

NOBODY SAID I HAD TO BE A LAWYER EITHER

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**22nd ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 18 - 20, 2001**

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For the past 38 years I have worked at institutions of higher education. The first 16 years I was a student affairs administrator, then for the past 22 years I have been a member of the graduate faculty at two different institutions in two different states. For three of those years I also served as the student grievance officer as well as a member of the faculty. During the past ten years I have served as the Chair of an interdisciplinary graduate academic program with 13 graduate faculty. In the past year I have served as the Director of the School of Leadership and Policy Studies which is one of four schools in our College housing five different graduate academic programs and the faculty of those program. I point this out only to show that I have had extensive experience with chairs, deans, faculty and students.

The purpose of this paper is to respond to the comments of my colleagues, Connell, Franke and Lee with a touch of reality born out of my experiences. While my colleagues have offered suggestions for chairs and deans, I will offer suggestions for university counsel (where one exists) and upper administration.

Who are Chairs and Deans

To begin an analysis of the legal and managerial challenges of Department Chairs and other academic administrators you must first understand who those individuals are, where they come from and their educational backgrounds. Academic administrators represent a wide variety of individuals and there is no single description that fits them all.

In most instances department chairs were elected to the position by their colleagues for a specific length of time set forth in the institution's governing document. They may be reelected or the faculty may, at the end of the term, elect another of their colleagues. Thus, chairs may represent what has been referred to as "fluid participation" of the faculty. The chair comes from the ranks of the faculty. At most four year institutions this means that the individual was educated at the Ph.D. level in his or her discipline. For example, the chair of the English Department would be a Ph.D. in English or the chair of the Physics Department would have a Ph.D. in Physics. Nowhere in the educational background of the vast majority of chairs would they have had any education or training in agency, indemnification, sexual harassment, free speech issues, copyright law, negligence, defamation, Title IX, Section 504, ADA or any other legal concepts or laws. To most, if not all chairs and deans, Connick (1983) is a jazz singer and Tinker (1969) is something you do if you are not serious. Those who have children in school may even think the ADA means "average daily attendance." Not only do chairs and deans lack legal training in their past educational experiences, but there are very few opportunities for them to obtain such training during their tenure in academic administration.

It must also be recognized that most chairs and deans work at small private colleges and universities. There are 2393 four year colleges and universities listed in the 2001 Higher Education Directory (Ridenhouse, 2001). Of these 1758 are private and only 635 are public. More than two-thirds of four year institutions in this country are private, and most of those are small liberal arts colleges. That's how the educational system in this country evolved. Harvard was founded in 1636 and it was not until almost

150 years later that our first public institution, the University of Georgia, was founded in 1785. Even if you add in two year colleges, private institutions still greatly outnumber publics – 2425 private institutions to 1658 public institutions. Most of these two and four year private institutions do not have in-house institutional counsel. They probably rely on one or more trustees who happen to be attorneys to provide them legal advice. In many cases these attorneys do not specialize in the kinds of laws chairs and deans have to deal with nor are they highly accessible to the chair or dean. My own experience as a student affairs administrator at a small, private college supports this view. Even at large public institutions that may have in-house counsel those attorneys, while probably better prepared to deal with campus legal issues, are often more knowledgeable with the issues pertaining to faculty than they are with issues pertaining to students. This past year I had a student affairs administrator who was dealing with a cheating case at a major state university where in-house counsel asked her “How do you spell Dixon” when she was outlining the procedures to be used for the hearing and why she was using them.

Not only do most small private institutions lack in-house counsel, but other resources are also scarce. If there is a disability coordinator, an affirmative action officer or Title IX coordinator, it is probably an assignment given to another member of the administration or the faculty who may have been sent to one conference and is routed all the “Dear Colleague” letters from the Department of Education.

Fish or Fowl?

My colleagues have stated, “Chairs may view themselves as regular faculty who, for the duration of their terms as chairs, are merely cursed with additional paperwork and meetings.” Although they also point out that this limited perspective ignores the legal

realities, it is, in fact, the perception of most chairs. If asked, most chairs would. I believe, tell you that they are faculty and not administrators. I have a colleague who is the Director of one of the other four schools in the College. He vehemently objects to being listed as a part of the administration of the College. He emphatically states that he is a tenured member of the faculty with an appointment on the graduate faculty and in his department. Simply stating that this perspective ignores the legal reality does not solve the problem. No one has yet explained to this academic administrator nor to most chairs or deans that they are "...an institutional agent on an on-going basis." nor the implications of that relationship.

Legal Implications of Relationships with Faculty

My colleagues have noted that many academic administrators manage conflict through avoidance and suggest that chairs should deal with problems immediately and "ensure appropriate due process when taking an adverse action against a faculty member...." That's sound advice except that the reality is most chairs, unless their discipline included conflict resolution, have not had specific training in this aspect of the job. We have already seen that chairs have no legal training so to suggest that they provide due process assumes that they understand the concept and can apply it to a specific set of facts. In most cases their efforts at due process will be an educated guess. In fact they may provide more process than is due which could also create additional problems. To suggest that chairs must investigate allegations of misconduct or immediately deal with conflict begs the question of how they should do so. Without proper training chairs may create more legal problems by conducting an investigation or

confronting a conflict than they would by ignoring the problem, albeit neither is an acceptable alternative.

The reason chairs manage conflict by avoidance is that they not only have no training in conflict resolution, but, as stated earlier, they are not aware of their own legal rights and responsibilities or those of the faculty. Most chairs will tell you that you can't terminate a tenured faculty member or you can't assign tenured faculty members to a particular course if they don't want to teach it.

Thus, conflict avoidance is born out of ignorance. Chairs fear being sued by a faculty member for discrimination, or violation of the right to academic freedom or free speech. Most will also tell you that they "heard of a colleague at another college who was sued for megabucks by a faculty member who was denied tenure." Of course these stories never have a case citation to follow up on, but to the chair it represents reality when he or she does not understand the law. The fact that my colleagues have listed in their outline 10 pages of case briefs on issues of promotion, tenure and termination only supports the chair's fear of being sued. Most chairs, if they were honest, would tell you that's too much of a challenge – "I am a scholar and I have to keep up in my field, do my research, teach a class and take care of all sorts of administrivia. I simply don't have time to confront contentious tenured faculty or the young turks and hazard a lawsuit that will take up more of my time even if the university had indemnified me." The head of a faculty union told me he advised his faculty not to serve on campus judicial boards because if the student didn't like the outcome or the board made a mistake they could be sued.

In their paper, my colleagues have also shown us that there is a balancing required in employee speech cases (most faculty object to being referred to as employees until it is time for the university to issue paychecks to all employees) and this is often a thin line. How are chairs to know this? It does not seem to be easy to determine and even lawyers disagree so how are chairs going to decide where the balance is struck.

It has also been noted by my colleagues that whether an individual is “disabled” under the ADA is “...a legal judgment made on the basis of the facts of the situation.” and there is “no real definition” of a reasonable accommodation. Having noted this and recognizing that most chairs have no legal training and little access to legal counsel or a qualified disability coordinator is it even reasonable to ask “What process should a chair or dean go through to make these determinations?”

Finally, there is a lack of understanding by chairs and faculty of the concept of academic freedom. At a 1987 AAUP conference, one participant, after observing several conflicting discussions of what academic freedom protected, said, “I think there’s substantial confusion as to what academic freedom means” (Mooney, 1987, p. 16). At least one legal scholar has concluded that “...the concept of ‘academic freedom’ carries less weight for judges than it does for academics (Pavela, 2000). Even Alan Bloom (1987) made the comment in his Closing of the American Mind that “The very special status of what came to be called academic freedom has gradually been eroded, and there hardly remains an awareness of what it means” (p. 260).

A University of Georgia professor believed that academic freedom gave him the privilege of withholding information from the court on how he voted in a tenure decision but the court disagreed and the professor was cited with contempt, jailed and fined until

he changed his mind (In Re Dennan, 1981). Most recently the Fourth Circuit Court of Appeals, after an extensive review of the evolution of academic freedom, concluded that “The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs” (Urofsky, 2000, p. 412). The court went on to point out that the Supreme Court “...has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so” (p. 414).

It will be difficult for chairs to “honor the concept of academic freedom” when there seems to be confusion about what it means and who it protects. If legal scholars can’t agree on what it is, how will chairs be able to honor the concept?

Legal Implications of Relationships with Students

If the legal and managerial challenges facing department chairs and other academic administrators appears overwhelming in their relationships with faculty, the challenges are exacerbated in their relationships with students.

Chairs generally have no clue about the legal concepts that present themselves in the everyday administration of their department. Had the chair of the Chemistry Department at the University of Georgia understood the basic elements of defamation, one would hope that he would not have made oral and written statements to colleagues who were not involved in the investigation of the theft of federal work study checks. However, without an understanding of defamation, he made these statements to his colleagues accusing a former student of being a liar, a thief and having trouble with the

IRS. The student sued the chair for slander and was awarded \$200,000 in damages (Melton v. Bow, 1978).

In two other instances chairs seemed oblivious to the dangers inherent in faculty classroom activity as there was no evidence presented to show any oversight of the activity by the chair. In Beach (1986) a professor took students on a required field trip and not only permitted the consumption of alcoholic beverages by underage students, but took them to dinner at a local ranch where alcohol was served to underaged students and the professor. That evening when the class arrived back at their campsite one of the underaged students who had been drinking fell off some high rocks in the vicinity of the campsite and was seriously injured.

The other incident involved taking students to a mountain retreat owned by a faculty member. The trip, scheduled as a part of the course and listed on the syllabus, was designed for graduate students to practice counseling skills. The students were all over 21 years of age and the professor permitted them to consume alcohol at the event. A male student who was observed by the professor to be obviously intoxicated subsequently raped one of the women students who was sleeping in a cabin without a lock. The case was settled out by the University.

Both of these incidents resulted in tragic consequences which probably could have been avoided had the chair minimally understood a few basic legal and risk management concepts. The court in Beach found no duty on the part of the University of Utah to protect the student or to enforce state drinking laws. However, it has been suggested by at least two legal scholars that the trend in the duty of the university to protect students is changing to one of imposing a duty (Bickel & Lake, 1999).

For several reasons it is very difficult for chairs to address student complaints about faculty. Students believe, and with some validity, that if they make a complaint about a faculty member, the professor will retaliate against them in their grade (see, for example, Alexander v. Yale, 1980). Thus, the student may not bring a complaint, wait until he or she graduates (Burtner v. Hiram College, 1998) or the professor's behavior is unbearable or report the matter to the chair, but insist that his or her name not be used. International students in particular are especially fearful of reporting complaints since the retaliation in their situation could result in deportation (Liu v. Striuli, 1999). While the chair may hear rumors of students' complaints, he or she may believe they can do nothing unless they have an actual complaint. This type of inaction can be especially dangerous if the complaint or rumor is one of sexual harassment or sexual assault, but it is reality. A female student (who was sexually assaulted by her date) at my institution asked her professor if she could finish the course on an independent study basis because she did not want to be in the same room with her assailant. She said she could not concentrate, but the professor denied her request. She then went to the Associate Vice President for Academic Affairs who informed her that he could not tell faculty what to do. She was referred to me since I serve on a campus organization (Coalition Against Sexual Offenses) that deals with such matters. I showed her the Sexual Assault Victim's Bill of Rights (20 U.S.C. 1092) and highlighted the portion requiring institutions to change academic arrangements if requested and if possible. She took that to the President and finished her class on an independent basis.

My colleagues have noted the Nova Southeastern (2000) case dealing with the university's duty to students who are placed at internship sites. This case, as they have

noted, has important implications for any academic program requiring an internship. The problem is that chairs are not aware of it, and those who are (I have made some aware of it) want to argue with the decision and point out how it is impossible to check out every internship site – that’s the faculty in them coming out again.

Summary and Conclusions

Let’s face it chairs and other academic administrators have no training in law, conflict resolution, budgeting, motivation theory, organizational behavior, management or any other area necessary for the effective operation of an organization composed of a group of highly educated experts. Because, as my colleagues have noted, “[T]he chair is an institutional agent on an on-going basis,” the institution has a great deal at stake in ensuring that the chair knows and understands institutional policies, the various state and federal laws affecting the operation of the department and some of the basic legal concepts to be encountered in administering a department.

The education of chairs in these areas cannot be left to chance. The days of Mr. Chips are gone forever and we live in a litigious society. It is almost as if the administration of our universities fear educating chairs because they are afraid faculty will not take the position if they knew all the legal and managerial challenges facing them. I have proposed in both Kentucky and Ohio that the statewide coordinating boards provide training for chairs (including law, conflict resolution, supervision, evaluation, budgeting and organizational behavior) but in both states the proposals fell on deaf ears.

Someone, and I believe it is the statewide coordinating/governing boards, must provide the necessary training for department chairs and other academic administrators. The same organization can provide such training for private colleges for a nominal fee as

a service to higher education in the state. We can no longer expect chairs to assume responsibility for something they know nothing about. Lets practice preventative law rather than hoping nothing will happen.

Where in-house counsel is available I believe counsel should provide an update of the law affecting academic administration (and student affairs too) each fall for all chairs, directors and deans. As important new cases are decided or rules are published counsel should issue “alerts” to the academic administrators. I wonder how many administrators now know the differences between OCR standards for Title IX sexual harassment and the Supreme Court’s standards? Isn’t that something counsel should have been advising chairs about?

Finally, the upper level administration must begin to budget for academic administrators to attend conferences like this and others where academic legal issues are discussed. The old adage is nowhere more true – pay me now or pay me later!

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