision carried to an extreme could have an enormous impact on the Greek world.

Suppose, however, that the negligent conduct occurred while many of the fraternity members were staying at a downtown hotel in connection with the fraternity's annual spring formal. Would there still be an obligation on behalf of the fraternity officers to supervise the conduct of the members? What if the conduct occurred over the summer when half a dozen or so of the members got together, simply as friends, at a summer resort? In each instance, it is likely that a court would have to look at the connection between the member's conduct and the fraternity. The more removed the conduct is from any involvement with the fraternity, the less likely it becomes that there would be any duty to supervise.

● Timothy M. Burke

AIDS ALERT

Robin Sawyer of the Division of Health Education at the University of Maryland concluded that efforts to educate students to the hazards of sexually transmitted diseases, especially AIDS, were hampered by the perception of most college students that they are not vulnerable. They can learn the facts about AIDS but assume that if they are not homosexual or drug users, the information has no relevance to them.

As a result of this, Mr. Sawyer has produced an excellent videotape on AIDS designed to reach the general college student who does not fit into a high risk

group. It does an excellent job of alerting the viewer that casual heterosexual intercourse without the protection of condoms does, in fact, spread AIDS.

Every college freshman should see the film.

The videotape and the training manual are available for a combined price of \$245.00. For more information write Robin Sawyer, 15608 Peyton Court, Bowie, Maryland 20716.

DARTMOUTH STUDENTS REINSTATED

On January 3, 1989, a New Hampshire Superior Court judge ruled that two Dartmouth students could return to college after serving 10 months of an 18-month suspension.

The students were members of the conservative, non-college affiliated, college newspaper, *The Dartmouth Review*. The suspension occurred as the result of a chain of events beginning with the publication of an article ridiculing a music class taught by Professor Cole, a black instructor. The article featured a surreptitiously taped, selectively edited transcript of one of Professor Cole's classes and implied that the course was academically deficient. (Prior to this particular incident, Professor Cole had a long history of conflicts with *The Review*.)

Before publication of the article, a student representative of the paper called Professor Cole's home two or three times one evening in order to give him an opportunity to react. Professor Cole hung up on the first call, and used abusive language during subsequent calls. The transcript of those calls was published in the newsletter alongside the article.

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Nevertheless, following publication of the article, four *Review* students went to Professor Cole's classroom as class was ending to demand an apology for the abuse and to notify Cole of the *Review's* reply policy. After an emotionally charged confrontation lasting three to four minutes, Cole told the students to get out. The encounter resulted in yelling on both sides and in a camera, carried by one of the students, being dropped to the ground.

Charges were brought by the college against the four students based on Dartmouth's Student Code of Conduct. At a hearing before the school's Committee on Standards two of the students involved in this incident were placed on

18-month suspension. The students, in turn, brought suit against Dartmouth and asked for a preliminary temporary injunction to allow their reinstatement.

The importance of this case lies in the extent to which the federal guarantee of due process will be held to reach into the affairs of private institutions.

In a lengthy opinion, Judge Mohl held that because one of the members of the Committee on Standards had previously signed a letter critical of *The Review*, the possibility of bias existed at the hearing. This invalidated the proceedings, and the plaintiff students were to be reinstated. The court left to the college the option of conducting a new hearing.

The President of Dartmouth issued a statement on January 30, 1989, stating that, "Although the court's order permits the college to retry these students, a rehearing now will disrupt this community more than it will enlighten it." Dartmouth has decided to wait until the trial to deal with these issues.

The importance of this case lies in the extent to which the federal guarantee of due process will be held to reach into the affairs of private institutions. While the court maintained that it had a very limited scope of review of a private body, it clearly sent the message that a private institution may not violate the contractual rights of its students or act arbitrarily or capriciously. The Dartmouth Student Handbook requires the college to give students a fair hearing. The court held that the hearing officer's bias violated the students' contractual rights to that fair hearing.

It is clear from this decision that a private institution must adhere strictly to its contractual due process guarantees or risk having its rulings overturned.

● Sally L. Cremeens-Strong

THE NCAA, DUE PROCESS AND EXPULSION

The United States Supreme Court recently opened the door to discussion of whether or not due process is required when a private organization disciplines its member or an agent of its member. The case of *National Collegiate Athletic Association v. Tarkanian*, 57 U.S.L.W. 4050 (December 12, 1988) involved disciplinary action taken by the NCAA against the University of Nevada at Las Vegas. The NCAA found 38 violations of NCAA rules by UNLV personnel, including improper recruiting practices of prospective athletes for the school's basketball team. Ten of the violations involved Coach Jerry Tarkanian.

The NCAA imposed sanctions upon UNLV, including placing the UNLV basketball team on a two-year probation, and gave the university an opportunity to show cause why additional penalties should not be imposed if UNLV failed to sever all ties between the athletic program and Tarkanian during the probation period.

After a hearing was conducted by UNLV at which Tarkanian was represented, the university suspended Tarkanian from his coaching position, but he continued at the school with a full professorship at a substantial cut in salary.

The coach filed suit in Nevada state court in reliance upon the United States Civil Rights Act of 1871 (42 U.S.C. 1983). This statute authorizes damages and an injunction if any person uses the color of state law to deprive the plaintiff of his rights, privileges or immunities under the Constitution and laws of the United States.

Tarkanian's lawyer may have selected the U.S. civil rights statute because there is a provision in a companion statute that authorizes the prevailing party to collect attorney's fees (42 U.S.C. 1988). The civil rights statute and the companion attorney's fee statute are equally enforceable in state and federal courts.

The coach may have selected the state court because he felt there would be greater sympathy for his cause there, but undoubtedly chose to go under the federal civil rights statute because of the opportunity to collect attorney's fees if he prevailed.

Tarkanian did prevail in the state courts. He obtained an injunction and an award of attorney's fees against both UNLV and the NCAA. The trial court's decision was affirmed by the Nevada Supreme Court. *Tarkanian v. NCAA*, 741 P.2d 1345 (1987) (per curiam).

The case was appealed to the Supreme Court of the United States where, in an opinion delivered by Justice Stevens, the court found that Mr. Tarkanian failed to bring himself under the scope of the federal civil rights statute because the action of the NCAA is not "state action." In order to fall within the protection of the Civil Rights Act and the Civil Rights Attorney's Fees Act, it is necessary for the aggrieved party to show that his civil rights were deprived under the color of state law. This is commonly referred to as the requirement of "state action."

The Supreme Court found that the NCAA "enjoyed no governmental powers to facilitate its investigation * Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership."**

The state courts concluded that when the university adopted NCAA regulations, the regulations and the procedures for their enforcement were thereby converted from an action of a private association to an action of the state of Nevada. The U.S. Supreme Court held otherwise, saying that the NCAA is merely a private organization with authority to discipline its own members in accordance with its own rules.

The case was widely reported in the popular press as an indication that private associations need not afford members due process when disciplining them. That is not what the case holds. The case has a very narrow holding which is that under the federal Civil Rights Act a private association is not engaging in state action merely because a state university ratifies its regulations.

The Supreme Court found that the NCAA "enjoyed no governmental powers to facilitate its investigation *** Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university

from membership." The NCAA had no power to discipline the coach directly.

This case does not change the state of the law as it relates to fraternities in the discipline of members.

Ironically, if the coach's case had not been driven by the desire to recover attorney's fees under the federal civil rights statute, he probably could have won the case under Nevada state law. The way in which the Nevada courts struggled to distort the federal statute to find state action indicated a predisposition for the coach to prevail in the political climate of Nevada. The state courts could have interpreted the due process requirements under the Nevada state Constitution to have ordered him reinstated. The only difference would have been that there would be no federal attorney's fee award statute under which the coach's attorneys could be paid. Had the Nevada courts relied upon the Nevada Constitution to find a due process violation, the United States Supreme Court would not have had jurisdiction to overturn the injunction reinstating the coach.

This case does not change the state of the law as it relates to fraternities in the discipline of members. The state of the law is as follows:

1. It is not clear when and under what circumstances a fraternity must afford due process to its members in a disciplinary hearing.
2. The confusion is derived from the fact that there are 50 states, each with its own ability to develop its own guidelines.
3. There has been a scarcity of cases.
4. The mere fact that a fraternity is recognized by a state university does not mean a fraternity necessarily is engaging in state action which brings it under the federal Civil Rights Act.
5. No fraternity should want to become the test case wherein the law is established in some state that there is a duty to afford due process of law in a disciplinary hearing.

The practical consequences of the lack of clarity in the law are as follows:

It is not difficult to give due process to someone who is accused of violating a fraternity rule. It involves a few simple considerations which are:

- a. Written notice to the accused of the offense that he is suspected of having performed.
- b. A reasonable time to prepare for a hearing.
- c. A hearing before an impartial body.
- d. The opportunity to be present when his accusers are testifying against him and to cross-examine his accusers.
- e. The opportunity to present any evidence relevant to the defense of the accusations.

There are two strong reasons for giving these due process protections to a fraternity member who is being accused of violating a fraternity rule. One is educational and the other is pragmatic.

Press reports of the NCAA litigation were misleading to the extent that they stated that private associations need not give due process rights to their members

The educational reason is that ever since the Book of Genesis recorded the questions that God placed to Adam and Eve about eating the forbidden fruit, it has been recognized in Judeo-Christian traditions that notice and the opportunity for hearing constitute the fair way in which to deal with disciplinary problems. Since it has been so universally agreed that this is the fair way to deal with disciplinary problems, the fraternity enhances its educa-

tional role by doing it the fair way and giving the essentials of due process in its disciplinary procedures.

The pragmatic reason is that with the confused state of the law, when a fraternity fails to give due process, it runs the risk that it will be involved in the test case where the courts of its state will hold there is a legal duty to afford due process and that it breached its duty. It is not only unpleasant to lose such a lawsuit, it is expensive whether one loses or wins. Even the University of Nevada at Las Vegas probably spent a substantial amount in attorneys' fees winning its lawsuit against the coach. No fraternity needs this expense.

The bottom line is that the press reports of the NCAA litigation were misleading to the extent that they stated that private associations need not give due process rights to their members. The educational and practical thing for fraternities to do in the future is to continue to give its members due process rights if and when they have disciplinary proceedings.

● Robert E. Manley

NEW IRS QUESTIONS, FORM AND AUDIT ACTIVITY

At the third meeting of the Commissioner's Exempt Organizations Advisory Group held in Washington, D.C. in January 1989, at least two of the agenda items were of substantial interest to fraternal organizations and their foundations: the introduction of a new Internal Revenue Service form and new reporting requirements, and new Internal Revenue Service audit activity in the field of charitable solicitations.

New IRS Reporting Requirements

1988 Changes

In the Form 990 for 1988, the IRS announced that it intends to include a new Part VII—Information Regarding Transfers, Transactions and Relationships With Other Organizations. The questions in the new section will solicit information concerning transactions of the particular organization with other organizations described in Section 501(c) of the Code, other than Section 501(c)(3) organizations, i.e. noncharitable exempt organizations. The transactions for which information is going to be solicited, as currently planned, include transfers of cash or other assets, sales, purchases, rentals, reimbursement arrangements, loans or guarantees, performance of services or membership or fund raising solicitations, and the sharing of facilities, employees and the like. Amounts involved will be

required to be reported as well as the name of the non-charitable organization involved.

What all this means is that on its 1988 Form 990 each fraternity foundation probably will be asked to disclose detailed information about its relationship with its fraternity and most other noncharitable exempt organizations with which it may deal.

In addition, organizations will be asked to state whether they are directly or indirectly affiliated with, or related to, one or more other tax exempt organizations other than Section 501(c)(3) organizations and, if so, to give further information about these relationships. Contrary to the historical reporting requirement on Form 990 on this subject, the definition of relationships for this purpose will be very broad. For example, either some element of common control or a historic and continuing relationship between the two organizations requires an affirmative response. Similarly, if more than 25% of the officers, directors or trustees of one organization serve as officers, directors or trustees of the other organization, or if such officials are elected or appointed by such officials of the other organization, the new information will have to be reported. Also, sharing of facilities and the like during the year or a

joint effort or working together on projects will also require an affirmative response.

What all this means is that on its 1988 Form 990 each fraternity foundation probably will be asked to disclose detailed information about its relationship with its fraternity and most other noncharitable exempt organizations with which it may deal. Similarly, fraternal organizations will be required to disclose this type of information with regard to any other noncharitable exempt organizations with which they are closely involved. Return preparers and directors of all of these organizations should make sure that their recordkeeping will be sufficient to allow accurate responses to these questions. Also, it will be very important that Form 990 for 1988 be reviewed with special care to make sure that the new section is appropriately completed.

Proposed Changes In Forms For 1989

With regard to proposed changes for 1989, there is both good news and bad news. The bad news is that the IRS, in response to a Congressional request for more information about unrelated business income activity of exempt organizations, plans to initiate a new Part VII-A and VII-B for 1989 Forms 990. This will require an analysis of all income-producing activities of the organization broken down by code, along with a statement as to why each activity is either exempt or unrelated and subject to tax. Again, this new portion will require appropriate recordkeeping by all fraternal organizations and foundations and a careful preparation and review of Form 990 for 1989.

Fraternal foundations, like all charitable organizations, need to review all of their fund raising literature to avoid having problems with the IRS in this connection.

The good news is that in return for all of these increased reporting requirements, the IRS plans to issue a new Form for 1989, Form 990EZ, which is a two-page short form for exempt organization filing. To qualify for the short form, at the present time, it is planned that organizations must have gross receipts of less than \$100,000.00 and total assets of less than \$500,000.00. It is estimated that 25% of exempt organizations will qualify to use the new short form. Filers of this form will not have to submit the information described above in the changes for 1988 and 1989.

Organizations should bear in mind that in all of these areas, increased scrutiny by the Internal Revenue Service normally follows increased reporting requirements, so this is an opportune time to review all transactions among related organizations as well as income-producing activities to make sure they can withstand such scrutiny.

Increased IRS Audit Activity

In the summer of 1988, all fraternal foundations, like other Section 501(c)(3) charitable organizations, should have received a communication from the Commissioner of Internal Revenue calling attention to the rules with regard to deductibility of payments made to charities that conduct fund raising events. At the recent Advisory Group meeting, the Commissioner made it clear that the IRS has an intensive campaign underway to stop what it considers a wide-spread practice of misrepresentation by legitimate charities as to the deductibility of contributions given to them. Congress has also indicated that its interest in solicitation by noncharitable tax exempt organizations (*Fraternal Law*, January 1989, Number 27) does not indicate a lack of concern in this area as to charitable organizations. As the Commissioner stated at the meeting, charitable organizations will either "clean up their act" or the Internal Revenue Service will do it for them.

In addition to its continuing educational activity on this subject, the IRS is also instituting a significant compliance effort. It will be writing charitable organizations whose fund raising literature it believes contains misleading fund raising information, and requesting changes to the material. The Commissioner indicated that if the IRS receives voluntary cooperation in this regard, then no untoward results would ensue to the organization. If the organization does not cooperate, however, serious audit activity will take place, including revocation of exemption being proposed in appropriate cases, and securing of donor lists. Also, during regular Internal Revenue Service audits of charitable organizations, agents are being instructed to check for violations of these fund raising rules.

Fraternal foundations, like all charitable organizations, need to review all of their fund raising literature to avoid having problems with the IRS in this connection. Examples of honest mistakes which might be made by fraternal foundations in their fund raising literature include statements that the fraternity is tax exempt under Code Section 501(c)(3), that the contributions to it are tax deductible, or so interweaving the appeal for funds that a donor can have no realistic idea whether he is giving to the fraternity or the foundation. Fraternal organizations, their foundations and their fund raising counsel need to educate themselves about the importance of proper solicitation for contributions so that tighter legislation and regulation in this area hopefully will not be found necessary.

● Barbara Schwartz Bromberg

Mrs. Bromberg's Cincinnati firm, Paxton & Seasongood, is an office of Thompson, Hine & Flory.

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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