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HAZING DEATH LEADS TO CHARGES AGAINST FIVE, INCLUDING TWO RIDER UNIVERSITY ADMINISTRATORS

Gary DeVercelly, an 18-year-old freshman at Rider University in Lawrenceville, New Jersey died on March 30, 2007 after attempting to drink an entire bottle of vodka at a "big-little night" event at the Phi Kappa Tau fraternity house. It was later determined that Mr. DeVercelly had a blood-alcohol content of 0.426, more than five times the legal limit in New Jersey.

Shortly after Mr. DeVercelly died, an assistant Mercer County prosecutor told the *New York Times* that "everything was on the table" for possible criminal charges. On August 3rd, the prosecutor, Joseph L. Bocchini Jr., announced indictments against five individuals following a

grand-injury investigation into the death. Surprisingly, two Rider administrators, Dean of Students Anthony Campbell and Director of Greek Life Ada Badgley, were among those indicted for aggravated hazing. The other three indictments are against fraternity officers: Adriano DiDonato, the residence director and house master; Dominic Olsen, the head of the pledge program; and Michael Tourney, the chapter president.

In New Jersey, a person is guilty of aggravated hazing "if, in connection with initiation of applicants to or members of a student or fraternal organization, he knowingly or recklessly organizes, promotes, facilitates or engages in any

12th National Fraternal Law Conference

The 12th National Fraternal Law Conference will take place on November 16 and 17, 2007 in Cincinnati, Ohio. The line-up of speakers is the best yet.

Professors Lisa A. Penland and Melissa Weresh of Drake University Law School will address legal issues and the Internet in the "Google Age."

Louis Billionis, the Dean of the University of Cincinnati College of Law and a former National Board member of the ACLU, will discuss fraternities and the First Amendment.

A panel of law enforcement experts which includes: Ken Parker, an assistant U.S. attorney who specializes in forfeiture issues; Tom Johns, a Cincinnati police captain who, for seven years, commanded the police district that included all of the fraternities at the University of Cincinnati; Chris Wagner, the assistant Cuyahoga County prosecutor who prosecuted a Cleveland area college official for failure to report sexual assaults on her campus; and Dave Westol, a former prosecutor and long time Greek advisor, will address interactions with law enforcement and obligations to report criminal activity.

Cindy Stelhorn from M-J Insurance and Kevin Canavan of the Philadelphia law firm Schwartz Campbell, will discuss responding to claims and lawsuits.

William A. Nolan of Squire, Sanders & Dempsey, who serves as counsel to Delta Zeta, will address the suit against DePauw University. Daniel J. McCarthy of Manley Burke will join him on a panel and address Sigma Chi's litigation against Dickinson College.

Victor Lloyd of the Mental Health Association of Southwest Ohio, will address mental health issues affecting college students.

The always popular Barbara Schwartz Bromberg of Dinsmore & Shohl, will discuss recent developments in tax laws and policies that impact Greek organizations.

Congresswoman Stephanie Tubbs Jones, the principle sponsor of the Collegiate Housing and Infrastructure Act pending in Congress has been invited and has indicated an interest in attending if the Congressional schedule permits her to do so.

A registration form for the Fraternal Law Conference is included inside this issue.

conduct, other than competitive athletic events, which places or may place another person in danger of bodily injury."¹ Aggravated hazing is a crime in the fourth degree, punishable by up to 18 months imprisonment or up to a \$10,000 fine.

"The ramifications of this for colleges and universities in New Jersey, and across the country, is that it will send some kind of message that the standards of college life, when it relates to alcohol, need to be policed carefully," the Prosecutor told the *Associated Press*.

The University is not directly commenting on the charges, but Rider President Mordechai Rozanski issued a statement on the University's webpage that expressed sympathy to Mr. DeVercelly's family and stated "[w]ith respect to the Phi Kappa Tau fraternity, the facts uncovered during the investigation indicate that dangerous underage drinking occurred at an unregistered party in the fraternity house, resulting in the death of a student. Consequently, we have dissolved the Phi Kappa Tau chapter on our campus."

According to the *Associated Press*, Rider is still deciding what action, if any, to take against the administrators. The AP quoted Jonathan Meer, a Rider spokesperson, as saying "It's our practice to judge each case on the facts and circumstances as they become known."

Douglas Fierberg, an attorney retained by Mr. DeVercelly's parents, told the *Times of Trenton* that the Rider officials did not adequately supervise campus fraternity houses and held them to far lower standards than other university residence halls. Mr. Fierberg specifically pointed to the fact that Adriano DiDonato, the house manager, was a part time University employee in charge of the fraternity house with similar tasks as a resident advisor. Mr. Fierberg told the *Times* that Rider failed to adequately train Mr. DiDonato and supervise the fraternity.

As the charges in this case were just filed, it is not clear how this case will conclude. It is difficult to envision how the prosecution will be able to prove, beyond a reasonable doubt, that the administrators "knowingly or recklessly organized, promoted, facilitated or engaged in conduct which resulted in serious bodily injury." However, it is clear that prosecutors across the country are looking for new ways to curb the twin dangers of hazing and alcohol abuse on college campuses. This case serves another warning to all involved with Greek organizations that such abuses must stop.

• Daniel J. McCarthy

¹ N.J. Stat. Ann. § 2C:40-3 (West 2007)

COLLEGE HAZING HAS A NEW ENEMY

As part of the ongoing attempt to end hazing on college campuses and particularly in Greek organizations, 20 international fraternities and sororities have joined together to establish a national Anti-Hazing Hotline. The toll-free number is 1-888-NOT-HAZE (1-888-668-4293). The line is available to those who think they, or students they know, have been or may be made victims of hazing. Callers may remain anonymous or they can provide personal information so that their concerns can be responded to directly.

The Hotline connects to a dedicated voicemail box at the Cincinnati law firm of Manley Burke, the publisher of *Fraternal Law*. Manley Burke will monitor the Hotline on a daily basis and will forward copies of all messages by email to the appropriate national organization, along with the hazing laws from the relevant jurisdictions.

Tim Burke, the President of Manley Burke, said, "National fraternities and sororities take hazing very seriously and have worked hard to see that hazing is eliminated. They recognize that too many people have been hurt or died as a result of hazing incidents and that today more than 45 states make hazing a crime. National officers are consistently teaching their members that hazing is antithetical to the high ideals of brotherhood and sisterhood embodied in the fraternity movement."

Norval Stephens, the Chairman of the Delta Tau Delta Educational Foundation and former International President of the fraternity led efforts in establishing the Hotline. Mr. Stephens worked to grow the Hotline from the time it was first mentioned as an idea in January 2007, through recruitment of sponsors and participating organizations and, finally, to its implementation. Mr. Stephens explained the goal: "Our experience in the Greek world on hazing and alcohol abuse is that behavior is not changed by research. Only programming and action change behavior. Research illuminates the problem but does not solve it. We hope the Hotline helps to eliminate hazing."

Toll-free: 1-888-NOT-HAZE (1-888-668-4293)

The Hotline is a crucial new tool for Greek organizations to use to fight hazing. The 20 founding sponsors invite other fraternities and sororities to join as official sponsors of the National Anti-Hazing Hotline. For more information, please contact Dan McCarthy at Manley Burke at (513) 721-5525.

• Daniel J. McCarthy

DELTA ZETA SUES DEPAUW

As happens from time to time with all Greek organizations, Delta Zeta identified one of its chapters as having significant problems. The Delta Zeta Chapter at DePauw University had declined in membership to a dangerously low level, jeopardizing its existence at a time when it was just short of its 100th anniversary.

By the spring of 2006, the DZ Chapter had only 57 members, compared to the next smallest DePauw sorority chapter with 114 members. Going into the fall semester of 2006, the DZ Chapter had only 42 members. That August, the Chapter voted by a majority not to recruit new members for the 2006-2007 year. Had the Chapter followed through with that plan by not recruiting new members, it would have been forced to close its doors at the end of the school year. National representatives of DZ met with the DePauw administration a month following the vote. The University urged DZ not to close the chapter and, according to DZ, DePauw's Director of Fraternity and Sorority Life recommended to DZ that they instead conduct a membership review. That is what DZ did.

In order to reverse this trend and rebuild the Chapter, National DZ officers began conversations with Chapter members about rebuilding the Chapter. Ultimately, DZ did a wholesale review of the current Chapter members and, after interviews with each of the 35 members of the Chapter, proposed to give 23 of them alumnae status. The goal was to rebuild the Chapter to 90 members by 2009, working from a core of 12 continuing members. The 23 who were asked to go on alumnae status received their notices December 2, 2006. Shortly thereafter, the Chapter reorganization exploded into the national press, with the *New York Times* leading the way. The *Times* summarized its view of what happened this way:

The Sorority evicted 25 members of its DePauw Chapter in December, and half a dozen other women later quit in protest. The action greatly diminished the Chapter's diversity. The women the Sorority allowed to stay were all slender and conventionally pretty. Those evicted included some overweight women, and several minority members were evicted or left the sorority on their own.¹

When the subsequent controversy hit the press, the University reversed its position and criticized DZ for its actions. The University was particularly critical of the fact that the results of the membership review were announced to the members shortly before finals were to begin. As the media controversy swirled, the University ultimately announced that DZ was no longer welcome on campus.

On March 28, 2007, the Delta Zeta Sorority filed suit against DePauw University in the United States District Court for the Southern District of Indiana.² The suit, which contains 92 separate paragraphs, makes eight specific claims against the University, including promissory estoppel (that is that the University made a promise to Delta Zeta on which the fraternity relied, and as a result, the University may not go back on that promise now); breach of contract; defamation; tortious interference with current business and prospective business relationships. In support of its breach of contract argument, Delta Zeta attached to its complaint University documents setting forth the standards fraternity groups are expected to comply with and establishing how they are recognized by the University.

The University has responded with its answer denying directly or for lack of knowledge many of the claims made in the DZ lawsuit. For example, while the University denies that its Director of Fraternity and Sorority Life recommended DZ conduct a membership review, it admits that he "offered examples of two fraternities that had conducted successful 'membership reviews'."

At this writing, the litigation remains pending and is still in the relatively early stages of the discovery process. *Fraternal Law* will continue to follow this matter. There are several things that can be learned from this controversy already:

- 1) Membership reviews may be an effective tool for dealing with a chapter that is in trouble, but they must be conducted with care in compliance with the rules and procedures of the Fraternity;
- 2) Timing can be a significant issue and the timing of when the review is conducted or the results announced should be carefully evaluated to ensure that it has as little impact on the academic calendar as possible;
- 3) While there were obvious efforts by DZ to work with the University, which ultimately failed, it is important that the University should understand that a review is underway and what the consequences of the review might be, including discussing in advance with the University what the housing situation would be for those members who may be asked to leave the house. DePauw, as a part of its reaction to this controversy, announced that in the future it would not permit membership reviews to disrupt housing arrangements in the middle of the school year; and

- 4) Public relations is an issue that should be considered as well and efforts should be made to identify potential negative public perceptions. A fraternity engaged in a membership review should be prepared to deal with those negative perceptions.

- Timothy M. Burke

1 *New York Times*, "After Evicting Members, the Sorority Itself is Evicted," March 13, 2007.

2 *Delta Zeta Sorority v. DePauw University*, United States District Court, Southern District of Indiana, Terre Haute Division, Case No. 2:07-CV-0059-RLY-WGH.

MORE HAZING CHARGES AT CHICO STATE

As reported in the January 2006 edition of *Fraternal Law*, Matthew Carrington died in February 2005 of water intoxication following a night of hazing at the unrecognized Chi Tau fraternity at Chico State. Following this incident, California passed Senate Bill 1454, now known as Matt's Law in honor of Mr. Carrington. Matt's Law makes hazing a felony when serious bodily injury is caused, or a misdemeanor when there are no injuries.

Three members of Beta Theta Pi's chapter at Chico State were recently charged with misdemeanor hazing under Matt's Law. Mike Ramsey, the Butte County District Attorney, said the fraternity made its pledges do calisthenics and crawl through mud before being submerged to their necks in freezing water.

The three charged are president Christopher Bizot, vice president Michael Murphy and ritualist Matthew Krupp. All are charged with misdemeanor hazing because there were no serious injuries; Bizot is also charged with interfering with the Police investigation. Murphy and Krupp face up to one year in county jail and a \$5,000 fine, while Bizot faces up to a \$10,000 fine and a year and a half in jail.

According to the *Chico Enterprise Record*, an attorney for at least one of the defendants recently filed a demurrer and a motion to dismiss the case, claiming the complaint is insufficient and lacks detail. This case is developing. Look for more information in future issues of *Fraternal Law*.

- Daniel J. McCarthy

CASE UPDATES

Updates on three recent cases recently reported on in *Fraternal Law*:

The University of Iowa has appealed the trial court's decision in *Phi Delta Theta House Assn. and Iowa Beta Chapter of Phi Delta Theta v. State of Iowa, et al.* In that case, the Phi Delta Theta Chapter sued the University of Iowa for secretly and illegally recording an alleged hazing activity. The University then improperly used the recording to punish the fraternity. Because of the University's actions, the fraternity was forced to close its doors. The Fraternity filed suit, and won a verdict for total damages in excess of \$140,000 in January of this year. The University vowed to appeal, and it has now done so. (See March 2007 issue of *Fraternal Law*.)

The appeal of the Chi Iota Colony of AEPi against the City University of New York, College of Staten Island was argued this summer before the United States Court of Appeals for the Second Circuit. A federal district court had ruled in AEPi's favor, finding that as a private social organization it had a First Amendment Freedom of Association right to restrict its membership to men. The trial court went on to issue an injunction prohibiting the College from denying recognition to the AEPi Chapter because it denied women membership. The College appealed. The Appellate Court has not ruled as of press time. However, on June 20, 2007, the Court issued a brief entry stating in full: "The City University and the related defendants appeal from the district court's grant of a preliminary injunction. The preliminary injunction is hereby vacated. Opinions will issue in due course." Since the Court has not fully ruled, the meaning of that action is unclear and it is impossible to predict the ultimate outcome. However, this is a case that could affect every Greek chapter in the country. (See September 2006 issue of *Fraternal Law*.)

Southern Illinois University at Carbondale settled its lawsuit with the Christian Legal Society. In that case, the University refused to recognize the CLS chapter because it claimed the chapter violated the University's antidiscrimination policy. CLS mandates all members comply with its Christian beliefs on homosexuality. CLS sued in federal court claiming the University's actions infringed on their associational rights. After the U.S. Court of Appeals ruled on CLS' preliminary injunction that the group was likely to succeed on the merits, the University agreed to recognize CLS, pay their legal fees and set up a scholarship to be controlled by CLS. (See November 2005 issue of *Fraternal Law*.)

- Daniel J. McCarthy

"Justice, justice shall you pursue."
Deuteronomy 16:20.

ARBITRATION CLAUSE IS ENFORCEABLE IN HAZING CASE

As previously reported in *Fraternal Law*, a twenty year-old junior "aspirant"¹ at the University of Pennsylvania recently accused two members of the Psi Chapter of Alpha Phi Alpha of hazing. The two members faced criminal charges and were recently convicted of assault and harassment for beating the aspirant and branding him with a rubber band. The members were each sentenced to nine months probation and the University placed one of the members on academic probation and suspended the second for one semester and fired him from his University job.

In addition to the criminal charges, the aspirant, E. Martyn Griffen, filed a civil lawsuit in the United States District Court for the Eastern District of Pennsylvania against the Alpha Phi Alpha national organization, the Psi Chapter of Alpha Phi Alpha and the two individual members (Kelechi Okereke and Lionel Anderson-Perez). Mr. Griffen sought damages for assault and battery, negligence and intentional infliction of emotional distress from the individual defendants and damages for negligence from the organizational defendants. The defendants filed a Motion to Dismiss or, in the Alternative, Stay Pending Litigation Pending Arbitration. Judge Gene E.K. Pratter recently ruled on the Motion and stayed the litigation pending arbitration of Mr. Griffen's claims.²

Application for Membership Includes An Arbitration Provision

Mr. Griffen desired to become a member of the Psi Chapter of Alpha Phi Alpha. The Chapter required all prospective members to complete an Official Application for Membership in order to become an aspirant and, ultimately, a member of the Fraternity. The Application, among other things, included a Membership Process Form, which described the "Intake process", or pledging, into the Fraternity. The Membership Process Form consisted of four paragraphs: 1) a description of the Intake process, 2) a statement against hazing, 3) details of the Fraternity's dispute resolution process, and 4) a certification that the application agrees to abide by the conditions of the Intake process.

The Court focused on the third paragraph, describing the Fraternity's dispute resolution process. The dispute resolution process provided, in part:

Any grievances and disputes regarding membership intake should generally be referred to the National Director of Membership Services for investigation and resolution. Matters that cannot be resolved within the Fraternity will be referred to arbitration. The aspirant specifically agrees to follow all the rules, regulations, and guidelines relating to the

Intake process.... The aspirant understands this agreement has an effect on interstate commerce and is subject to the Federal Arbitration Act. The aspirant... and [the Fraternity]... agree that any and all disputes, conflicts, claims and/or causes of action of any kind whatsoever, [i]ncluding but not limited to: contract claims, personal injury claims, bodily injury claims...relating in any manner whatsoever to the Intake process and application shall be subject to and resolved by compulsory and binding arbitration under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq. and the commercial rules of the American Arbitration Act.

Each aspirant had to initial each paragraph and sign a certification that he read, understood, and agreed to comply with the terms set forth in the Membership Process Form. Mr. Griffen complied with the requirement by initialing the paragraphs and signing his name.

Mr. Griffen sues following hazing activity

Mr. Griffen alleged that on October 12, 2005, the individual defendants punished the aspirants because of the actions of one of the other aspirants. According to Mr. Griffen, Mr. Anderson-Perez repeatedly punched him in the thighs and Mr. Okereke repeatedly snapped a rubber band around Mr. Griffen's upper arm. Mr. Griffen alleged that he suffered permanent injuries and scarring as a result of the hazing. Mr. Griffen responded with a civil lawsuit in federal court.

Arbitration or Federal Court?

The Defendants' motion to dismiss or for a stay argued that Mr. Griffen could not pursue this case in court because of the arbitration clause in the Membership Process Form that Mr. Griffen willingly signed. Mr. Griffen first argued that the arbitration clause was not valid because it was unconscionable. In order for an arbitration clause to be set aside as unconscionable, the challenging party must establish that the arbitration clause is both procedurally and substantively unconscionable. The Court separated the unconscionable arguments into two sections.

The Court stated that it could not conclude, without additional evidence, that the arbitration clause was procedurally unconscionable. The Court noted that the Fraternity unilaterally drafted the Application, but there was no evidence that the Fraternity refused to negotiate the terms, that Mr. Griffen did not understand the contract or that he found it unfair when he entered into it. The Court further stated

that there was no evidence that Mr. Griffen lacked a meaningful choice of whether or not to enter into the membership contract. Further, the Court found no procedurally unconscionable aspects in the form itself because Mr. Griffen initialed and signed the application, indicating that he had read and accepted the arbitration clause.

As for substantive unconscionability, Mr. Griffen argued that public policy demanded a finding of substantive unconscionability based on the Pennsylvania Anitazing statute. Mr. Griffen argued, "judicial resolution and the attendant disclosure of the adjudication is necessary in order to protect the population of students and applicants to the University of Pennsylvania and the public at large." The Court refused to "infer from the mere criminality of hazing in Pennsylvania a broad, over-riding intent to prohibit private resolution of hazing incidents." Ultimately, the Court refused to make a finding of substantive unconscionability because it found no inconsistency "between the important social policies protected and advanced by Pennsylvania's Anti-hazing statute and enforcing agreements to arbitrate claims of hazing...."

Conclusion

This case could have wide implications in the Greek world. Should a fraternity or sorority include an arbitration clause in its membership application process? Some defendants prefer arbitration because they see it as a faster, simpler and less expensive alternative to litigation. Some plaintiffs abhor arbitration because they see it as denying them their day in court. Ultimately, the decision whether to include an arbitration clause must be made by each organization. According to at least one court, now such clauses are enforceable in hazing cases.

• Daniel J. McCarthy

- 1 Alpha Phi Alpha calls students who seek membership aspirants, not pledges.
- 2 *Griffen v. Alpha Phi Alpha, Inc.* No. 06-1735, 2007 WL 707364 (E.D. Pa. Mar. 2, 2007).

"Justice is: JUST US." Richard Pryor

TEXAS LEGISLATURE REQUIRES RISK MANAGEMENT TRAINING FOR STUDENT ORGANIZATIONS

The Texas Legislature unanimously passed a bill requiring advisors and designated officers of student organizations at institutes of higher education to attend annual risk management training beginning with the 2008 fall semester. The risk management program must address: (1) possession and use of drugs and alcoholic beverages; (2) hazing; (3) sexual abuse and harassment; (4) fire and other safety issues; (5) travel; (6) behavior at parties and other events; and (7) adoption by the organization of a risk management policy. Each officer or advisor required to attend must report on the program's contents at a meeting of the full membership of the student organization he or she represents.

The Act, 2007 Texas House Bill No. 2639, applies to all public and private postsecondary educational institutions, except for health-related institutions and exclusively graduate-level private institutions. At least once during each academic year, postsecondary institutions must provide a risk management program for members of registered student organizations. All student organizations must send representatives to the training program unless the institution has opted to specify individual organizations or classes of organizations that "could particularly benefit from risk management guidance." Student members who are not required to attend training may do so as well.

The institution may designate at most four officers from each organization that are required to attend training every year. "such as the president, membership chair, risk

management chair, social chair, or pledge class or new member chair." The institution shall designate equivalent officer positions if otherwise designated positions are vacant.

Advisors to student organizations, defined as persons over 21 years who are not students at the same institution and who provide guidance to the student organization, are required to attend training if they have not done so before, or may complete "an appropriate computer-based risk assessment program."

The Act also requires the Texas Department of Insurance to conduct a study concerning the levels and types of insurance coverage fraternities at Texas institutions of higher education are required to carry by their chartering organizations, the availability and affordability of such insurance, and whether such insurance is available through authorized insurers or independently procured insurance contracts. The Texas Department of Insurance is required to submit a report to the governor, lieutenant governor, the speaker of the House of Representatives, and legislative committees having jurisdiction over insurance and higher education.

Source: 2007 TX H.B. 2639 (NS)(West, May 24, 2007)

• James A. Tate*

* Summer Law Clerk at Manley Burke

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FRATERNAL LAW CONFERENCE 2007

The 12th national FRATERNAL LAW CONFERENCE will take place November 16-17, 2007, at the Westin Hotel in downtown Cincinnati, Ohio. The full day session will begin at 9:00 a.m. on Friday and the half-day session on Saturday ends at noon.

Who should attend?

Fraternity officers, council members, administrators, students, school officials, attorneys and anyone involved with Greek organizations. We offer a substantial discount to students.

CLE credit is available from the State of Ohio and many other states. We are happy to cooperate in providing you or your state CLE Board with conference information.

The **general registration** fee is \$350.00 per participant; **student fee** is \$250.00. Included in the conference fee is a continental breakfast on Friday and Saturday, lunch on Friday and a reception to be held Friday evening. Parking is not included but is available at the Westin for \$15 per day for self parking, and also at several garages nearby.

A block of rooms have been reserved at the Westin Hotel for \$149.00 per night for a standard room. Conference Hotel room rates are subject to applicable taxes in effect at the time of check in (currently 10.5% occupancy Tax and 6.5% State and Local Taxes). Reservations must be made no later than October 27, 2007, to guarantee the group rate. Hotel reservations may be made by calling the Westin Hotel toll free at (800) 937-8461. Ask for the Fraternal Law Conference rates when making your reservation. For further information contact **Bonnie S. Hill** at (513) 721-5525.

REGISTRATION FORM

Return to: Bonnie S. Hill, *Fraternal Law*, 225 West Court Street, Cincinnati, Ohio 45202 Phone: (513) 721-5525; Telefax: (513) 721-4268; E-mail: bsh@manleyburke.com.

Name _____ Title _____

Affiliation _____

Address _____

City/State/Zip _____

Phone _____

I am a/an: Attorney Fraternity/Sorority Leader Student University Official

Enclose Conference fee of \$350.00 per participant, made payable to *Fraternal Law*.

Enclose Conference fee of \$250.00, per participant, student registration fee.

Refund Policy: Full refund for cancellations received on or before October 20. Refund minus \$50 for cancellation received between October 21 and November 15. No refunds after November 15.

