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JOHNSON & WALES U. PREVAILS IN LITIGATION INVOLVING THE CLERY ACT; EASTERN MICHIGAN U. FINED \$357,500 FOR CLERY ACT VIOLATIONS

Two recent cases highlight the importance of the Clery Act on college administrators. First, in December, the United States Court of Appeals for the First Circuit ruled in favor of Johnson & Wales University in a case in which a former student at the Providence, Rhode Island school sued for defamation after the school named him as an assailant in a crime alert.¹ Then in January, the United States Department of Education fined Eastern Michigan University \$357,500 for failing to warn the campus community of a student's murder.

The Clery Act Defined

The court's opinion in *Johnson & Wales* gives a very good primer and summary of the Clery Act, which is codified at 20 U.S.C. §1092(f). In general, the Clery Act requires colleges and universities that receive federal financial aid to notify their campus communities, including students, faculty, employees and others, of certain reported crimes. Colleges and universities must make "timely reports to the campus community on [certain] crimes considered to be a threat to other students and employees... that are reported to campus security or local law police agencies."² The Act only applies to murder, manslaughter, aggravated assault, sex offenses, robbery, burglary, motor vehicle theft, arson, liquor, drug, weapons offenses and hate crimes.

The Act is named after Jeanne Ann Clery, who was killed in 1986 while a freshman at Lehigh University. Ms. Clery's parents led the effort to enact legislation after they learned that students had not been told about numerous violent crimes on the Lehigh campus in the three years before her murder. The Clery Act was initially signed into law in 1990 and has undergone several amendments, including as part of the Higher Education Amendments of 1998.

The Act now requires schools to report the covered crimes that occur not only on campus, but also on certain property located near campus used in support of the school's educational mission. Schools have broad discretion to determine how best to inform their constituent communities of the

relevant crimes. The court stated "[a]s we read the Act, it vests substantial discretion in each campus security office to phrase and disseminate reports in those ways that the particular institution deems best suited to apprise its constituent campus communities of incipient criminal activity."

The United States Department of Education is tasked with enforcing the Act. Schools that fail to comply with the Act's reporting requirements are subject to discipline, including monetary fines.

Johnson & Wales prevails

The *Johnson & Wales* case is the first time a federal appellate court has interpreted the Act's notification requirements. In the case, Christopher Havlik was a student at Johnson & Wales, and was a member of a fraternity. He was involved in a fight with another student, Donald Ratcliffe, on September 16, 2004. Havlik punched Ratcliffe, knocking him to the ground. Ratcliffe hit his head on the sidewalk and suffered a concussion and a fractured skull.

Havlik was arrested for his participation in the fight. The University also investigated the fight. The University issued an incident report, which stated that the fight was probably fraternity related; that Havlik was the likely aggressor; and that Havlik reportedly showed a knife at the fight. The University then temporarily suspended Havlik and charged with him with three violations of the student code of conduct. The school's conduct board held a hearing on the charges and recommended that Havlik be dismissed from the school. His dismissal was upheld on appeal.

While the school was preparing to hold the hearing on the code of conduct charges, Barbara Bennett, the University's chief in-house counsel, reviewed and edited a crime alert about the incident. The crime alert described the incident and stated that members of Havlik's fraternity were involved, while also naming Havlik as the party reportedly responsible for the crime. Members of the University's campus safety and security office posted the crime alert in various places around campus.

Havlik was also charged criminally with criminal assault. Though he was initially convicted during a bench trial, he appealed to the superior court and was acquitted by a jury during a trial de novo.

Having obtained his acquittal, Havlik then sued the University in federal district court. He sued for defamatory publication of false information because of the crime alert and for breach of contract for the University's alleged failure to provide a fair appeal process.

The court conducted a thorough review of the history and purpose of the Clery Act and determined that the University had a duty under the Act to report the incident. Havlik argued that the University failed to act reasonably in issuing the crime alert. The court rejected that argument, finding that, "common sense must inform a court's assessment of the reasonableness of a university's belief that the reporting of a crime is compulsory under the Act. And in making that assessment, the need to assure safety and security for campus communities counsels that doubts should be resolved in favor of notification."

The court found that the Clery Act provided the University with a qualified privilege against the defamation claim: "school officials must act expeditiously to satisfy their responsibilities under the Clery Act, and a reasonable belief—even if later shown to be incorrect in some particular—is all that is required for the qualified privilege to attach."

Havlik also asserted a contract claim concerning the appeal of his dismissal from school. The Court reiterated that the relationship between a university and its students is contractual in nature. However, the court held that Havlik's contractual rights were not violated.

Eastern Michigan Fined \$357,500 for 13 Clery Act Violations

Laura Dickinson was found dead in her dorm room at Eastern Michigan University in December 2006. The facts surrounding her death indicated that she was a victim of a violent crime. The university issued a press release the day after Ms. Dickinson was discovered, stating that "at this point there is no reason to suspect foul play." The university continued to publicly state that there was no reason to suspect foul play, even though the police were investigating the case as a homicide. The university even told Ms. Dickinson's parents that there was no reason to suspect foul play, going so far as saying they thought she died of a heart condition.

On February 23, 2007, police arrested Orange Amir Taylor, III, another student, with Ms. Dickinson's rape and murder. It was only at that point, ten weeks after the death, that the University advised the campus community and her parents of specific information about the crime. The Department of Education found that the university clearly violated the timely warning requirements of the Clery Act.

In all, the Department found 13 separate Clery Act violations. Because of the egregious nature of the violations, the university was fined the maximum, \$27,000, per violation, for a total of \$357,500.

• Daniel J. McCarthy

¹ *Christopher Havlik v. Johnson & Wales University*, 509 F.3d 25, C.A.1 (R.I.) 2007.

² *Id.* citing 20 U.S.C. §1092(f)(3).

DEPAUW AND DELTA ZETA SETTLE LITIGATION

As reported in the September, 2007 issue of *Fraternal Law*, Delta Zeta recently sued DePauw University in federal court, alleging, among other claims, breach of contract, defamation and tortious interference with business relationships. The parties announced a settlement in the case in November. The press release stated, in full,

Delta Zeta national sorority and DePauw University have reached a resolution terminating the litigation between them. Although Delta Zeta does not have a chapter on campus, the parties have agreed that with support of a group of DePauw Delta Zeta alumnae, Delta Zeta national sorority will have the opportunity to seek a return to campus beginning in academic year 2010-11.

DePauw values its relationships with its alumnae who are members of Delta Zeta and recognizes that

like DePauw, Delta Zeta has an objective to develop college students.

This case highlighted the importance of two common recurring themes for Greek organizations. First, if a chapter conducts a membership review, such review must strictly comply with the organization's written guidelines. Such reviews can generate controversy, both among the chapter members and the wider campus community. The organization must be prepared to effectively deal with any such backlash. Second, all fraternities and sororities must have complete public relations plans in place. The national organizations must ensure that all of their chapters know what to do if a particular issue grabs the attention of the local, or in this case, national media. Issues that would otherwise be of little public interest can quickly become huge stories if the wrong person makes ill-advised comments to the media.

• Daniel J. McCarthy

MEDICAL AMNESTY – GOOD SAMARITAN PROGRAMS

This past spring, Beth Speidel, a 19-year-old sophomore at Miami University in Oxford, Ohio, was killed at 3:00 a.m. on a Saturday morning, when she was hit by a train while walking across the railroad tracks. It was subsequently determined that she had a blood alcohol content of nearly three times the legal limit.

Five other female students at Miami University were charged with crimes related to furnishing alcohol to a minor. One of those agreed to a plea deal. The charges against three of the others were subsequently suppressed by the trial court judge because, according to the court, while the police detective who interviewed the students “took no action to overpower or coerce the defendants, however, the court does find that there was an element of trickery involved.” Prosecutors have appealed that decision, which remains pending. The charges against the fifth individual, which were the only ones to relate to alcohol being provided to a minor in a bar, remain pending. This tragic case serves to emphasize the fact that criminal liability can attach to even those individuals who as a matter of “friendship” provide alcohol to an under-aged student.

In contrast, *The Chronicle of Higher Education* reported in its December 21, 2007, issue that more colleges are offering “amnesty” for drinking violations when intoxicated students seek medical help for themselves or their friends.

The abuse of alcohol remains a real problem for higher education as a whole, and the Greek community in particular.

Emory University has such a medical amnesty, or Good Samaritan, program. Students who have been identified as seeking medical help resulting from the overconsumption of alcohol are required to meet with a representative of the college administration, after which they must meet at least twice with a substance abuse counselor and attend two 4-hour risk-reduction classes. More than 100 Emory students have been granted medical amnesty since the program began in the 2005-2006 academic year.

The theory behind medical amnesty seems sound, encouraging students who need medical help to get it rather than hiding their alcohol violation. At least one study, reported in *The International Journal of Drug Policy*, has suggested that the Good Samaritan policy at Cornell University resulted in only a minor increase in students seeking medical treatment. The same study found that a much greater reason for avoiding medical treatment was not knowing when someone was drunk enough to need medical care.

The Chronicle offered pros and cons for Good Samaritan programs from Robert J. Chapman, a Drexel Univer-

sity assistant professor. It included positives such as being consistent with a university’s concern for the well-being of its students and encouraging students to assume a truly supportive role as they come to the aid of their peers. Cons included conflict with existing zero tolerance policies, and the potential for the program to be viewed as a “get out of jail free card.”

At the same time, while medical amnesty and Good Samaritan programs are in operation on other campuses, like Ohio State University, local police are, sometimes with the assistance of federal funding, cracking down on underage drinking. According to a recent *Associated Press* article by Andrew Welsh-Huggins, seven Central Ohio police departments have received a \$35,000 grant from the United States Department of Justice to fund the STOP Campus Project. The grant provides overtime pay on days of Ohio State football games to patrol the area around campus looking for students who appear to be underage and are drinking. Even a student sitting on the front porch of a fraternity house who appears to be underage is subject to being approached by local police and asked for identification. If they are underage, they are taken to jail.

During the 2007 football season, this program resulted in some 211 arrests of underage drinkers. According to the AP article, student reaction to the program prompted Richard Hollingsworth, the Vice President of Student Affairs at Ohio State to send an email to Buckeye students warning of a “humiliating 8-hour or longer ordeal” if jailed as a part of this crackdown. The article quotes him as saying: “There is a perception that this program is targeting people peacefully sitting on their porches having a beer and not going after people who are seriously intoxicated or those selling to underage minors.”

Underage consumption of alcohol in Ohio is a misdemeanor of the first degree, a relatively serious charge equivalent to simple assault. Conviction can lead to a jail sentence of up to six months and a fine of up to \$1,000, though usually it does not. While the *Associated Press* article suggests that other experts on alcohol abuse, such as National Institute on Alcohol Abuse and Alcoholism and the National Social Norms Institute, believe the approach to the underage consumption of alcohol requires more than a police crackdown, what is clear is that police take underage drinking very seriously. Unfortunately, tragedies like what happened to Beth Speidel provide too frequent justification for the seriousness of that police response.

The abuse of alcohol remains a real problem for higher education as a whole, and the Greek community in particular. Compliance with the law, appropriate risk management, and caring for one another are all necessary steps to avoiding alcohol-related tragedies.

• Timothy M. Burke

SAM AND CHAPMAN U. SETTLE FIRST AMENDMENT DISPUTE

As reported in the November 2007 issue of *Fraternal Law*, Chapman University in California was recently threatened with litigation by the California Chapter of the American Civil Liberties Union (ACLU). The complaint arose because a group of Chapman University students sought to organize a chapter of Sigma Alpha Mu (SAM) without recognition by the University. SAM had been one of more than a dozen national fraternities that had sought recognition from the University, which was going to invite one group to start a new chapter on campus.

When SAM was not selected, those students desiring to organize a chapter on campus proceeded to do so anyway. University officials responded by issuing a directive prohibiting their organizing activities from occurring on campus and threatened disciplinary sanctions even for wearing SAM letters on campus. The ACLU viewed the University's action as a violation of the First Amendment right to associate and right of free speech.

Rather than engage in litigation, the ACLU and the University entered into negotiations, ultimately reaching a resolution with an agreement executed by representatives of both sides in late November of 2007. The agreement made it clear that neither party was admitting any wrongdoing and entered into the settlement in order to avoid the time and expense of litigation. The agreement did not provide recognition to SAM, but it did affirm the right to wear their letters, congregate on campus, advertise in the student newspaper, post flyers on campus community bulletin boards, distribute flyers and rent tables in front of a campus building traditionally used to recruit new members. These rights were also affirmed for other non-recognized student groups associated with campus.

SAM was required to disclaim on its material any recognition or sponsorship by the University, provided the University has a similar policy requiring the same from all other student groups. SAM was prohibited, as are recognized groups, from leafleting during the two weeks preceding Rush Week and during Rush Week. SAM and student members of unrecognized student groups were also prohibited from tabling during Rush Week.

Hector Villagra, the Director of the ACLU's Orange County Office said "we are gratified that we could work with Chapman Administrators and SAM members to develop a settlement that preserves the free speech rights of students while supporting the University's obligation to maintain strong policies and procedures that are fair to and protective of all its students." Mary Platt, Chapman's Director of Communications and Media Relations, said: "Chapman University, with its long history of dedication to issues of social justice, is ever mindful of fostering the fundamental values of Freedom of Speech, inquiry and association among our students. This agreement, in essence, makes clear that members of unofficial student organizations can

promote themselves on campus, consistent with our long-standing commitment to students' rights."

Chapman University is a private university that would not normally be subject to enforceable First Amendment Freedom of Association rights directly under the Constitution (under certain circumstances, they could be under a contract theory). However, because Chapman is located in California, the provisions of the California Constitution and codified law apply. The California Constitution, in Article 1, Section 2, states:

SEC. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

The Leonard Law, Cal. Educ. Section 94637(a), makes it clear, stating:

94367. (a) No private postsecondary education institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Students at California private colleges are better protected than those in other states. Indeed, the California Leonard Law provides protection for students at private colleges that no other states provide.

• Timothy M. Burke

NEW PROPERTY TAX IN INDIANA?

Many national fraternities and sororities who have their headquarters in Indianapolis are carefully watching developments in the Indiana State Legislature which could make fraternity headquarters and chapter houses pay substantial property taxes. A bill currently pending in the Indiana Legislature would do just that and, as a result, Greek representatives have been attending state house hearings and are contemplating hiring a professional lobbyist to assist in opposing the legislation.

DOCUMENTS GIVEN TO A SCHOOL MAY BECOME PUBLIC RECORDS¹

At many universities, certain records are shared between the university and fraternities and sororities. Universities may provide certain student names and contact information to aide in student recruitment. At times, universities may provide information regarding student grades. Fraternities are frequently called upon to share with the university certain documentation such as the governing documents of chapters and, on occasion, are known to request information regarding member disciplinary matters. Many times the sharing of information can be beneficial.

While both the university and Greek organizations involved need to be concerned about privacy issues associated with information sharing, this article focuses on a different issue – public records. Recent years have seen a groundswell of strong state public records legislation, frequently in response to pressure from journalists seeking to promote government transparency and the public's right to know. Virtually every state now has freedom of information or public record laws which require public institutions to make most records and documents in the possession of public institutions available to anyone who asks for them. These laws vary from state to state, but generally apply to any public institution. It is of particular relevance here that those laws apply to public colleges and universities.

While the reach of the public records laws vary, generally records in the files of public institutions are readily available to the public unless they fall under a specific exception to the law. Typical exceptions include such things as security arrangements, trade secrets, medical records, adoption records and other private information. But it is unlikely that such exceptions would prevent the public disclosure of chapter or international governing documents filed with a public university. Lists of students provided during fraternity recruitment activities, even those kept only on computer

records, are equally unlikely to be protected by any exception to a state public records law. Most such laws define public records to include any records, no matter what medium they are kept in, whether on hard paper copies or in a computer memory.

Likewise, a public university may, depending on the specific state law, have an obligation to share, upon demand, certain student records, including name and contact information, whether its administration want to or not. If the school publishes a student directory, school officials would be hard pressed to prove that the information contained therein was exempt from a public record request.

Even if an administrator at a public university had advised that such records were not going to be available to the public, it is unlikely that such an understanding could be enforced against a challenge for their disclosure. Many public records laws provide for someone seeking public records who is denied them to have the ability to go to court and obtain a court order requiring the disclosure of those records. Frequently, too, they are entitled to recover their attorneys fees.

Such laws would not normally impact on the internal records of a fraternity or sorority chapter or national office. But if copies of those records have been provided to a public institution, they are likely to be publicly available if someone knows enough to ask for them.

In order to protect the privacy of internal records, it is important when those records are sought by a public university to have a frank discussion about the impact of the local public records law on the ability of some unintended individual to obtain copies of those records. It may be appropriate that such a discussion take place between legal counsel for the chapter and the university.

• Timothy M. Burke

¹ John Genin, an advisor for Phi Delta Theta at Mississippi State University, suggested this topic. Thank you, John. As always, we welcome both article ideas and, when appropriate, article submissions.

GW ESTABLISHES EMAIL HOTLINE

The January 24, 2008 issue of the *GW Hatchett* from George Washington University reported that the University has established its own hazing hotline that takes reports of hazing by anonymous emails. According to the article, Dean Harwood, the Director of Greek Life at GW, said the system "should encourage more students to report suspicious behavior." While the President of the Interfraternity Council at GW was quoted as strongly supporting the idea, at least one Chapter President raised concerns about anonymous reports flooding the system with false accusations.

Based on the experience of the National Hazing Hotline, founded by 26 national fraternities and sororities¹

(see *Fraternal Law*, September 2007), there is likely to be some experience of false reporting, but in spite of that, national fraternities and sororities continue to support and rely on hotlines to help them respond quickly to reports of hazing. Investigations can promptly identify those reports which were pranks or false, but more importantly, they allow national fraternities and sororities to identify and address real problems.

• Timothy M. Burke

¹ Other fraternities and sororities, such as Phi Delta Theta, Pi Beta Phi and others, who are not sponsors of the National Hazing Hotline, already had their own hotlines in operation.

DELTA UPSILON CLOSES IOWA CHAPTER FOLLOWING POT BUST

Delta Upsilon recently closed its chapter at the University of Iowa after four members of the chapter were arrested following a December drug bust at the chapter house. Police raided the chapter house and found 650 grams of marijuana, cash, packing materials, scales and drug-deal ledgers. Stephen Boyler, James Goetz, Joseph Hillegas and Arthur Kerwin were charged with possession and/or conspiracy to deliver marijuana and failure to affix required tax-stamps to the drugs.

Justin Kirk, Delta Upsilon's Executive Director, stated in a press release that they closed the Iowa Chapter because "[t]he actions and decisions of these men are incongruent with the mission and values of Delta Upsilon Fraternity. Substance abuse does not have a place in our Fraternity. Our mission is to build better men through our four

founding principals of Friendship, Character, Culture, and Justice. Unfortunately, this was not happening in our Iowa Chapter." The fraternity hopes to return in the future, but is uncertain of what they will do with the chapter house in the mean time.

Dealing drugs out of a chapter house, such as alleged in this case, creates the possibility of a federal forfeiture action under 21 U.S.C. §881(a)(7) and 18 U.S.C. §985. The United States Attorney's Office in Vermont recently filed such a forfeiture action against the Lambda Iota Society at the University of Vermont. Chapters must be diligent to ensure that their members are not risking the entire chapter's existence by bad decisions of only a few members.

• Daniel J. McCarthy

AEPI CLOSING CHAPTER AFTER HAZING REPORTS

Alpha Epsilon Pi's Beta Iota Chapter at Indiana University was recently closed following reports of hazing. The chapter, which was started in 1958, was on a deferred suspension from IU at the time of the incident because of earlier hazing and alcohol violations. According to an article on Reporter-Times.com, Dean of Students Dick McKaig stated that the chapter's hazing allegations included "sleep deprivation, inciting fear, requiring behavior that could cause harm, and leaving members in a remote location and forcing them to walk back to campus."

AEPI will be able to apply for re-instatement of the chapter at IU after two years. Andy Borans, AEPI's Executive Director, quoted in the Reporter-Times.com article, stated that the chapter will seek a return to campus. "It is

always difficult to close a chapter that has a long-standing history. We value our alumni who have worked so diligently with the chapter, the university and the international fraternity.... We look forward to returning to campus as a valuable entity of Indiana University and its Greek community."

Section 35-42-2-2 of the Indiana Code defines hazing as "forcing or requiring another person: 1) with or without consent of the other person; and 2) as a condition of association with a group or organization; to perform an act that creates a substantial risk of bodily injury." No criminal charges have been filed against any of Beta Iota's members.

• Daniel J. McCarthy

UPDATE ON TEXAS INSURANCE LAW

As reported in the September 2007 issue of *Fraternal Law*, last year the Texas State Legislature adopted a law that requires universities in Texas to conduct risk management training sessions for fraternities and sororities. The attendance of selected officers and advisors is mandatory.

In addition, the law requires that the Texas Department of Insurance study the insurance arrangement of fraternities and sororities.

MJ Insurance, which specializes in providing insurance coverage for women's fraternities and sororities and, as a result, provides coverage on 39 separate college campuses

in Texas, has been in contact with the Department of Insurance. MJ reports that the topics that the Department of Insurance will concentrate on include whether the chapter is a part of a national insurance program, whether the insurance is mandatory, and whether the coverage is provided by "admitted or non-admitted insurance companies."

Fraternal Law will follow developments with the insurance study.

• Timothy M. Burke

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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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