

Representing Victims of Hazing and Other Group Violence on Campus

By Douglas E. Fierberg, Esq.

Hazing of students pervades high schools and colleges. While the problem has gone relatively unnoticed by the public, a 1999 study by Alfred University indicated that seventy-nine percent of NCAA athletes were hazed as a condition of joining a team.ⁱ In a subsequent report published by Alfred University, forty-eight percent of high school students admitted being hazed by school groups.ⁱⁱ In addition to being widespread, hazing can also be very dangerous. In his first of three books on the subject, journalist Hank Nuwer reported that “every year since 1970, a young man or woman has died during an activity related to fraternity or sorority pledging.”ⁱⁱⁱ One tool to combat this pervasive problem is civil litigation. This article offers practical advice about some of the unique issues involved in civil lawsuits that arise out of hazing incidents.

Recent widely-publicized cases provide good examples of the problem of hazing. In the fall of 1997, two young women who were pledging a national sorority at a Midwestern university were branded with cigarettes as a test of their commitment to the group. In 1999, a ninth grade wrestler in the Midwest was prodded in the rectum with a broomstick by older members of the team.^{iv} That same year, a Kentucky court entered a judgment against a national fraternity in excess of \$1 million after its members severely beat a young student during initiation. This followed entry of a \$375,000 judgment against the same fraternity for a hazing incident at the University of Maryland.^v Recently, a college freshman in Michigan died of alcohol poisoning following an initiation ritual during which he consumed the equivalent of twenty-seven shots of alcohol. His death is one of several recent fatal incidents involving hazing and the misuse of alcohol.

Hazing Defined

While there is no federal statute defining or prohibiting hazing, forty-two states have enacted statutes criminalizing hazing. Definitions of hazing vary from state-to-state. A good working definition is conduct which causes or threatens to cause serious physical or psychological injury to another as a condition of joining a team, student organization, or other school group. The Ohio Code is particularly instructive, defining hazing in the following terms:

[D]oing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person. No person shall recklessly participate in the hazing of another. No administrator, employee, or faculty member of any primary, secondary, or post-secondary school or of any other educational institution, public or private, shall recklessly permit the hazing of any person.^{vi}

Many statutes expressly recognize that hazing involves improper coercion or threats.^{vii} Hence, many statutes expressly bar wrongdoers from defending their conduct on the basis of the victim's alleged consent or willing participation. This can be a strong basis for arguing in civil litigation that the defenses of contributory negligence or assumption of the risk are precluded. Some statutes waive claims of sovereign immunity for suits against state schools.^{viii}

Legal Theories and Cases

Hazing can give rise to legal claims of assault, battery, intentional or negligent infliction of emotional distress, several other different theories of negligence, and traditional theories of premises liability. Many hazing rituals also involve unlawful furnishing of alcohol to a minor and to someone who is obviously intoxicated. State dram shop acts should be consulted since they may affect the particular claim.^{ix}

Hazing often involves placing people in positions of peril in which they must rely upon others for their safety. When those doing the hazing do not act reasonably, and particularly when the hazing is combined with intoxicating amounts of alcohol, serious and often fatal consequences can result. Viewing hazing in this light, age-old common-law principles might provide victims with a viable theory of recovery.^x

Specifically, § 324 of the **Restatement (Second) of Torts** provides that:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any harm caused to him by:

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

The legal issues in hazing cases overlap many of the issues in cases involving school group misconduct that results in sexual assault or other injuries. Courts are beginning to recognize the serious risks associated with certain types of conduct by Greek groups, as reflected in the following statement by the Supreme Court of Arizona:

"We are hard pressed to find a setting where the risk of an alcohol-related injury is more likely than from underaged drinking at a university fraternity party the first week of the new college year."^{xi}

Duties of Care Unique to Greek and Other Student Organizations

There are several unique bases which may give rise to a duty of care on the part of fraternities or other student organizations.

School Safety Codes of Conduct and Related Rules

Most universities require student groups to apply for the status of “Recognized Student Organizations” (“RSO”), or some similar designation. As a condition for obtaining this status, the potential RSO agrees to comply with any and all applicable safety rules of the university, as well as local and state laws and ordinances.

The university’s student safety rules set forth standards of conduct on campus which generally prohibit hazing, restrict the use or provision of alcohol or controlled substances, and prohibit certain types of dangerous social events, such as “open” parties. Some university safety rules expressly require the group to bear responsibility for the misconduct of its members. For example, Widener University’s Student Code of Conduct provides: “[F]raternities and sororities are responsible and will be held accountable for the actions of their members when their behavior is defined as resulting from fraternity or sorority conduct.”

These safety rules may be helpful in establishing a general standard of care in the state and university community. It may be argued that the RSO voluntarily assumed these specific duties of care for the protection of students in exchange for the benefit and privilege of operating as an RSO. In some states, a state school’s rules have the same force and effect of a statute because the rules are enacted under authority directly conveyed by the legislature.^{xii} This opens the door for satisfying at least one element of the argument that the wrongdoer’s violation of the school safety rule constitutes negligence *per se*.

Internal Risk-Management Rules and Insurance

Approximately seventy percent of Greek organizations belong to the insurance purchasing group of FIPG, Inc. FIPG is headquartered in Indianapolis, Indiana, and its stated primary goals are to: (1) develop a comprehensive risk management policy and monitor the enforcement of that policy by members; (2) serve as an information clearinghouse for insurance and risk management issues facing the Greek movement; and (3) assist its members in the purchase of liability insurance. Typical liability coverage for FIPG members ranges from \$2 million to \$20 million.

FIPG members have adopted an extensive risk-management policy containing numerous rules, restrictions, and statements concerning hazing, alcohol, social events, and other basic safety considerations. An opening passage in the FIPG Manual provides: “In fact, in the late 1980s, fraternities and sororities were ranked by the National Association of Insurance Commissioners as the sixth worst risk for insurance companies – just behind hazardous waste disposal companies and asbestos contractors.” Many universities have adopted provisions of the FIPG manual for school groups or, at a minimum, incorporated similar provisions into their particular rules.

Selected Litigation Issues

Discovery

The RSO process involves the regular submission of numerous documents to the university because RSOs must regularly apply for re-certification, and their activities are generally monitored by the school. University files likely include applications for recognition, articles of incorporation, by-laws and other formation documents, up-to-date membership lists, internal risk-management policies, agreements regarding

safety rules, alleged violations of university safety rules and correspondence related thereto, police complaints, and the existence of, or basis for, any disciplinary proceedings, suspensions, or terminations. Additional potential sources for relevant documents are the university's office of Greek or student affairs, PanHellenic council, student judicial affairs board, and university police.

To the extent discovery requests seek personally identifiable information from student records, anticipate challenges to that discovery under the Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and corresponding state statutes. A university's primary objections to production may be overcome by counsel's agreement to initially accept production with all personally identifiable information (e.g., students' names) redacted. Obviously, having an opportunity to review substantial portions of the records aids the determination of whether filing a motion to compel would be productive.

Whom to Sue: A School Group's Typical Structure

Many fraternities have carefully engineered corporate structures. This creates unique legal issues, as reflected by the following example of the fictitious KTA Fraternity located on the campus of State University.

The KTA house and real property are likely owned by the KTA Housing Corporation, a nonprofit company holding no other assets. KTA Housing Corporation has its own officers and directors, and its sole purpose is to own, manage, and lease the property to a group of fraternity members operating the State University KTA Fraternity Chapter Corporation. The KTA Chapter Corporation is also a nonprofit

corporation, holding few assets beyond a bank account used to collect dues, pay rent to the KTA Housing Corporation, and pay dues to the KTA National Fraternity Corporation.

The KTA National Fraternity Corporation sits atop this type of structure for numerous chapter operations across the country. The KTA National does not technically hold title to any chapter or housing corporation assets, and its articles of incorporation and by-laws likely state that it has no right or ability to control or supervise the activities of the chapter or housing corporations.

This corporate structure means that careful decisions must be made when determining which entity or entities bear legal responsibility for the victim's injury, and under what legal theories. For example, claims which are based on principles of premises liability may be affected by the fact that the separate housing corporation purportedly manages and controls the premises, rather than the chapter corporation, its members, or the national. This structure may also affect collection or punitive damages issues because KTA National's balance sheet, financial statement, and tax returns likely exclude the value of the chapters or housing corporations and their respective assets. Some of the most valuable parcels of land on college campuses are owned within this type of structure, so understanding it at the outset will allow one to accurately identify the defendants' true financial worth for punitive damage or collection purposes.

This structure has been used by national fraternities to argue that they have no legal responsibility for the wrongdoing of their local chapters.^{xiii} Recently, this legal fiction has been circumvented.^{xiv} The insurance policies issued to FIPG members generally cover the different entities comprising this structure.

Suing the School?

Counsel should research fully the numerous legal **and** practical issues concerning whether, how, when, and at what cost a university may be held liable for the misconduct of student groups. Focus too should be given to whether the university is a state school protected by principles of sovereign immunity and damage caps, and how this may affect settlement, joint-tortfeasor, and contribution issues. There are also critical legal and practical differences between suits involving state high schools and claims against private universities.

One significant practical issue worth noting is that the university, its administration, and personnel can become one of the victim's greatest assets or roadblocks in litigation against a school group. Virtually every university prohibits hazing and recognizes that this type of misconduct by student groups is dangerous and creates problems for the university. In a serious injury case, the university may have already revoked the organization's RSO status, and may be openly poised to cooperate with the victim's pursuit of a remedy against the organization and its members. This includes making senior officials available for deposition and trial who can testify about the purpose of student safety rules, the standards expected of RSOs and students, the risk of personal injury for violations thereof, and the wrongfulness of the misconduct which caused injury to the victim. This testimony may be helpful for numerous issues raised in pre-trial or dispositive motions, and these witnesses may be very persuasive at trial. Because this potential alliance will be permanently impacted by a decision to

name the university as a defendant, considered thought should go into how this posture will affect every stage of the litigation.^{xv}

Suing the Student Wrongdoers?

Because they still legally reside with, or are dependents of, their parents, many members of student organizations are likely covered insureds under their parents' homeowner's insurance policies for claims arising out of their acts of negligence. Counsel can expect common coverage questions being raised where the misconduct appears intentional, willful, or malicious. However, in hazing cases, the injury or death often results from engaging in traditions that are purportedly intended to be fun, build character, or create bonds between people. Coverage should still apply because injury or death is an accidental or unintended result of this conduct.^{xvi}

Careful consideration should be given to how the trial (or appeal) will be affected by keeping young students in the case as defendants **at the time of trial**. Clearly, counsel may need discovery from many of these individuals, and they are transient or likely to leave the jurisdiction. Neither plaintiff nor defendant can plan around their voluntary cooperation, particularly with respect to appearing at trial, so naming some student defendants may help case administration. Nonetheless, counsel must integrate into the overall case strategy the effect their age, appearance, and own perceived vulnerability may have on the jury's deliberations concerning the amount and responsibility for damages.

Conclusion

Hazing is a serious problem causing injury and death to young people in high school and college. Civil litigation can provide immeasurable benefits. To the victim or victim's family, litigation helps by holding the wrongdoer accountable and directing the final outcome of the crime. The litigation also raises public awareness and causes schools and school groups to change long-standing traditions which have hurt or killed far too many young people.

Douglas Fierberg, Esq., is a partner in a Washington, D.C. law firm. In addition to handling general commercial and personal injury litigation, Mr. Fierberg specializes in representing high school and college students who have been seriously injured or killed. Most often, the precipitating misconduct involves the crimes of hazing, alcohol misuse, sexual assault, or other violations of school codes of conduct. He has been a member of the National Crime Victim Bar Association since April of 2000. Mr. Fierberg can be contacted at Sherman, Meehan, Curtin & Ain, P.C., 1900 M Street, N.W., Washington, DC 20036, 202/530-3300, dfierberg@smcalaw.com, www.smcalaw.com.

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1. Alfred University, *Initiation Rites and Athletics: A National Survey of NCAA Sports Teams* (Alfred Univ. 1999).
 2. Hoover and Pollard, *Initiation Rites in American High Schools: A National Survey* (Alfred Univ. 2000).
 3. HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* (Indiana Univ. Press 1999).
 4. *Stewart v. State Monroe Falls High School* (Ct. of Common Pleas, Summit County, OH 2000).

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5. *Snell v. Omega Psi Phi Fraternity* (Cir. Ct., Montgomery Cnty., MD 1995).
 6. OHIO REV. CODE ANNO. § 2903.31 (1999).
 7. *See, e.g.*, MD. CRIMES AND PUNISHMENT CODE ANN., ART. 27 § 268 (1999).
 8. *See, e.g.*, OHIO REV. CODE ANN. § 2307.44 (1999).
 9. The following reported cases are good examples of how hazing claims have been litigated in various states, with different types of organizations, legal theories, and results. *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999), *Knoll v. Bd. of Regents of the Univ. of Nebraska*, 601 N.W.2d 757 (Neb. 1999), *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105 (La.App. 1999); *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344 (N.Y.App. Div. 1999); *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del. 1991); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Id. 1999); *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193 (Ill. Ct. App. 1987). In a few hazing cases, victims have sought remedies under federal civil rights statutes, but the federal claims have provided no, or only marginal benefits. *See Alton v. Texas A&M Univ.* (U.S.D.C. Galveston, Texas) (42 U.S.C. §1983, case dismissed); *LaTuillippe v. Univ. of Vermont* (U.S.D.C. Vermont) (20 U.S.C. §1681, case settled). The U.S. Supreme Court's ruling in *Davis v. Monroe Cnty. Bd. of Educ.*, 119 S.Ct. 1661 (1999), may give guidance as to how Title IX might provide a federal claim and jurisdiction for hazing that involves oppressive sexual harassment.
 10. *See* RESTATEMENT (SECOND) OF TORTS § 321 (1965).
 11. *Estate of Hernandez v. Arizona Bd. of Regents*, 866 P.2d 1330, 1341 (Ariz. 1994). Two cases are particularly instructive: *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968 (Ind. 1999)(applying premises liability principles to hold that a fraternity chapter had a duty of care to rape victim as its invitee); *Estate of Hernandez v. Delta Tau Fraternity, Inc.*, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995)(claims arising out of automobile accident with intoxicated fraternity partygoer). *See also, Marquay v. Eno*, 662 A.2d 272 (N.H. 1995).
 12. *See James v. Wall*, 783 S.W.2d 615, 619 (Tex. Ct. App. – Houston 1989).
 13. *See, e.g., Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289 (Mich. Ct. App. 1994).
 14. *Estate of Hernandez v. Delta Tau Fraternity, Inc., supra.* (The national fraternity, “having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored”).
 15. The following cases illustrate many of these issues: *Knoll v. Bd. of Regents of the Univ. of*

Nebraska, 601 N.W.2d 757 (Neb. 1999); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105 (La. Ct. App. 1999); *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999); *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del. 1991).

16. See generally, *Norris v. State Farm Fire and Casualty Company*, 16 S.W.2d 242 (Ark. 2000); *Baugh v. Redmond*, 565 So.2d 953 (La. Ct. App. 1990); *Vermont Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417 (S. Car. 1994).