NOBODY SAID THIS WAS GOING TO BE EASY:
Legal and Managerial Challenges for Department Chairs and Other Academic Administrators

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This paper will explore several of the major legal and managerial challenges facing department chairs and other academic administrators today. American colleges and universities—even relatively small ones—are complex institutions. They enter into many types of legal relationships. The relationships may involve individual faculty, students, staff, administrators, and alumni, or groups of these individuals. Colleges and universities have elaborate dealings with external and internal for-profit and non-profit entities. They are subject to a staggering array of federal and state laws and regulations.¹

An individual department chair or dean exercises significant responsibility in many areas touched by the law. Among these are three we will address here: evaluating tenure candidates, accommodating faculty and students with disabilities, and developing and managing programs for student foreign study. Happily, these functions often proceed smoothly, with all parties collaborating in harmony toward a common goal.

In real life, though, difficulties can arise. When they do, legal rights and obligations are brought into sharper focus. We plan, therefore, to concentrate on the problematic situations:

• The marginal tenure candidate who has vigorously criticized the institution
• The faculty member or student with a disability who stridently demands ever greater accommodation while falling farther behind in meeting work or educational requirements
• The overseas program in a remote and undeveloped locale that poses formidable challenges in areas such as facilities, staffing, government relations, oversight, and student safety.

How can a department chair, dean, or other academic administrator navigate these challenges?

We will address one additional area: the role of the chair or dean in the chronic disputes that can plague a department or college. What if tenured colleagues are incapable of being in the same room and engaging in civil dialogue over their profound disagreements? What if a staff member files repeated grievances against the department chair? What if a doctoral candidate comes to believe that her adviser has it “in” for her? From the seeds of such disputes grow the lawsuits that can deplete an institution’s morale, reputation, and resources. We will evaluate possible approaches to chronic disputes and chronic disputants.

I. SETTING THE STAGE: AGENCY AND INDEMNIFICATION

A department chair or dean often approaches situations that have the potential for legal claims by asking what support he or she can expect from the institution. That is, indeed, an important question. But it should be addressed only after the individual understands that he or she is the institution, at least for legal purposes. We discuss in this section basic principles of agency and indemnification.

Agency. Department chairs and deans are, legally speaking, agents of the institution. Their words and deeds can bind the institution to legal commitments. The institution can and does legally act through them, as well as through higher administrators and the governing board. Needless to say, a department chair cannot usurp the powers reserved to the governing board. Different levels of institutional responsibility may be exercised by different groups.
What about the faculty as a whole? The classic concept of shared institutional governance suggests that the faculty is the institution. From a legal standpoint an individual faculty member may occasionally serve as an agent of the institution, for example in dealing with a student enrolled in his or her course. The chair is an institutional agent on an on-going basis. Some exceptions exist, as when a department chair makes of promise of future tenure that is beyond the scope of his specifically delegated authority.  

The role of agent brings special legal responsibilities to the department chair:

- A chair should not make promises to students, prospective or current faculty, or others that the institution is not prepared to honor.

- A chair should not ignore allegations of misconduct that come to his or her attention. Even informal allegations or credible rumors should be addressed, regardless of whether the alleged victim has filed a complaint. When the chair has notice of a potential problem, the institution also has notice of it. This is especially important in the area of harassment.

- A chair should be scrupulous in adhering to institutional policies. The law treats more harshly, for example, a situation in which a chair harasses an assistant professor than one in which an assistant professor harasses a peer.

Chairs may view themselves as regular faculty who, for the duration of their terms as chair, are merely cursed with additional paperwork and meetings. This limited perspective, however, ignores the legal realities.

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3 One setting in which the respective roles of chairs and faculty arises is collective bargaining. Do chairs have a “community of interest” with faculty sufficient to be included in a faculty bargaining unit? Or are chairs supervisors who should be excluded from a bargaining unit? For public institutions, sometimes state law expressly includes or excludes the chairs. Otherwise, the actual responsibilities performed by chairs are the key. For a historic look, contrast Fordham
**Indemnification.** Having established that the chair or dean is an agent of the institution, we can now examine the support that he or she might expect when legal problems develop. The high stakes situation that brings this issue most sharply into focus is when a chair or dean is named as a defendant in a lawsuit. (The same principles apply when an individual faculty member is sued.) Will the institution provide the individual with a legal defense? Will the institution pay any money judgment or settlement owed to the plaintiff?

As an emotional matter, both of these questions are important. The individual wants top-notch legal representation. He or she also wants to be able to sleep at night without the specter of personally defraying a multi-million dollar jury verdict. As a practical matter, though, the first question is more important. In most higher education legal disputes, lawyers' fees exceed the sums the plaintiff may recover. Also, the number of situations in which a defendant may face personal liability is relatively small. Some threat of personal responsibility, though, exists so the question is not merely abstract.

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4 See Edward Lee Isler et al., “Personal Liability and Employee Discipline,” *Legal Report*, Society for Human Resource Management, September October 2000, p. 1. “Violations of the various [federal] anti-discrimination acts, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act, do not generally result in personal liability on the part of supervisors and managers.” Personal liability may exist under the federal Fair Labor Standards Act, the Family and Medical Leave Act, some state workplace statutes, and state common law actions such as defamation or battery. See also Elizabeth R.K. Whittenburg, “Individual Liability for Sexual Harassment Under Federal Law,” 14 The Labor Lawyer 357 (1998).

5 E.g., *Harris v. Howard University*, 28 F.Supp.2d 1 (D.D.C. 1998)(University vice president served on bank board at university's request. The FDIC sued the bank, and the university was not obliged to indemnify the vice president for actions that were grossly negligent or undertaken after his retirement from the university). *Buchwald v. University of Minnesota*, 573 N.W.2d 723 (Minn.App. 1998)(researcher whose federal grant program was investigated by the federal government was not entitled to indemnification for legal expenses that were not supported by adequate documentation).
Whether an institution can and will defend and indemnify an individual hinges on two factors: state law, which is especially relevant to state institutions, and campus policy. Some laws may define the general circumstances under which an entity may indemnify an individual employee or volunteer. In Florida, for example, state law allows public institutions to use their discretion in indemnifying employees for their actions. In Maryland, the Education Code applicable to public K-12 schools requires the local school board to defend an employee accused of wrongdoing for any “action taken in performance of his duties, within the scope of employment, and without malice … [when the] board determines he was acting within his authorized official capacity in the incident.” State law normally permits, or at least does not prohibit, defense and indemnification for employees and volunteers who were acting in the scope of their duties.

Institutional policy often follows this same line of reasoning. Chairs and deans who act in good faith within the scope of their duties receive defense and indemnification. So, for example, a chair who is sued after making a careful, but ultimately flawed, recommendation to dismiss a failing student could be indemnified. In contrast, a dean who rapes an undergraduate and is named in a civil or criminal lawsuit was not acting within the scope of his duties and would not be entitled to a defense or indemnification. If, however, the dean ultimately proves that the allegations were false, then some institutional support may be appropriate.

An institution is well advised to have a written indemnification policy and to remind employees, the governing board, and other interested groups about it occasionally. Useful points to cover in the policy include:

- The categories of people entitled to indemnification clarifying, for example, the rights of part-time employees, volunteers, and students

- The types of acts and disputes for which defense and indemnification are available

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• The types of acts and disputes for which defense and indemnification are not available

• Procedures for notifying the institution about legal claims, requesting assistance, and selecting or appointing counsel

• The person or body who decides whether the institution will provide defense and indemnification in a given situation

• The circumstances, if any, under which the institution might reassess a decision on defense and indemnification as, for example, in light of additional information.

Faculty and chairs often seek absolute assurance that the institution will defend and indemnify them if they face a lawsuit that arises from their institutional responsibilities. Yet, as the rape example illustrates, absolute guarantees cannot be made in advance. The individual will most likely need to show that he or she was acting in good faith to discharge a professional responsibility. The institution may choose not to stand behind those who act irresponsibly or who ignore legal advice.8 Some institutions are declining to indemnify faculty who decline to attend campus training programs on topics such as sexual harassment. To receive indemnification, however, one need not necessarily show that, in hindsight, all actions and decisions were entirely correct. Honest mistakes of careful judgment within the scope of professional duties will not generally defeat a request for indemnification.

One institution relies on seven guidelines in evaluating requests for indemnification:

• Whether the request is reasonably related to the individual’s role within the university

8 Courtney Leatherman, “State Is Not Liable for Professor’s Legal Tab in Grade Dispute, N.J. Court Rules,” Chronicle of Higher Education, June 4, 1999, on-line daily news (Professor who ignored legal position of administration and state attorney general’s office “forfeits her right to indemnification.”)
• Whether the individual acted responsibly and reasonably under all of the circumstances

• Whether the individual consulted appropriately with and acted on the advice of supervisors or other administrators, including the general counsel

• Whether the relevant actions likely would be those taken by a reasonable person under the same or similar circumstances

• Whether the conduct violated university policy or rules of ethical behavior, including conduct such as sexual harassment, research fraud or unlawful discrimination

• Whether the conduct was justifiable for reasons relating to the individual’s role at the university, even if it violated university policy

• Whether any other factors should be considered in the specific case. ⁹

Further ideas about institutional guidelines on indemnification may be found in the AAUP policy statement “Institutional Responsibility for Legal Demands on Faculty,” Academe January-February 1999, page 52.

Individual chairs and deans who, having reviewed their institutional policy, still remain uncomfortable about their potential for legal exposure can explore the option of purchasing individual insurance coverage for professional activities. The limits and exclusions of such policies should be reviewed carefully.

We have set the stage by establishing that chairs, deans, and other academic administrators are agents whose actions can legally bind the institution. They are likely to receive defense and indemnification for good faith actions that fall within the scope of their

⁹ University of Tulsa, Policy Statement on Indemnification and Defense, approved June 5, 1996.
responsibilities, subject to the terms of state law and institutional policy. Against this backdrop we now turn to some of the major legal challenges they may face.

II. THE MARGINAL TENURE CANDIDATE

A. Clear Cases and Marginal Cases

Evaluating a marginal candidate for tenure can be a formidable professional challenge for a department chair or dean. If the candidate is denied tenure, the aftermath may become a daunting legal challenge for those who contributed to the decision and for the institution as a whole. The complexities compound if the unsuccessful candidate has been an outspoken critic of the institution.

The easy tenure evaluations are the clear cut ones. Happy is the day when reviewers agree that a tenure candidate is excellent under all measures of performance. The candidate has received good feedback during the probationary period, the tenure process follows the established procedures, and all interested parties welcome the favorable outcome. Almost as clear cut is the situation in which all reviewers agree that a tenure candidate’s performance has been entirely unsatisfactory. Provided that the candidate received appropriate feedback during the probationary period, the institution met all procedural requirements in the tenure evaluation, and the outcome did not rest on the candidate’s legally protected speech, the institution will be in a good position to defend itself should the candidate challenge the outcome through legal means.\(^\text{10}\)

Many tenure decisions are not clear cut. Reasonable people, including both internal and external reviewers, may differ about whether a tenure candidate meets the institutional standards.

\(^{10}\) An earlier nonrenewal would probably have been a better solution than retaining the individual for the full probationary period and then conducting a tenure evaluation. The best approach is to take necessary steps as soon as they become evident.
During the probationary period the candidate’s chair and senior colleagues may have offered unrealistic or conflicting advice and evaluations. The institution may have violated its own procedures during the tenure review. These are the tenure decisions that can pose the greatest challenges for chairs and deans.

B. The Courts’ Role

For many years the courts took a highly deferential approach to tenure decisions. In the few cases that were filed, the faculty members typically lost. Common wisdom attributed this trend to an affinity that judges felt towards universities and their administrators. Congress sowed the seeds of change in 1972, when President Nixon signed legislation applying the major federal laws against discrimination to colleges and universities. During the 1970’s and 1980’s, faculty members still filed relatively few lawsuits over tenure. In the courts they often continued to face judicial deference to administrative decisions. Change came more quickly after 1991. That year Congress passed legislation that, for the first time, allowed many plaintiffs to try their federal discrimination cases before juries rather than judges. Juries, common wisdom holds, often side with the “little guy” rather than the institution. The new law also expanded the types of monetary damages available to victims of discrimination. As a result more unsuccessful tenure candidates have pursued legal challenges and with greater prospects for success. Most tenure denial challenges involve discrimination claims, but occasionally an unsuccessful candidate will allege a free speech violation.

Tenure denial litigation is burdensome for all concerned. These lawsuits can consume enormous amounts of time, energy, goodwill, and money. Every action that the plaintiff or the institution took over the entire probationary period comes under the microscope of the legal process. Why was each possible alternate course of action rejected? Through the time-consuming process of pre-trial discovery, the parties exchange information and grill one another on their motives, performance, and decisions. Reputations and morale suffer. If a case goes to trial, the event will likely last several weeks. Monetary costs, for lawyers fees alone, can reach hundreds
of thousands of dollars. Regular readers of *The Chronicle of Higher Education* know that judgments and settlements are often of a similar magnitude.

C. **Good Practice in Tenure Evaluation**

Are disputes over the denial of tenure inevitable? For advice on this question, we turn to a recent report *Good Practice in Tenure Evaluation: Advice for Department Chairs, Deans, and Academic Administrators*. The report, issued in December 2000, was jointly prepared by the American Council on Education, the American Association of University Professors, and United Educators Insurance Risk Retention Group. The full text is attached as Appendix A. It is also available at www.acenet.edu.\(^{11}\)

The report is structured around four basic principles of good practice:

**Clarity in Standards and Procedures for Tenure Evaluation.** Institutions need clear standards and procedures for tenure evaluation, and they should share these early on with every tenure-track faculty member. These should include the actual criteria that the institution applies; guidance on the weight to be given to developments that occur after the candidate has submitted the application; and protocols on the weight, if any, accorded to informal communications made to decision-makers outside of the formal review channels.

**Consistency in Tenure Decisions.** As noted above, discrimination is the most common legal claim brought by unsuccessful tenure candidates. In a recent decade of experience, United Educators found that sex discrimination was the most common allegation, followed by age, national origin, race, religion, and disability. The essence of these claims is that the candidate

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would have received tenure had he or she possessed different personal characteristics. Legally, that boils down to an allegation of inconsistent treatment. While tenure decisions are highly individualized, institutions must consider comparative elements to ensure that their decisions are fair among candidates. Another aspect of consistency is the consistency over time in the treatment of one candidate. The successive evaluations of an individual should make sense relative to one another. An assistant professor who received glowing evaluations for five years but who is denied tenure for inadequate teaching or research has a compelling story to tell a jury.

**Candor in Evaluations.** An on-going challenge for chairs and deans is providing honest advice to tenure-track faculty. Some academic are averse to conflict and share only praise and encouragement. Over the long term, however, evaluations that omit constructive criticism and a realistic prognosis can hurt the individual. Chairs need to offer candid evaluations in plain English. Diplomatic argot may not get the message through to the candidate—or to the jury.

**Caring for Unsuccessful Candidates.** Efforts to assuage some of the anger and frustration of an unsuccessful tenure candidate can go a long way toward averting litigation. A meeting within a day or two of the adverse decision is vital to repairing the individual’s damaged sense of self-worth. The provost or dean should give the individual an opportunity to express his or her feelings about the situation, which can be cathartic, and should outline ways that the institution may assist with relocation once the individual’s contract ends. These might include professional networking, career counseling, funds for travel to conferences, and other types of support that will enable the individual to move ahead with his or her life.
D. Moving Forward

When seeking to improve their tenure processes (or any other processes), colleges and universities tend to focus most intently on redrafting their written policies. While the policies are important, they are only one piece of the equation. A college or university committed to improvement must also examine the actions of the chairs, deans, and others who recruit and evaluate tenure-track faculty. Their consistency, candor, and caring are integral to the operation of a successful tenure system.

An institution can conduct workshops for chairs and deans, collaborate with nearby institutions on regional programs, or send campus leaders to external programs such as this one. To compound the benefit of external programs, attendees are well advised to share the insights they learn with others back on campus.

An institution can also learn from its own experiences. A working group can analyze past situations in which it has denied tenure, to assess whether the process was fair. If lawsuits or other disputes have occurred, those experiences can be a source of ideas for change.

Finally, an institution can learn from the perceptions of its own tenure-track faculty. Through informal dialogue or more formal surveys, it can elicit their opinions about whether the tenure criteria and procedures are appropriate and whether the chairs provide helpful ongoing evaluations. Seeing the process through the eyes of a tenure candidate, even an outspoken marginal tenure candidate, can suggest paths to improvement.

III. MANAGING CONFLICTS WITHIN THE ACADEMY

"Conflict within our academic department? Within our college or university? Of course not! We have a faculty working in perfect harmony and absolutely incapable of acrimony and dispute. While I, as a department chair, dean, or provost, have heard of disputes among faculty,
between faculty and the administration, and between faculty and students at other institutions, I certainly cannot imagine such behavior taking place at our university!"

Believable? No, not for a minute. Such an idyllic situation is not likely to exist this side of Utopia.

For years, we in higher education tried to hide—or to deny—conflict within our ranks. We referred to our college or university as the “Ivory Tower,” a place immune from the stress, tensions, and turmoil of the everyday workplace. We defined conflict as “something that happens in someone else’s department.”12 When conflict arose, we tried not to discuss it; when faculty did not get along with each other, we tried shifting one person to another department or even dividing departments. We managed conflict by avoidance.13

During the last thirty years, the myth of the “Ivory Tower” has been dispelled as issues of race and gender discrimination, accommodations for disabilities, sexual harassment, ethnic separatism, tenure denial, copyright ownership, co-authorship, scientific misconduct, free speech, and academic freedom, among others, have on occasion torn departments, schools, and colleges apart. These same conflicts have often appeared as bases for lawsuits.

Most conflict within the academy manifests itself through words—criticism, complaint, accusation, bickering, or denigration of colleagues. What can and should an academic administrator do about a faculty member or a student, whose speech causes disruption, disharmony, and an inability on the part of the department or college to manage its affairs in a responsible and efficient manner? How does the department chair, dean, or provost strike the delicate balance between the right of the faculty member or student to express him or herself freely against the right of the college/university to expect loyalty and responsible behavior from its employees and students? Finding the point of equilibrium in situations of tension and conflict is a recurring managerial, ethical, and legal dilemma. The challenge of the department chair, dean, or provost is to manage conflict in a way that will cause the least personal and professional disruption to others and to the institution. There are no magic means of meeting this challenge.


However, recognizing the problem early on, confronting the problem rather than wishing it away, providing fair opportunity to the protagonists to be heard, and identifying and implementing solutions form the basic foundation for successful management of conflict.\textsuperscript{14}

Conflicts within the academy arise from matters such as annual evaluations, tenure denials, lack of salary increases, teaching assignments, office location, working conditions, accusations and filing of charges against colleagues, and a general lack of collegiality on the part of some faculty. This portion of the outline will present an overview of the case law in situations where conflict manifested itself in disruptive speech or conduct. It will conclude with a summary of lessons to be learned and with advice for managing conflict so as to minimize legal problems.

A. Restrictions on Public and Private Institutions

The public college/university must act in accord with the mandates of the First Amendment and its interpretative case law, as well as honor the concept of academic freedom, when dealing with conflicts on campus which result in a use or misuse of speech. The private college/university is not bound by constitutional principles, but must act in accord with its own employment contract terms and the concept of academic freedom.

Certain legal principles apply to the conduct of a public college/university as it reacts to criticisms, complaints, accusations, bickering, and a general lack of collegiality of its employees and students:

\begin{itemize}
\item Neither a teacher nor a student surrenders constitutionally protected rights of freedom of expression as a condition of public employment or education; however, these rights are not unlimited.
\item A public employee's speech is entitled to protection under the First Amendment only if it is made primarily in his or her role as a citizen rather than as an employee and only if it addresses a matter of public concern.
\end{itemize}

\footnote{Susan A. Holton, \textit{And Now ... the Answers! How to Deal with Conflict in Higher Education}, in Conflict Management in Higher Education 79-89 (Susan A. Holton, ed., Jossey-Bass Publ. 1995).}
When a public employee speaks on matters which involve only his or her personal employment conditions, the employee’s speech is not afforded constitutional protection. Criticisms of internal management decisions or personal grievances are generally not considered protected speech.

The task of the court is to arrive at a balance between the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

A college/university does not have to tolerate bickering and running disputes by an employee or student with faculty, department heads, or other administrators.

A college/university has a right to expect its employees and students to follow instructions and to work cooperatively and harmoniously within the community.

Even if an employee’s speech and criticisms involve a matter of public concern, the college/university can still take action against the employee if he or she engages in vituperation and personal vilification of the institution or its administrators.

Collegiality can be considered in initial employment, in tenure, in promotion, and in termination decisions.

B. Representative Cases Involving Denials of Tenure and Promotion, Termination, and Retaliation Arising from Conflicts within the Academy.

There are numerous cases addressing complaints, criticisms, accusations, bickering, and a lack of collegiality that have resulted in conflict within the academy. This conflicts have at times lead to adverse employment actions being taken against the complaining party, such as a denial of tenure or promotion, termination, or denial of salary increase or requested teaching assignments.

1. Denial of Tenure and Promotion

   a. Watts v. Board of Curators, University of Missouri\(^\text{15}\)

\(^{15}\)495 F.2d 384 (8th Cir. 1974).
Watts sued the University of Missouri after being denied tenure, contending that his tenure was denied because of his exercise of free speech. The University's dean said that tenure was denied because Watts, even after receiving considerable grant support from the university to enable him to complete and publish a book, had failed to do so. Watts had also refused to teach a class assigned to him by his department chair.

In its review of the matter, the Tenure Review Committee listed Watt's disloyalty to his colleagues as a factor it took into consideration in its negative recommendation of him. The Committee specifically noted that Watts distributed a critical review to members of the department and that he took a position with students that they were always right and that perhaps the university "might need burning down." Affirming judgment for the university, the Court of Appeals for the Eighth Circuit found that the real reason the university denied tenure to Watts was his failure to complete his book as promised. The court stated specifically that a college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration.

b. Megill v. Board of Regents of State of Florida\(^\text{16}\)

The Board of Regents of the University of Florida denied tenure to an assistant professor of philosophy. Five of the grounds for denial involved issues of free speech. Professor Megill called a press conference during a meeting of the University's Chancellor with legislative leaders in which he said that the University of Florida is "an authoritarian institution in which the faculty and students are powerless when facing the decisions of a politically appointed president."\(^\text{17}\) In an interview with the campus press concerning the denial of tenure to another professor, Megill said that the University's president was a dangerous man who used his power in an arbitrary manner to deny tenure to Megill's colleague when, in fact, the denial of tenure took place under a previous president. On another occasion, Megill disrupted a panel discussion by using profanity to the extent that the discussion had to be adjourned. At another campus event, Megill announced to the crowd that the University's administrative spies (the University's attorney and another staff member) had arrived. And, on another occasion, Megill made a blatant misrepresentation regarding a working relationship between the University and the teacher's union.

In each instance, the Board found either that Megill made false and inaccurate statements to the public or that his conduct demonstrated a lack

\(^{16}\) 541 F.2d 1073 (5th Cir. 1976).

\(^{17}\) Id. at 1082.
of professional maturity. In holding for the Board of Regents, the court found that in balancing Megill's First Amendment interests against those of the Board, the Board's interests prevailed. The court said: "The First Amendment protects the right to make a statement. It does not, however, clothe a person with immunity when his statements are shown to be false and inaccurate, when their truth could be easily ascertained."18

c. Curtis v. University of Houston19

Throughout his time at the University, Curtis vociferously spoke against the insular power structure in his department and other policies; he opposed the tenure and appointment of various faculty members; he complained about nepotism and racism in the department; and, he publicly objected to the University's falsification of graduate student hours to obtain state funds. When he was denied promotion to full professor, he sued claiming that the denial was based on his speech.

While the district court noted that Curtis's speech was on matters of public concern, the court found that the University based its decision not to promote Curtis on his lack of a published research monograph, his lack of national visibility, and his hiatus from a productive output of academic materials for many years. The court held that the University had met its burden of articulating rational, neutral justifications for nonpromotion independent of its assumed hostility to Curtis's speech. Summary judgment was granted the University.

d. Cotter v. Board of Trustees of University of N. Colo.20

A former professor sued the University's Board of Trustees and Dean of Liberal Arts and Sciences for denying him tenure and promotion, alleging that the denial was in retaliation for his raising questions about the mismanagement and misappropriation of funds by the Dean, for his complaints that the Dean abused the authority of his office by selecting and sending forward only his own proposals for grant money, and for his assertions that the Dean made salary and promotion decisions in a manner that discriminated against his critics.

The court denied summary judgment to the University, finding that the professor's allegations of malfeasance and impropriety concerning the use of public funds, as well as the Dean's using his office to further

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18 Id. at 1085.


private financial gain at a public university, were not merely criticisms of internal management decisions, but touched on matters of public concern. The court further said that the fact that the professor did not disseminate the information publicly, but selected a private forum in which to address those matters, did not invalidate the protections of the First Amendment. Likewise, the fact that the professor’s statements may have been “an outgrowth of his personal disputes” did not prevent them from touching upon matters of public concern.

e. Babbar v. Ebadi\textsuperscript{21}

An assistant professor in the business school at Kansas State University sued after being denied tenure, claiming that the denial was based on his sex, religion, and national origin. In recommending that Babbar be denied tenure, the department chair and faculty expressed criticisms of the professor’s research and of his lack of collegiality toward his colleagues, describing him as “two-faced,” “zero collegiality,” will say one thing and do another,” and “engages in tactless and inaccurate self-promotion.”\textsuperscript{22}

Babbar contended that the University used his lack of collegiality as a pretext for discrimination. The court disagreed and dismissed his suit, holding that Babbar had failed to show how the University discriminated against him by incorporating collegiality into the tenure process.\textsuperscript{23}

f. Bresnick v. Manhattanville College\textsuperscript{24}

After being denied tenure in the dance and theater department, Bresnick sued. He contended that the college violated its contract with him by considering his difficult working relationship with other faculty and his lack of collegiality in his tenure evaluation. (Neither collegiality nor working relationship with colleagues were designated as criteria for tenure in the college’s tenure policy.)

The court rejected Bresnick’s claim that the tenure documents had to spell out every consideration that might be involved in his tenure review, saying: “Cooperation and collegiality are essential to a department


\textsuperscript{22}Id. at 1272.

\textsuperscript{23}Id. at 1279.

\textsuperscript{24}864 F. Supp. 327 (S.D.N.Y. 1994).
which may be called upon to work with other departments, and to train students to collaborate in the difficult task of orchestrating dance or drama programs in the outside world."²⁵

g. **Mayberry v. Dees**²⁶

This was the first case to uphold the use of collegiality as a distinct criterion in tenure decisions. The plaintiff sued East Carolina University, alleging that he was denied tenure in retaliation for his outspoken criticisms of the department chair throughout the year preceding his tenure review.

The University defended by producing evidence that the chair had expressed reservations about granting Mayberry tenure before he (Mayberry) made any of the criticisms at issue and that the chair was unaware of the criticisms when he voted on Mayberry’s tenure.

The Court of Appeals for the Fourth Circuit upheld the tenure denial. **Mayberry** is significant because of comments made by the court about the role of collegiality in considerations of tenure. First, the court cited the trial judge’s conclusion that “the evidence reflected an insubordinate dimension to his [Mayberry’s] protected criticism.”²⁷ In addition, the court noted the importance of finding sufficient evidence of a professor’s scholarship, accomplished pedagogy, able service to the university, and “developed collegiality—the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests”²⁸ before granting an award of tenure.

h. **McGill v. Regents of the University of California**²⁹

McGill, a tenured math professor was denied tenure, partly because of his lack of research and publication and partly because of his lack of collegiality. In particular, the professor had denigrated the University and his colleagues to candidates for new teaching positions at the University. The court did not delve into whether McGill’s

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²⁵Id. at 328.
²⁷Id. at 507 n.16.
²⁸Id. at 514.
controversial speech was protected by the First Amendment, but did uphold the University’s denial of tenure.

2. Termination

a. Dodds v. Childers\(^{30}\)

A cosmetology instructor at a community college sued after being terminated, contending that her termination arose from her continuing complaints to the Dean about special treatment afforded the sister-in-law of the President of the Board of Trustees. The instructor complained specifically that the sister-in-law had been allowed to enroll in a “nonexistent” course as a cosmetology instructor-trainee in order to prepare for the state licensing exam. The instructor admitted at trial that she was afraid the sister-in-law was being trained to replace her.

The court held that the instructor’s speech was not on a matter of public concern. To rise to the level of public concern, the speech must have been made by the speaker primarily as a citizen, not as an employee. Finding that the instructor’s complaints about the sister-in-law reflected predominantly the instructor’s concern about the security of her job and her own working conditions, the court determined the instructor’s speech to involve merely personal grievances. It noted that the instructor did not address her complaints to anyone outside the College, nor did those complaints occur against a background of ongoing public debate about the administration of the College, its use of funds, or the operation of the Cosmetology Program. While the private form of the speech was not dispositive, it was a factor in assessing whether the speech addressed a matter of public concern.

b. Jawa v. Fayetteville University\(^{31}\)

A tenured professor sued, claiming that his termination was based on his national origin. The evidence indicated, however, that numerous student complaints had been registered regarding the professor’s poor teaching performance, his interpersonal reactions with students, his failure to keep office hours, his improper advising of students, and his refusal to abide by the university’s grading policies.

\(^{30}\)933 F.2d 271 (5th Cir. 1991).

In addition, Jawa demonstrated unprofessional conduct toward his department chair and a continuing pattern of noncooperation with other faculty colleagues. Specifically, he stopped speaking to the Chair except when they were in meetings and then he frequently caused a disturbance. On one occasion he burst into the Chair’s office, on another he called him a liar, and on another he refused to come to the Chair’s office when requested to do so, responding that he “was not an office boy.”

Finding that Jawa’s termination was the direct result of his inadequate performance as a teacher and his non-cooperation with his colleagues and the administration, the court wrote language helpful to colleges and universities in similar situations:

Bickering and running disputes with colleagues does not constitute a form of protected speech under the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship. “A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department.”

Hall v. Ford 33

Hall, the former Athletic Director at the University of the District of Columbia, brought suit contending that he was fired because of his criticisms of improprieties within the Athletic Department. Hall publicly voiced his concerns about possible violations of NCAA rules involving ineligible athletes playing on UDC teams, the improper authorization of an athletic scholarship to an ineligible athlete, the changing of grades by University employees for purposes of athletic eligibility, the use of drugs by student-athletes, and violation of practice rules. The University’s President acknowledged that he fired Hall because of pressure from the governing board and not because of deficient performance.

The court found that even if Hall’s statements reflected job-related disagreements with his superiors, they were still speech on matters of public concern. The court then turned to a balancing of Hall’s interest in speaking against the interest of the University in its efficient operation. Noting that there are certain high-level employees for whom compatibility with superiors is crucial, the court concluded that Hall and the Board fell

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32 Id. at 230 (quoting Chitwood v. Feaster, 468 F.2d 359, 360 (4th Cir. 1972)).

33 856 F.2d 255 (D.C. Cir. 1988).
into that narrow band of relationships which require loyalty at the expense of unfettered speech. The court decided in favor of the University, stating that Hall’s position related to a policy area, that his duties identified him as a prominent policy level official, and that the University had a significant interest in ensuring that its Athletic Director was perceived to be compatible with its President and governing Board. Hall’s speech directly interfered with this interest when he engaged in a pattern of opposition to the policies of his superiors. The University President and the Board were undermined by Hall’s contrary views as to how policies should be formulated and implemented. Therefore, the University could dismiss Hall “for expressing views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors such that they could not expect him to carry out their policy choices vigorously.”

d. **Sinnott v. Skagit Valley College**

Sinnott, a tenured welding instructor, had a long history of making derogatory remarks about other faculty members, of accusing the Chair of the welding department of theft (which was never substantiated), of repeatedly using profanity, and of engaging in ongoing criticism of his supervisors and coworkers. After a review of the welding program by the State Board for Community College Education, Sinnott met with a reporter from the local paper and commented that the report was a “whitewash,” that the program used inconsistent standards to certify instructors, that instructors lacked sufficient course work in welding-related mathematics to be teaching, and that there were two instances where students were given credits for welding courses they did not take.

The President of the College met with Sinnott and gave him a letter outlining conditions for his continued employment, namely, that he make no derogatory statements about institutional employees, other faculty members, or the welding program, that he cooperate in the welding curriculum modification, and that he team-teach a coordinated program. Sinnott refused to sign the letter and to agree to the conditions. He was terminated for unprofessional conduct and insubordination. Sinnott then sued.

The court found that Sinnott’s speech was directed toward the quality of the welding program which, when balanced against the interests of the college in maintaining harmony among coworkers, was of sufficient

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34Id. at 265.

public interest to merit constitutional protection. However, the court denied Sinnott’s claim for relief, finding that, although his speech was a factor in his termination, the College produced sufficient evidence that it would have made the same decision in the absence of the protected conduct.

3. **Denial of Salary Increases and Requested Teaching Assignments**

   a. **Webb v. Board of Trustees of Ball State University**\(^{36}\)

   Webb, a member of the University’s Criminal Justice and Criminology Department, and several other University employees sued maintaining that the University retaliated against them for protected speech and sought a preliminary injunction. Webb accused other professors of sexual harassment, of ethical lapses, and of various improprieties. He filed multiple charges with the University’s discipline system. Dissatisfied with the outcomes, he wrote and presented to the President and to the Board of Trustees a 225-page broadside laying blame on almost everyone but himself. He and another professor, Sayles, filed various charges with EEOC. None were successful. However, they asserted that the University removed Webb as Department Chair and denied tenure to Sayles in retaliation.

   The University’s President appointed a new Chair and directed Webb to cooperate in the transition. Instead, Webb filed two suits in an Indiana court asking the judge to resolve a dispute about teaching assignments. Both suits were resolved in the University’s favor in late 1997. In 1998, the new Chair issued teaching schedules to which Webb and Sayles objected. They filed this suit, seeking the court to order the Chair to rejuggle teaching schedules to their satisfaction and for other relief. In denying the injunction, the court said that universities are entitled to insist that members of their faculty devote their energies to promoting goals such as research and teaching. The court commented that when the bulk of a professor’s time goes to fraternal warfare, students and the university community alike suffer, and the university may intervene to restore decorum and ease tensions. Under the circumstances and facts of this case, the University’s right as an employer to achieve its goals must prevail over any speech, even though on matters of public concern.

   b. **Gumbhir v. Curators of University of Missouri**\(^{37}\)

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\(^{36}\)167 F.3d 1146 (7th Cir. 1999).

\(^{37}\)157 F.3d 1141 (8th Cir. 1998).
After years of feuding within the University of Missouri at Kansas City's School of Pharmacy (UMKC), Professor Gumbhir brought suit against the University, the Pharmacy Dean, and another professor. In a lengthy trial, the appeals court noted that there was exposed an incredible sequence of petty, venomous exchanges between the main protagonists and an unprofessional spate of communications that would not be tolerated in a well-functioning workplace.

Gumbhir had complained to the Dean about ethnic slurs by another professor (also a defendant in this suit), about an Associate Dean's unfavorable comment concerning immigrants working in the United States, and about what Gumbhir perceived as a racially biased environment in the Pharmacy School. Gumbhir received substantially lower than average salary increases the next three times the School gave such raises, which he contended were the result of his criticisms.

The Eighth Circuit found sufficient evidence of a causal connection between Gumbhir's protected activity of complaining about racial and ethnic discrimination and UMKC's adverse salary actions. The court held that the evidence was sufficient for this Title VII retaliation issue to have gone to the jury and upheld the jury verdict in favor of Gumbhir on this count.

Turning then to Gumbhir's Section 1983 claim, the appellate court upheld the district court's grant of summary judgment in favor of the Dean and professor. The court said that Gumbhir's denigration of his colleagues was not protected speech and that he did not present evidence that his criticism of his Dean and of Professor Evans was a substantial factor in the adverse salary actions. The court dismissed the Section 1983 claims.

c. Dorsett v. Board of Trustees

Dorsett, a tenured associate math professor at Louisiana Tech University, brought suit against several university faculty and officials for harassment, allegedly in retaliation for his challenge of several departmental decisions and for his public support of another professor who had been attacked by the administration for refusing to lower academic standards. Dorsett was not fired or threatened with termination. The only actions of which he complained were decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures.

38940 F.2d 121 (5th Cir. 1991).
In upholding summary judgment for the University, the court held that Dorsett’s speech did not address a matter of public concern but reflected predominantly his concerns about assignment of summer and overload classes to himself and to his friends. These matters, the court concluded, were matters of personal grievance, not public interest, and were not afforded constitutional protection.

C. Lessons to be Learned and Practical Advice for Managing Conflict in the Academy

- Acknowledge that conflict exists and that it is inevitable, especially in a setting where independent thought is encouraged.

- Accept that where conflict exists, it must be managed, not ignored.

- Deal with problems immediately. Do not permit conflict to fester and grow through neglect. Administrators who identify and diagnose conflict at an early stage minimize disruption and disturbance in the academic community.

- Expect faculty, staff, and students to follow instructions and to work cooperatively and harmoniously within the academic community.

- Help faculty and students to understand that rights of free speech are not unlimited. There is no constitutional right to disrupt the workplace, even when speaking on matters of public concern.

- Inform faculty that civility, collegiality, and good working relationships can be considered as factors in tenure and promotion decisions.

- Insure appropriate due process when taking an adverse action against a faculty member or student.

- Discuss anticipated changes in tenure or promotion criteria with faculty who will be affected by heightened expectations.

- Explain the reasons to faculty for increasing teaching loads or assigning unpopular classes or teaching times.
IV. DEALING WITH ACCOMMODATION REQUESTS

Chairs and deans are frequently asked to accommodate the needs of individual faculty or students and, depending on the chair or dean’s view of the reasonableness of the request for an accommodation, such requests are frequently granted. For example, a faculty member may ask to teach only on Tuesdays or Thursdays so she can pursue a special course or because an important committee on which she serves meets on Mondays. Or a student may ask to have a course from another institution transferred into his graduate program for credit. Criteria for granting these requests are usually whether they can be made without causing inconvenience for others (especially for other faculty) and whether they can be made without conflicting with the program’s academic standards.

Certain individuals who request accommodations may have a legal entitlement to them, or may believe that they do. The Americans With Disabilities Act (ADA) requires colleges and universities to make accommodations for employees, students, and visitors to the campus if such accommodations are reasonable (for employees and students) or readily achievable (for visitors). The most frequent accommodation requests that a chair or dean will face will be either employment accommodations requested by faculty or staff, or academic accommodations requested by students.

A. Employment Accommodations

Title I of the ADA protects a “qualified individual with a disability” from discrimination on the basis of that disability. The law covers not only hiring, compensation, promotion, and discharge, but other terms and conditions of employment, including work schedules, the physical organization of the work, and even the time that the work is conducted. For example, faculty or other employees may need to undergo medical or psychiatric treatment, and may request a work schedule that will accommodate their treatment needs. Faculty (and students as well) may have difficulty walking to a second or third floor classroom or office if the building lacks an elevator. Faculty or staff may need devices to help them do their work, such as telephones with adjustable volume controls or “talking” computers.
But what if a faculty or staff member requests an accommodation that will either disrupt the way that academic work has traditionally been accomplished, or that is virtually impossible to provide? For example, consider the situation of a professional school that offers all of its master’s level courses in the evening on the third floor of a building without an elevator. A faculty member recently diagnosed with congestive heart disease has been told by her doctor that she should not climb steps and that she should keep “regular hours,” meaning that she should not teach in the evening. Must the school reschedule the class to a first floor classroom? Probably so. Must the school now offer classes during the day so that this faculty member can be productively employed? Probably not. What process should a chair or dean go through to make these determinations?

1. Is the person disabled? The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. §12101(b)(2). The determination as to whether an individual meets the statutory definition is a legal judgment made on the basis of the facts of the situation. The chair or dean should seek the advice of in-house counsel (if available) on this issue. If the college has no in-house counsel, each college should have a “disability coordinator” who may be able to advise the chair or dean on this issue. Some examples of individuals who are not disabled are those who cannot get along with a particular supervisor or co-workers, individuals who cannot perform their own job but who can perform other, similar jobs, or individuals whose misconduct interferes with the efficient functioning of the institution.

2. Is the person qualified? The ADA defines a “qualified individual with a disability” as one who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. §12111(8). This requires the chair or dean to determine whether the individual’s accommodation request would then enable him or her to perform the essential functions of the position. If the individual is a faculty member whose disability does not allow him to teach, even with a reasonable accommodation, then the institution could establish that the faculty member was not “qualified” and thus was not protected by the ADA. Chairs and deans should work with their faculty

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39 See, for example, Gaul v. Lucent Technologies, 134 F.3d 576 (3d Cir. 1998) and Wynne v. Loyola University of Chicago, Dkt. #97 c 6417 (N.D. Ill., E.D., 10/10/00).


colleagues to establish what the essential functions of faculty positions are. Must every faculty member teach? (Are there faculty who only conduct research? What criteria are used to make these assignments? Can the department truthfully say that it’s appropriate for some faculty not to teach but that this disabled faculty member must teach?) If the faculty member has a psychiatric disorder that results in problematic behavior, what is the effect on the rest of the faculty? On the students? A faculty member who does not show up for class would probably be viewed as unqualified by a court. See, for example, Newberry v. East Texas State University, 161 F.3d 276 (5th Cir. 1998) (termination of faculty member with obsessive compulsive disorder was appropriate because his erratic and noncollegial behavior demonstrated that he was not qualified).

Because the ADA explicitly includes mental disabilities within its coverage, it is important for chairs and deans to follow the ADA-mandated process if a faculty or staff member with a psychiatric disorder requests an accommodation. The chair or dean is entitled to request documentation from a qualified professional that the individual has been diagnosed with a psychiatric disorder. If the chair or dean believes that the individual may not need some or all of the accommodations requested, then they may require a second medical or psychiatric opinion concerning both the diagnosis and the proposed accommodations.

3. Is the accommodation reasonable? The ADA provides examples of a reasonable accommodation, but no real definition. Reasonable accommodations include “(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. §12111(9). Accommodations involving accessibility could include reassigning classes to buildings that were physically accessible to the faculty member, providing computers or software that accommodated the faculty member’s physical or other limitations, or redesigning work space to accommodate the faculty member’s physical needs. Other examples of reasonable accommodations could include modifying the faculty member’s teaching schedule, curricular materials, or teaching technology to meet the faculty member’s physical or mental needs.

4. Is the accommodation an undue hardship? The ADA states that any accommodation that poses an undue hardship for the employer is not reasonable. Undue hardship means “an action requiring significant difficulty or expense.” 42 U.S.C. §12111 (10)(A). Most accommodations requested by faculty are not significantly expensive, but may pose significant difficulty in that they may be disruptive, may require other faculty to assume additional duties, or may make it difficult for the department or program to deliver all the courses that need to be covered. For example, an open-ended disability leave with no return-to-work date has been held to be an undue
hardship, similarly, a request to work at home when the work must be done at the worksite has been found to be an undue hardship.

The Interpretive Guidance to the ADA regulations states that the development of a reasonable accommodation must use an “interactive process” whereby the faculty or staff member with a disability works with the chair or dean to create one or more accommodations that will enable the individual to perform the job without disrupting the workplace or requiring significant expense. 29 C.F.R. §1630.9.

B. Student Accommodations

Students in public elementary and secondary education have been entitled to accommodations for physical, psychological, and learning disorders since the 1975 enactment of the Education for All Handicapped Children Act (Public Law 94-142), which was renamed the Individuals with Disabilities Education Act (IDEA) by Congress in 1990. Many of the students who have received special services and other accommodations from the public schools are now enrolled in college. Although the IDEA does not apply to a student once he or she has completed high school or has reached the age of 21 (whichever occurs first), students with disabilities are protected by Section 504 of the Rehabilitation Act of 1973, and by the Americans With Disabilities Act.

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability[,] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. §12132. Title III extends the ADA’s nondiscrimination provisions to places of public accommodation, which include both public and private colleges and universities. Title III imposes a multitude of requirements on colleges and universities, affecting admissions policies,

42 See, e.g., Hudson v. MCI Telecommunications Corp., 1996 U.S. App. LEXIS 15821 (10th Cir. 1996); Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

43 Vande Zande v. State of Wisconsin Dept. of Admin., 44 F.3d 538 (7th Cir. 1995).
residence hall and classroom accessibility, and access to educational programs and cocurricular activities.

In order to receive the protections of either Section 504 or the ADA, the student must demonstrate that he or she has a disability that meets the statutory requirements. The ADA's definition of disability is common for all titles. Although most student cases do not involve this issue (in contrast to employment litigation under the ADA, where a frequent employer defense is that the individual's disorder does not meet the ADA definition), it is useful to remember that the institution is entitled to inquire into the nature of the disability, to require documentation of the disability, and to reach its own determination as to whether the disorder is a disability that requires accommodation.

The types of student accommodation requests most frequently encountered by chairs and deans will be requests for modification of a course requirement, a program requirement, or assistance with the learning process. For example, some colleges provide students with notetakers, interpreters for students with hearing impairments, braille machines for students with visual impairments, or other human or mechanical assistance with the learning process. Other students may need additional time on tests, a quite room in which to take tests to minimize distractions, large print or alternate forms of tests, or other accommodations. Most of the time, these accommodations are routinely granted, and the college should have a disability coordinator who can help a faculty member, chair or dean evaluate a student's request and to determine if the requested accommodation is reasonable.

But what if the student asks to have a required course waived because of a psychiatric disorder? Is "math anxiety" a legal justification for avoiding the required course in statistics? Is inability to handle reptiles, (or inability to kill them) a legally-justifiable reason to excuse a student from a biology lab? Should a program excuse a student from an otherwise required internship because the student has acrophobia (fear of going out in public)?

In an early case brought under Section 504, the U.S. Supreme Court refused to require a nursing program to waive some of its clinical requirements so that a student with a hearing impairment could complete the program (Southeastern Community College v. Davis, 442 U.S.
Issues similar to some of these were addressed in a series of thoughtful opinions in *Guckenberger v. Boston University*, 957 F. Supp. 306, 974 F. Supp. 106 (D. Mass 1997), 8 F. Supp. 2d 82 (D. Mass. 1998). Students with learning disorders challenged the university’s policy of requiring recent documentation of their disorders, and also challenged the mandatory foreign language requirement. Although the court struck the recent documentation requirement (unless updating the documentation was medically necessary), it ultimately upheld the university’s refusal to waive the foreign language requirement for students with learning disorders. The court did, however, require the university to go through a “deliberative procedure” for determining whether waiving the foreign language requirement would substantially alter the university’s academic program, and whether alternative courses or learning experiences would have been appropriate accommodations. The university engaged in a comprehensive analysis of its own requirements and the similar requirements at other institutions (including those without a language requirement), and ultimately concluded that the requirement was “fundamental to the nature of the liberal arts degree at Boston University,” and the court concurred.

Other student accommodation requests that federal courts have reviewed include alternate forms of testing (*Wymne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991)), being relieved of certain clinical requirements in medical or nursing school (*Zukle v. The Regents of the University of California*, 166 F.3d 1041 (9th Cir. 1999); *Wong v. Regents of the University of California*, 192 F.3d 807 (9th Cir. 1999); *Darian v. University of Massachusetts*, 980 F. Supp. 77 (D. Mass. 1997)), and additional time and other accommodations on bar and other licensing examinations (*Bartlett v. New York State Board of Law Examiners*, 2000 U.S. App. LEXIS 22212 (2d Cir. 2000).

Given the amount of litigation and the existence of these laws, how should a chair or dean proceed when a student requests an accommodation?

1. Do not leave the decision up to the discretion of the faculty member. A faculty member does not have “academic freedom” protections from the requirements of the ADA or Section 504. Requests for accommodations that are reasonable by students with documented disabilities should be granted unless they interfere with academic requirements or programmatic integrity.
2. Develop some expertise within the department or school about what academic activities are required and how the unit will respond to an accommodation request. Develop a “deliberative procedure” involving faculty for reviewing accommodation requests that impact on the integrity of a course or an academic program. Make faculty familiar with the process that will be used. Inform them that this decision is not within their discretion.

3. Familiarize yourself with the college’s policy, and develop a policy of your own if the general policy is not specific enough to meet your needs.

4. Don’t hesitate to ask for help—from the disability coordinator, from in-house counsel, or from another experienced chair or dean.

5. Document the process used to evaluate the student’s accommodation request and the reasons for granting or denying it.

6. Provide for an appeal process if the institution doesn’t have one in place.

V. ISSUES RELATED TO OFF-CAMPUS PROGRAMS

Many colleges and universities are offering off-campus programs, from a one-day field trip or conference to a semester or full-year study abroad program. These programs can be intellectually enriching and rewarding for the students and faculty involved in them. They can, however, also present legal problems if careful planning and monitoring have not been done.

A. Student and Faculty Safety Issues

The issue receiving the most publicity with respect to off-campus programs is the issue of student safety. Students have been injured or killed while enrolled in study abroad programs or while engaged in a college-sponsored activity off campus, whether in the U.S. or outside the United States.

Issues related to domestic off-campus programs. If the college requires an internship, offers a field trip sponsored by the institution, or provides transportation and housing for student athletes for intercollegiate sports events, the college may face liability if a student (or staff member) is injured or killed while participating in the off-campus activity. For example, in Delbridge v. Maricopa County Community College District, 893 P.2d 55 (Ariz. App. 1994), a
student was injured while performing a required test of climbing ability in a course offered on
the site of the student's employer. Although the premises where the course was offered were
under the control of the employer, the college had a duty to provide a safe environment for its
students; because the learning experience was offered by the college and the course was part of
its curriculum, the court ruled that a trial must be held on the issue of whether the college
breached its duty to the student.

A ruling by the Florida Supreme Court has important implications for institutions that
require students to complete an internship as part of their degree requirements. In
_Nova Southeastern University, Inc. v. Gross_, 758 So. 2d 86 (Fla. 2000), the college identified
internship placement sites for students in a doctoral program in psychology. The plaintiff was
assaulted at the internship site, and sued the university for negligence. The court ruled that the
student-institution relationship created a special duty on the part of the university to use ordinary
care in assigning students to internship sites. There was evidence that there had been earlier
assaults at the internship site, and that the university had been aware of that fact but had not
warned the student.

Additional issues related to student or staff safety include:

- Does the college have a policy requiring drivers of college vehicles to be licensed?
  Over a minimum age (for insurance purposes)? Trained or certified in some way?
  Are these policies enforced consistently? Has the chair or dean made sure that the
  policies are being followed?

- What precautions are taken when arranging housing for students travelling on
college-sponsored business, such as athletic events? Is the chair or dean informed
about these issues?

- What precautions are taken to ensure that a faculty or staff member who is leading an
  off-campus trip is trained with respect to the potential dangers (for example, is the
  leader of a rock-climbing trip experienced in rock climbing? What kind of
information has the chair or dean considered in giving permission for the event to occur?


**Issues related to international off-campus programs.** International programs are gaining in popularity; safety issues are equally salient in international locations. Congress is responding to the concerns of parents whose students were injured or killed while participating in study-abroad or other college-sponsored international programs. The House of Representatives Subcommittee on Oversight and Investigations (for the Committee on Education and the Workforce) held public hearings on October 4, 2000 concerning student safety in overseas programs, and it is possible that legislation will ensue. The subcommittee’s website includes written testimony by representatives of higher education institutions, the U.S. Department of State, the U.S. Department of Education, a security expert, and the parent of a student killed in a bus accident in India. The website is at http://www.house.gov/ed_workforce/hearings/106th/oi/studyabroad10400/wl10400.htm.

Because most college students are legally adults, courts do not necessarily expect the college to supervise the students closely unless there is some dangerous condition of which the college, but not the student, is aware. The legal standard applied to student safety abroad is the same as that for domestic student safety issues—was the injury to the student foreseeable to the college, and did the college act in a reasonable way? For example, in *McNeil v. Wagner College*, 667 N.Y.S.2d 397 (Sup. Ct., App. Div. 1998), a student sued the college for “negligent supervision” of medical treatment she received in Austria for a broken ankle. The court ruled that the college had no duty to supervise the student’s medical treatment. On the other hand, if the college places a student in an international site known to be dangerous, or if the U.S. State Department has indicated that U.S. citizens should not travel to a certain international location and the college does not heed that warning, liability could ensue. If the chair or dean is not familiar with potential risks of a particular international site, they should obtain information
about that site and ensure that it is up-to-date and reliable. For an interesting and informative discussion of institutional liability for injuries occurring in international locations, and an examination of whether the institution acted reasonably under the circumstances, see *Bloss v. University of Minnesota Board of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999).

**B. Contract Issues**

*Catalog information.* Courts in several states have ruled that the college catalog, and other written documents concerning academic programs, are contracts (see Kaplin and Lee (1995) at 373-377). If a school or department sponsors a study-abroad or other international program, the dean or chair should ensure that the written information provided to students is accurate, and that the faculty and staff comply with the policies and promises contained in the written material. For example, does the institution locate housing for the student? If so, there will be an obligation to ensure that the housing is adequate and, if there is a problem locally, that alternate housing is provided. Is the student responsible for meals, local transportation, and educational costs? If so, the materials should make that clear. What is the refund policy if the student does not participate, or drops out part-way through the program? All of these issues should be thoroughly spelled out and complied with.

*Individual contracts with local co-sponsors (other colleges, nonprofit organizations, government offices).* Some schools or departments enter individual agreements with an international organization, whereby the local organization handles local arrangements and the U.S. school or department selects or sends the students and either provides the courses itself or agrees to accept the credits earned for courses taken abroad. Obviously, the relationship between the school/department and the international organization is very important. Is this an organization that has a history of working with college students? With U.S. colleges? What assurances is the organization giving that it will fulfill its obligations to the U.S. partner and its students? What information has the chair or dean obtained about this organization that suggests that it will be an appropriate partner? Is the individual or group with whom the school or department is contracting authorized to bind that organization? What alternative plans have been made in the event that the international organization cannot fulfill its obligation to the U.S. students?
Whether or not the U.S. college or university has a requirement that such arrangements be approved by the president or some other official, the written agreement should be reviewed by legal counsel. If U.S. citizens are paid for teaching in an international location, they may incur tax liability in that country, even if they are paid by the U.S. college in U.S. dollars after they return. There may be special visa requirements for faculty who are not citizens of the country in which they are teaching. Singapore, for example, requires a passport endorsement to be obtained by the organization inviting a noncitizen to give a lecture, even if there is no payment for the lecture. It also levies an income tax of 27 percent on any stipend paid to a noncitizen for teaching or performing some other work in Singapore.

If the local partner will be making housing and/or transportation arrangements for students, the U.S. college should ensure that these arrangements are safe and of an acceptable standard. It may be necessary for a representative of the U.S. college to visit the international site and determine whether the local arrangements are appropriate.

C. Student Conduct and Discipline

Does the campus code of conduct extend to external programs? Although most students complete study-abroad programs with no behavior problems, the college should anticipate that the occasional student may either misbehave or violate a law. The college should have a plan for responding to these problems. One important issue is whether the campus code of conduct extends to students enrolled in external programs. If the college itself offers the course at an international location, then the campus code could arguably extend to student conduct at the off-campus site. But if the student is enrolled at a different institution and will be transferring the credits back to the home college, then the campus code may not apply. Deans and chairs should determine under what circumstances the code may not apply.

One method of ensuring that students understand that the campus code of conduct follows them wherever they are studying is to include a statement to that effect in the written documents that describe the study abroad program. The statement should include information as to what will happen to a student if he or she engages in academic misconduct or social misbehavior in that foreign academic setting.
Will the student have an opportunity to respond to charges locally before being required to return home (for students at public institutions, due process considerations are significant. For students at private institutions, the protections afforded students by college policies are also significant).

Will the student receive a hearing upon returning to the U.S. college?

Will a temporary grade be given in a case of suspected plagiarism, with the final determination made when the student returns?

If the student is behaving in a disruptive fashion and needs to be removed from the classroom, what responsibility will the college take to return the student to the U.S.? To his or her home?

What will be the college’s response if the student is accused of violating a criminal law?

The written material describing the study abroad program should make it very clear what the college will do, and what is the student’s responsibility if problems occur of the student’s own making.

D. Faculty Conduct and Discipline

Harassment of students. Colleges need to make it clear that faculty are expected to abide by the same rules of conduct that apply on campus. Deans and chairs need to anticipate potential problems that can occur in an international setting where faculty and students spend significant amounts of time together. Faculty who participate in study abroad programs should be given information about the college’s harassment and nondiscrimination policy, and should be told how to respond if a student reports harassment, no matter what the source of the harassment.

The faculty member’s responsibility as the college’s agent. Because the college will probably have few or no local staff at the international location, the faculty member will need to understand that his or her responsibilities extend beyond merely teaching or escorting students to and from the program site. An orientation program should be conducted that includes, at a minimum:
• A discussion of safety issues.
• A discussion of how to respond if a student is injured, becomes seriously ill, misbehaves, or is arrested.
• Some training about the culture of the country in which the program will be held.
• Contact information for the local partner organization, with names of individuals who can assist the faculty member if problems occur.
• A briefing on how faculty and students may need to conform their behavior to local laws (for example, it is illegal for women to drive a car in certain countries).

The faculty member’s rights. Just as the faculty member is expected to meet the standards of professional conduct no matter where the teaching occurs, the faculty member has the right to be protected by the college’s personnel policies and guidelines. For example, protections for faculty academic freedom should extend to international sites, allowing for special circumstances related to cultural differences. Classroom speech would receive greater protection, just as in an on-campus course, than political or personal speech unrelated to the faculty member’s academic assignment. This issue should be addressed in the agreement between the college and the local partner before the program begins. In addition, it should be clear to all parties how complaints about the faculty member’s teaching will be handled, both locally and by the U.S. college.
Problem One

Delia Disorganized ("DD" to her friends) has served as Chair of the Department of Hard Work at Happy Valley University for one year. DD has an excellent reputation as a teacher and scholar. Her administrative skills have not received equal praise. In fact, several members of her department have secretly met with Dean Don’t Bother Me to discuss their frustration with DD’s management abilities and the overall disharmony within the department. They have asked the Dean to remove DD as Chair. Most of DD’s troubles center around two young male faculty members Macho Max and Complaining Cal.

Macho Max

Max, a tenured faculty member, is invited frequently to speak at conferences, many of which are in foreign countries and require significant travel time. DD has been quite lenient in giving Max permission to miss classes, registration periods, and advising sessions with students in order to attend the conferences. Her leniency in this regard has caused other members of the department to have to cover Max’s classes, fulfill his advising duties, and work extra hours at registration. They have expressed their displeasure at these extra work assignments to DD and have asked her to require Max to meet his on-campus obligations.

When DD denied Max permission to take a trip to China which would have resulted in his being absent the first two weeks of the Spring semester, he ignored her and took the trip anyway. DD warned Max that his insubordination could lead to his termination. Max told DD, in front of several junior faculty members and several prospective graduate students, that she was too old for the job of Chair and that she was just as provincial and incompetent as most of the other faculty in the department. He made similar denigrating remarks about DD and his faculty colleagues to a candidate for an assistant professor position in the department on the occasion of the candidate’s visit to campus. DD met with Max many times to discuss his disruptive behavior. At the end of each session, Max would scream at DD, storm out of her office, slam the door, and leave her in tears. Finally, pressured by the entire department faculty, DD recommended to Dean Don’t Bother Me that Max be terminated.

What should Dean Don’t Bother Me do? What could or should DD have done differently in this situation? Are there legal grounds for the termination of Max? What should Dean Don’t Bother Me do about Max and about DD’s continuation as Chair?

1. Complaining Cal

Cal is an untenured faculty member in the Department of Hard Work. DD, the Chair of the Department, has high expectations of performance from all faculty but especially those serving their probationary period for tenure. DD carefully evaluated Cal each of the first four years of his probationary and annually advised Cal of his need to publish.
Cal did not like the Chair’s constant pressuring of him to publish. He also did not like the manner in which DD allocated departmental resources, designated office space, and assigned to Cal evening and off-campus classes. Cal filed several internal university grievances involving his salary increases, his office location, and teaching requirements imposed on him by the DD. Cal also complained to the local press about DD’s managerial style and called her a “tyrant” and a “poor academic administrator,” who demanded too much from her faculty. Relations between the two became so strained that DD refused to conduct an annual evaluation of Cal during his last probationary year.

When Cal was reviewed for tenure, the department faculty voted 10-8 to grant tenure. The Chair sent a negative recommendation to the Dean, saying that she found Cal to be a disruptive and divisive presence in the Department, a constant complainer, and lacking in scholarship and collegiality. After tenure was ultimately denied by the president, Cal sued. He maintained that he was denied tenure because of his exercise of free speech in the filing of internal grievances and complaining to the press about work conditions.

What could and should the Chair have done differently? Did she have legitimate grounds for recommending against tenure for Cal? Could she have taken steps to manage the conflict better? What should the Dean do in this situation about Cal’s tenure and about DD’s role as Chair?
Mary Jones is a student at Humdrum State College (HSC). She is majoring in anthropology and minoring in women’s studies. Mary has never travelled out of her home state, and has decided that she will participate in HSC’s study abroad program.

Mary applied for the study abroad program at the end of her sophomore year, and was accepted for a program in Pakistan. The program involved classes in anthropology and intercultural communications, and was taught by Pakistani professors in English. The program was designed to provide students with first-hand experience in living in a local Pakistani community. Students were placed with local families and classes were held in a community center. One of the reasons that the site appealed to Mary was that she would have a “unique” experience that she could not get in a Western European city or in a more traditional educational setting.

About one month before she was to leave for Pakistan, Mary was diagnosed with multiple learning disorders. The recommended accommodations for her learning disorders included a tutor, a notetaker, and a quiet room for studying. When Mary notified the director of the study abroad program of the recommended accommodations, the director replied that she couldn’t guarantee anything—that Mary was “on her own” because it was impossible to predict what the housing situation would be like, whether the community center would have a room that was quiet, or whether tutors and notetakers were available on site. The director said she would try to contact the local agency with whom the college had contracted to run the program. The college’s director of disability services verified the diagnosis and the appropriateness of the recommended accommodations, and noted that they would be readily available on campus if Mary did not participate in the study abroad program.

Mary decided to travel to Pakistan, and was placed with a host family. She was required to share a bedroom with two of the family’s daughters, and there was no private room available to her for studying. The village library was approximately two miles from the home in which Mary was living, and was reachable by a bus ride of approximately 45 minutes. Mary put up a sign at the community center and the library, attempting to hire a tutor at her own expense, but no one replied. Her professors could not suggest any candidates for tutors or for notetakers. Mary’s
academic performance, which had been adequate in her classes on campus, began to founder, and she earned a D in three courses and a C in the fourth. The college’s policy with respect to transferring credits for courses taken abroad was that the student must earn a grade of C or better. Only one of Mary’s courses would transfer to HSC, and she would be required to complete an extra semester in order to graduate.

After she returned to HSC, Mary filed a grade appeal for two of the “D” grades, which were given by the same professor. Mary says that the professor behaved “inappropriately” and “demeaned women,” and that her academic performance was at least at the C level and perhaps even a B. She says she cannot afford to attend college for an extra semester, and that if she had “been given the support she was entitled to,” she would be able to graduate on time.

You are the dean of the School of Arts and Sciences. How would you respond to Mary’s appeal?
Good Practice in Tenure Evaluation

Advice for Tenured Faculty, Department Chairs, and Academic Administrators

A Joint Project of
The American Council on Education,
The American Association of University Professors, and
United Educators Insurance Risk Retention Group

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A free electronic version of this report is available through www.acenet.edu/bookstore/
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Introduction

This report provides guidance on conducting tenure evaluations that are thoughtful and just. Flawed tenure processes can exact a heavy toll on the unsuccessful candidate, his or her colleagues, and the institution. Our hope is that the good practices offered here may lessen the frequency and impact of disputes over tenure. We seek not to debate the merits of tenure in American higher education, but rather we seek to examine the tenure process and offer some suggestions to those responsible for conducting it.

Each year, thousands of nontenured faculty members undergo evaluations of their work, and each year a smaller but still significant number are evaluated for tenure.¹ A recent study quantified some faculty concerns about the process. Of 378 faculty members surveyed at 19 four-year institutions, 37 percent said that standards for tenure and promotion were unclear. This sentiment existed even among senior faculty members who had themselves received tenure.² It is no startling revelation that problems occasionally arise in tenure reviews. Most academics can recount a first- or second-hand tale about a difficult case. Unsuccessful candidates may file appeals on their campuses challenging tenure denial, and, with increasing frequency, they resort to the courts for redress of perceived discrimination, breach of contract, or other legal wrongs. Judges then have the final responsibility to assess tenure standards and procedures.

This report originated at a meeting convened by the American Council on Education (ACE), the American Association of University Professors (AAUP), and United Educators Insurance (UE).³ These collaborating organizations have complementary interests in American higher education:

The American Council on Education
ACE is a comprehensive association of the nation’s colleges and universities dedicated to analysis of higher education issues and advocacy on behalf of quality higher education and adult education programs. Counted among ACE’s members are more than 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations. For further information, visit www.acenet.edu.

The American Association of University Professors
AAUP is a nonprofit charitable and educational organization that supports and defends the principles of academic freedom and tenure and promotes policies to ensure academic due process. AAUP has more than 45,000 members at colleges and universities throughout the country. For further information, visit www.aaup.org.
United Educators Insurance Risk Retention Group, Inc.

Founded in 1987, UE provides insurance to colleges, universities, and related organizations. It is owned and governed by over 1,000 member institutions. UE offers policies that cover legal disputes over the denial of tenure. For further information, visit www.ue.org.

Following the meeting, the organizations developed the specific recommendations offered here. We hope this report will promote self-reflection by those who evaluate tenure-track faculty, as well as general institutional dialogue and improvement.

Ann H. Franke, Esq.
Vice President for Education and Risk Management
United Educators Insurance
 Practical suggestions for the tenure evaluation process fall into four major themes. These suggestions speak to various audiences—notably department chairs, senior faculty who participate in evaluating tenure-track faculty, and academic administrators.

**Clarity in Standards and Procedures for Tenure Evaluation**

Institutions should ensure that their stated criteria for tenure match the criteria that, in actual practice, the institutions apply. Department chairs and other responsible administrators should clearly communicate all criteria, including any special requirements applicable within a department or a college, to a tenure-track faculty member early in his or her career at the institution. When the tenure review occurs, complications can arise if positive developments (such as the acceptance of a book for publication) or negative allegations (such as harassment charges) come to light. Institutions should anticipate these possibilities and develop procedures in advance for handling them. Another potential source of difficulty lies in the personal opinions expressed to those responsible for conducting the review. An institution should adopt a consistent approach to handling private letters and conversations, outside the normal review process, concerning the merits of a tenure candidate.

**Consistency in Tenure Decisions**

Tenure decisions must be consistent over time among candidates with different personal characteristics—such as race, gender, disability, and national origin. Protections in law and institutional policy against discrimination apply with full force to the tenure process. Consistency also requires that the formal evaluations of a single individual over time reflect a coherent set of expectations and a consistent analysis of the individual's performance. Department chairs and other colleagues should not convey excessive optimism about a candidate's prospects for tenure. A negative tenure decision should not be the first criticism the individual receives. Everyone who participates in reviews must scrupulously follow tenure policies and procedures, and administrators should take special care when reviewing candidates from their own disciplines.

**Candor in the Evaluation of Tenure-Track Faculty**

The department chair or other responsible administrator should clearly explain to every tenure-track faculty member the standards for reappointment and tenure and the cycle for evaluations of his or her progress in meeting these requirements. Periodic evaluations should be candid and expressed in plain English. They should include specific examples illustrating the quality of performance, constructive criticism of any potential areas
for improvement, and practical guidance for future efforts.

*Caring for Unsuccessful Candidates*

Faculty and administrators must treat an unsuccessful tenure candidate with professionalism and decency. The person responsible for conveying the disappointing news should use compassion, and colleagues should take care not to isolate the person socially. Active efforts to assist the candidate in relocating to another position redound to the mutual benefit of the individual and the institution.
Chapter 1
Clarity in Standards and Procedures for Tenure Evaluation

Most colleges and universities have well-articulated tenure policies. Over time, their faculty and administrators have collaborated on crafting standards and procedures that fit their unique institutional circumstances. Experience suggests, however, that some aspects of a tenure policy may nonetheless be overlooked, creating the potential for uncertainty or conflict. Faculty and administrations that anticipate these issues and develop thoughtful and consistent approaches to them will be best positioned to defend their decisions.

The tenure policy should comprehensively list all the major criteria used for evaluation. “Teaching, research, and service” is the standard trinity for evaluating faculty. Some institutions have enlarged these criteria with additional factors, while others rely on the traditional three. Whatever the formulation, an institution should assess, through its appropriate decision-making bodies, whether its policies accurately reflect the actual operation of its tenure system. Do tenure evaluators sometimes use unstated factors? Examples might include student enrollment, success in attracting external funding, or long-term institutional needs.

If a tenure denial is based on a criterion that does not appear in the written policy, the unsuccessful candidate may challenge the decision as unfair and improper. Some courts are sympathetic to these claims. Other courts give campuses latitude in interpreting, for example, “research” as including the ability to attract external funding, or “teaching” as including social skills in relating to students. The safest course is to articulate written standards that reflect the major criteria that are actually used.

The evaluators at all stages in the tenure process should know—and apply—the criteria.

After the institution identifies the major criteria, the next logical steps are to distribute and follow them. Many people may be involved in a tenure evaluation: senior faculty in the candidate’s department; members of a campus-wide tenure committee; the dean; the provost; the president; and, on most campuses, the governing board. Each evaluator at each stage must know and apply the proper criteria.

Has the candidate’s department adopted special requirements relevant to its discipline? Fields such as studio and performing arts, for example, often require creative output in forms other than traditional scholarly publishing. Computer scientists might use software development to demonstrate professional achievements. Even departments such as history or mathematics may have tailored criteria specific to their particular goals. The institution should take special care in evaluating interdisciplinary scholars to ensure that all evaluators measure the can-
candidate against the same yardstick. Whatever the criteria, all evaluators should know and apply them.

The tenure policy should address whether tenure evaluators will consider positive events occurring after the tenure application has been submitted.

Most institutions require candidates to submit comprehensive applications detailing their achievements. The policy should specify whether the evaluation will take into account developments occurring after the candidate has completed his or her application. A faculty tenure committee may need to be alert to the possibility, for example, that a publisher may finally accept a candidate’s manuscript after the tenure review has begun. Will this positive development carry weight in the tenure process? If so, who is responsible for supplementing the application with the new information? Can the candidate add the new information at any stage of the process, or is it at some point too late? If the candidate adds new information, should he or she receive reconsideration at any earlier stages?

While subsequent developments are most often positive, such as a new publication or improved teaching evaluations, they need not be. After applying for tenure, the candidate might suffer a decline in teaching evaluations, receive a harsh review of a recent book, or, in rare instances, be found to have engaged in sexual harassment or plagiarism. Commentators sometimes use the terms “static” and “dynamic” to distinguish between those tenure systems that accept new information during the review process and those that do not. An institution is well-advised to adopt policies that make clear in advance which approach it will use and, of course, to adhere to its policies. Positive developments can extend the tenure process; negative developments, as discussed below, may interrupt it.

The tenure policy should indicate what steps the institution will take if a faculty member under consideration for tenure is charged with misconduct or if other negative events emerge.

The problem of unexpected negative information is infrequent but can prove very troublesome. An allegation of misconduct may be made against a faculty member who is undergoing tenure evaluation. For example, a senior professor may allege during the departmental tenure deliberations that the candidate has included on his resume a paper that was actually written entirely by a graduate student. Unsigned or signed letters alleging sexual harassment may arrive from students. Someone may offer a rumor that the candidate has been charged with domestic violence, whether recently or in the distant past.

We strongly encourage institutions to seek legal advice in these situations before completing the tenure review. Beyond this generic advice, institutions take varied approaches.

Some institutions will channel such allegations into a campus dispute resolution mechanism, such as the college or university sexual harassment procedure. The institution will suspend the tenure process until completing the other proceeding. Other institutions give the candidate notice of the allegations and an opportunity to respond directly to the tenure committee. Under a hybrid approach, the institution might offer the candidate the option of a separate proceeding or consideration directly by the tenure committee. Still other institutions may decline to receive or consider in the tenure process any unsubstantiated or unresolved allegations of misconduct. An AAUP investigating committee concluded in one case that a probationary faculty member charged with misconduct during the course of a tenure evaluation should have received written charges stated with particularity, time to for-
mulate a response, and an opportunity to appear before the decision makers to present the response. Advice of legal counsel may well be helpful in ensuring compliance with institutional policy and legal responsibilities in these complex situations.4

Evidence of serious misconduct might come to light after tenure has been awarded. Rather than revisiting the award of tenure, the better course is to invoke the regular disciplinary process applicable to tenured faculty.

The tenure policy should address the voting protocol when an evaluator serves at more than one level of review.

A member of the candidate’s department may serve on the campus-wide promotion and tenure committee. If someone “wears multiple hats,” the question arises whether that individual votes once or twice on the tenure candidacy. Consider, for example, a full professor in biology who serves on the college-wide review committee. If an assistant professor in biology has applied for tenure, would the senior colleague vote only within the department, only on the college-wide committee, or at both levels? Smaller institutions may face this question most often. There is no single correct answer. The best approach is to anticipate the situation, address it through clear written policies, and then follow the policies consistently.

Individual faculty members may wish to express their own opinions about a tenure candidate to members of the campus-wide promotion and tenure committee or to the administration. The tenure policy should address how the recipients should treat these individual opinions.

Consider this scenario. A senior faculty member strongly believes that a junior colleague should not receive tenure. She is, however, unable to convince the department, which votes to recommend the award of tenure. She writes a separate letter to an acquaintance on the promotion and tenure committee, or to the dean, forcefully explaining her opposition to the candidate. Is such a letter proper under the institution’s policies? How should the recipient handle it? Should the tenure candidate be informed about the letter?

Senior faculty members often hold strong opinions about tenure candidates. They may seek to express their opinions, whether positive or negative, privately to individuals with influence in the evaluation process. They may write letters or e-mails or engage in conversations. From a policy standpoint, the institution’s rules should clarify whether such individual opinions may be properly conveyed and considered. If so, how should the recipient use the information? Should it be shared with evaluators who were involved earlier in the process, or should it be shared with the candidate?

The press has reported on one illustrative situation at New York University. A candidate who directed an ethnic studies program received a departmental vote of 17 to 1 in favor of tenure. The lone dissenter, a former dean, wrote a private 10-page letter to the incumbent dean sharply criticizing the candidate’s scholarship. Unknown to the candidate or the department, the letter became part of the tenure file. According to the press account, the promotion and tenure committee voted 8 to 2 against tenure, relying in part on the critical letter. The letter writer and the department disagreed over the propriety of the separate letter. Was it an exercise of the dissenter’s right to express his opinion or a subversion of the department’s democratic process? The administration ultimately offered the scholar a tenured position.5

From a litigation standpoint, a senior professor needs to understand that her letter may become public through the discovery process. If the candidate about whom she
wrote the letter is denied tenure, that individual may file suit and would receive access to the letter. Suppose, however, that the private, critical letter is unpersuasive and the candidate receives tenure. The letter remains in the institution’s files. Now suppose another scholar is denied tenure. The letter will come to light in a lawsuit if the court compares the evaluations of the successful and unsuccessful candidates. The trial judge can also order disclosure of verbal comments.

This problem is not hypothetical. In one tenure battle that landed in court, a senior historian had written a “confidential” letter to the dean of the faculty questioning whether a male historian had been evaluated less rigorously than female historians during their tenure candidacies. The male historian received tenure. A female scientist who subsequently was denied tenure sued and compared her qualifications to those of the male historian. The “confidential” letter from the senior history professor was presented as evidence at the trial and was reported in the press.6

Given the realities of academic life, some individual faculty members may well wish to share their unsolicited opinions about candidates with decision makers in the tenure process. The best course is for institutional policy to address the possibility. Key issues are whether the candidate receives notice about the communication and what weight, if any, the recipient may place on that communication. Good institutional rules will offer guidance so that all participants in the tenure process share a common understanding.

Checklist on Clarity

✓ The tenure policy should clearly state the criteria for tenure and should encompass all the major factors actually relied upon in evaluating tenure applications.

✓ Evaluators at all stages of the tenure process should know and apply the criteria appropriate to the candidate.

✓ The tenure rules should clearly explain whether evaluators will consider positive events subsequent to the submission of the tenure application—such as acceptance of a manuscript for publication—in making their evaluations.

✓ The institution should formulate a plan for handling allegations of misconduct or other negative information that may arise during the tenure process.

✓ A senior faculty member who serves on a college-wide tenure committee should know, in advance, whether he or she should vote on a tenure candidate in the department, at the college-wide level, or both.

✓ The institution’s rules should address what weight, if any, decisionmakers should give to informal and unsolicited opinions they receive about tenure candidates and whether candidates should be informed about such unsolicited communication.
Chapter 2
Consistency in Tenure Decisions

Institutions strive for the highest standards of fairness in individual tenure decisions. They evaluate each candidate with great care, conducting a time-consuming and elaborate review. The process places the candidate’s achievements under intense scrutiny as his or her application proceeds through the various levels of review. The goal is a correct judgment based on the merits of the individual’s qualifications. Sometimes, though, evaluators overlook the role of consistency. The fairness of the tenure process depends not just on the outcome of an individual decision, but also on the consistency of multiple decisions over time.

The faculty, administration, and governing board should strive for consistency in the operation of the institution’s tenure evaluation process.

The challenge of consistency of evaluation is well known to anyone who has graded a large stack of student essays. Does the professor judge the first paper by the same standards as the one at the bottom of the pile? Consistency in tenure decisions presents a larger challenge. Evaluators make tenure decisions primarily on an individual basis rather than a comparative one. Student essays are graded within a relatively short time frame, but tenure decisions are made on an ongoing, periodic basis and through a process of successive recommendations leading to a decision. Candidates come from different disciplines. Most significantly, tenure decisions require a highly nuanced assessment of professional achievement.

From a legal standpoint, consistency in tenure decisions is a central concern. In 1972, Congress decided that colleges and universities must abide by the federal laws prohibiting employment discrimination. Tenure decisions thus receive close scrutiny from judges and juries as to whether the institution has equitably treated tenure candidates of different races, genders, national origins, religions, ages, or disability status. Sexual orientation may be relevant under state or local law or campus policy. Institutional policies typically list the types of discrimination that the institution prohibits. Inconsistency in tenure decisions, legally termed “disparate treatment,” is the essence of legal challenges alleging that an institution’s tenure process is discriminatory.

The courts typically allow an unsuccessful tenure candidate who sues for discrimination to compare his or her situation to those of scholars who have received tenure. An African-American electrical engineer suing for racial discrimination, for example, will point to the qualifications of white electrical engineering faculty members who have received tenure. A court may allow the plaintiff to compare his candidacy to those of white professors in other departments such as civil engineering, physics, or even more remote fields such as languages or social sciences. Yet different disciplines may apply different standards for tenure. Clinical programs are a good
example. Departmental tenure standards that articulate the different criteria will facilitate the legal review of the consistency of decisions.

Given that judges and juries will compare the institution’s tenure decisions over time and across disciplines, faculty and administrators need to pay heed to the consistency of tenure decisions. Reviewers at each level, from the department to the ultimate decision maker, should ask, “How does this candidate compare to others we have evaluated for tenure in the recent past?” Each tenure candidate is unique, and the evaluation process is anything but mechanical.

Even in the face of these difficulties, however, the institution needs to be alert to inconsistencies, particularly gross or blatant ones. One institution gives its university-wide committee a special role in checking for consistency. The committee members’ terms are staggered so that at any given time at least one member of the committee has served for six years. With each new tenure decision, the committee compares the candidate to the candidates it has evaluated over the past six years. Whether using this type of mechanism or others, the committee best devotes its attention to the consistency of decisions before a lawsuit is filed rather than after.

The faculty and administration should strive for consistency over time in their review of the work of each nontenured faculty member.

It is important for the department chair and other reviewers to be consistent over time when evaluating an individual candidate. An assistant professor may, for example, receive five successive annual evaluations from her department chair that praise her for excellent teaching. In the sixth year, the department chair begins to criticize her teaching. The change may be due to an actual decline in the candidate’s performance, or it may be due to a change in the chair’s approach to the evaluation. The institution should strive for consistency in the successive evaluations of an individual candidate. If challenged in a lawsuit, an institution is placed at a distinct disadvantage if an unsuccessful candidate for tenure received only excellent evaluations up to the point of tenure rejection.

Consistency in successive evaluations, of course, does not require that evaluators photocopy the same written comments and reuse them annually. Successive evaluations should, rather, faithfully reflect the candidate’s performance, including both improvements and declines. A careful department chair will review the prior evaluation before writing the next one as a check on both the expectations that were conveyed and the candidate’s progress in meeting them. The evaluations may also be useful items to include in the tenure application file. Faculty and administrators who conduct tenure reviews may benefit from seeing the earlier annual evaluations. If a candidate received earlier excellent evaluations but is rejected for tenure, he or she will be understandably frustrated by what appear to be capricious and misleading actions.

A department’s counseling of nontenured faculty members should be consistent with its and the institution’s tenure requirements.

The department bears the major responsibility for ensuring that a tenure candidate receives appropriate ongoing counseling during the probationary period. In several recent tenure disputes, departments have been faulted for providing inconsistent counseling or guidance to a junior faculty member.

In one situation, the president of a research university addressed a grievance filed by an unsuccessful tenure candidate. In deciding the grievance, the president wrote to the candidate explaining that he was assessing “whether you were substantially misled about your progress in meeting University standards.” The president concluded, “In light of the exceptionally incautious feedback that you received from your department, you may not
have taken every opportunity available to you to make more progress on your second project before your tenure review..." Based on this flaw in the department's treatment of the candidate, the president upheld the grievance, offering as a remedy additional time and another tenure review.

Departmental evaluations that are inconsistent with the institution's requirements can also be problematic. At Trinity College in Connecticut, the chemistry department had supported the tenure candidacy of Dr. Leslie Craine. When the college's Appointments and Promotions Committee voted against Craine, the department wrote to the committee asking for reconsideration. As quoted in the Chronicle of Higher Education, the department blamed itself for not doing a better job of counseling Craine. Two years before the tenure decision, the department had evaluated whether Craine was on target for tenure. The department explained to her the publication requirement and, two years later, in the department's opinion she had satisfied the requirement. After the negative tenure decision, the department wrote to the committee, "To change the rules between the second and the final [review assessing her progress towards tenure] is fundamentally unfair."

According to the press account, the department faulted itself for causing the institution to treat Craine inconsistently over time.

These cases illustrate the serious problems that can arise if a department's approach to a tenure candidate is inconsistent with the institution's requirements as interpreted by other bodies.

If the candidate is in the same discipline as an administrator involved in the tenure process, the administrator should handle the tenure application consistently with other applications.

An administrator should take care in reviewing the tenure application of a candidate specializing in the same discipline as the administrator. The administrator should treat the application the same way as those of candidates in other fields. While the administrator can certainly draw on his or her detailed knowledge of the discipline, the safest course is not to deviate in other respects from the normal tenure review process.

Consider, for example, a provost who is a political scientist. She might be tempted, when reviewing the tenure application of an assistant professor in political science, to call a few trusted colleagues at other institutions...
for their opinions. If she departs from normal practice, and if the candidate is rejected, the candidate may argue that the outsiders were unduly influential. The candidate might argue further that the provost specifically sought negative opinions in an effort to scuttle the tenure application.

Another example is the administrator who will soon return to the faculty. If the administrator recommends against tenure for a candidate from the same field, the individual may allege that the administrator acted out of biased self-interest. The candidate may assert that the administrator wished to save a “slot” for his or her return to the faculty or did not want to compete with the more successful junior scholar.

Fortunately, these situations are relatively uncommon. They underscore, however, that special circumstances enhance the need for consistency.

All reviewers should follow tenure procedures to the letter.

An unsuccessful tenure candidate may seek to overturn the decision by pointing to irregularities in the handling of his or her tenure review. It is easy to state the abstract proposition that a college or university should faithfully and consistently follow its own procedures. Turning this abstraction into a reality requires ongoing vigilance and attention to detail.

The use of outside letters of reference offers a ready illustration. In one case at Kansas State University, a federal judge noted a departure from institutional rules on external letters:

The tenured faculty voted without having reviewed letters from faculty outside of the school (outside reviewers), which was the school’s practice, although the school’s written procedures provide for such information to be available or review prior to voting.9

In another case, the University of Minnesota solicited more than 40 external review letters about a female mathematician, while the normal number would have been six to 10.10

The best written rules are not always easily applied to actual situations, but all evaluators should strive to adhere as scrupulously as possible to the institution’s tenure review procedures. Letters of reference are one potential point of contention. A fuller list of the key steps in the tenure process that require close attention includes:

- Compilation of the tenure application file.
- Procedures for identifying external referees.
- Voting eligibility of departmental members (including faculty on leave).
- Availability of written materials to committees and individual administrators who vote on the candidacy.
- Informal communications made outside the official review process about the candidate.

One institution has built a procedural check into its tenure process. Before notifying a candidate of tenure denial, those evaluators who have had major responsibility for the review meet and work through a checklist to confirm that they have handled each procedural element of the tenure process correctly. Such a review can flag missing materials, missed deadlines, or other irregularities.

Departures from the tenure procedures may be reviewed in the unpleasant context of litigation. The institution will probably argue that the irregularity was not legally defective. Even if the institution prevails, the distraction and expense of litigation might have been avoided had the procedural error never arisen.
Checklist on Consistency

✓ Ensure that tenure decisions are consistent over time among candidates who have different personal characteristics that are legally protected such as race, gender, disability, ethnic origin, and religion.

✓ Ensure that the formal evaluations of non-tenured faculty and what they are told informally about the quality of their work are based on a consistent set of expectations. A negative tenure decision should not be the first criticism of the individual's performance.

✓ The department should provide advice to faculty during the probationary period that is consistent with its and the institution's expectations for tenure. Departments should be cautious about conveying excessive optimism about prospects for tenure.

✓ The tenure application dossier should include all required materials and exclude items that the institution has not used for other candidates.

✓ Administrators should take special care, when reviewing candidates in their own disciplines, that they not depart from standard tenure processes.

✓ All reviewers should scrupulously follow tenure procedures. Deviations can be used as evidence that the institution breached its obligation to conduct a fair review.
Chapter 3
Candor in the Evaluation of Tenure-Track Faculty

The concepts of clarity, consistency, and candor are useful in analyzing tenure evaluation procedures. Admittedly, though, the categories overlap somewhat. If, for example, tenure criteria are not clear, then it will be difficult if not impossible to counsel a tenure-track faculty member candidly about his or her progress in meeting them. Examining institutional processes from the perspective of tenure-track faculty can be instructive. Here are some observations from tenure-track faculty that illustrate the stresses they face. Their concerns also illustrate the overlapping nature of clarity, consistency, and candor:

"What does it take to get tenure? That's the million dollar question. Standards change, and you never know how many articles you need."

"I had a book contract, and in my second year review, they said I should concentrate on articles, not the book. So I did. In my fourth year review, they said, 'Where's the book?'"

"I'm in business, but my field is in psychology, so about half my work is published in psychological journals. My department chair told me that was fine." The dean of this individual, however, told the interviewers, "What advice would I give to a young faculty member? I'd tell them to publish in business journals. We are a professional field and we should service the profession. To publish elsewhere would be a risk."

"Almost 50 percent of my time is spent on committees. The problem is that we don't have enough senior faculty to go around, and those who are senior don't want to serve. The department chair feels he doesn't have a choice, and the dean seems oblivious. There are always good reasons to put me on a committee; it's just that I don't think it will help me get tenure."

A faculty member at a small college described her third-year review:

"That year the review was just a mess so it wasn't particularly helpful... They wanted names of three potential reviewers and so I did my research about people who were in appropriate institutions and so on and submitted the names. Then some time passed and finally I got word that all the reviewers had to be local and none of the reviewers I had given them were local. That meant that in a matter of two or three days I had to come up with new names. It was incredibly stressful."

Responsibility for candor falls most squarely on the department chair or other individual charged with the direct, ongoing review of a tenure-track faculty member.
Mathematician John B. Conway has described for fellow department chairs the overriding importance of candor in evaluations:  

"On humanitarian and professional grounds, junior faculty should get a clear understanding of their status long before tenure is considered. “It is the head’s solemn duty to report to the candidate any bad news that comes out of the retention review. In a serious situation, the candidate should be asked to respond in writing. No one likes to communicate bad news. (Well, almost no one.) But it is absolutely essential that you do this, especially now. A head who puts on kid gloves at such a time is doing no one a favor. If the report is so bad that it seems irredeemable, terminate the candidate now before tenure is considered.

“There is the legal question, but there is also your obligation as a human being and the unofficial mentor of this young colleague. Do you really want them to spend the next few years thinking there is nothing to correct? That what they have been doing is leading toward tenure? And meantime the faculty is anticipating change and will conclude, when it fails to appear, that this person did not heed a warning and, hence, is unworthy of tenure. I have known of cases where a department head did not pass on the faculty’s concerns. When tenure was eventually denied, the candidate was shocked, the faculty discovered their warnings were not transmitted, and the head’s prestige and reputation suffered.

“A word of caution here is advisable. With five or six years of contact, people can become very friendly. Sufficiently friendly that hard decisions are almost impossible. Remember you are running a department, not a club. Chumminess is not an area where excellence suffices for tenure. Nice young mathematicians do not invite harsh judgments, but your job, and that of your colleagues, is to promote the well-being of the university. It is not to promote the sociability of the department.”

The temptation to put social concerns ahead of academic needs is real. In an article about a multimillion dollar jury verdict in a tenure denial case involving a chemistry professor, the press reported:

“David Henderson, then chairman of the chemistry department, said recently that he and his colleagues incorrectly perceived their roles as Ms. Craine’s advocates. ‘She was a friend,’ he explained. ‘We’d worked with her for six years . . . Today, Mr. Henderson describes some of the things that he wrote in the department’s letter of appeal as ‘hyperbole,’ part of a ‘calculated strategy’ to meet the requirements for appealing a negative tenure decision.”

Against this backdrop, we offer three general principles to guide the candor of faculty evaluations.

An institution owes every tenure-track faculty member a clear explanation of the requirements for tenure.

The institution should give every new faculty member an explanation of the requirements for reappointment and tenure. Members of the search committee might convey some information about standards during the interview process. Whatever the nature of discussions during the search process, after appointment the department or administration should fur-
nish a thorough explanation. Subsequent evaluations then provide an opportunity to review the requirements with the candidate. AAUP recommends that:

Probationary faculty members should be advised, early in their appointment, of the substantive and procedural standards generally accepted in decisions affecting renewal and tenure. Any special standards adopted by their particular departments or schools should also be brought to their attention.\(^\text{14}\)

It is vital that the institution promptly inform the candidate of any changes in the standards. Interdisciplinary scholars may require special attention. Faculty members who are affiliated with more than one department face a particular risk that the institution will not clearly define the overall standards for evaluation of their performance, or will change these standards frequently over time.

An institution owes every tenure-track faculty member clear advice about his or her progress in meeting tenure requirements. The institution’s primary goal in the evaluation is to give the candidate a full understanding of his or her progress to date in meeting the requirements. Candor is critical to both the institution and the candidate. The evaluation should be specific and should cover the full review period. Evaluators should avoid broad generalizations such as “Don’s teaching has improved over the past year.” Add specific details, such as “In his introductory readings course, Don succeeded in motivating the students, stimulating class discussion, and preparing them for upper level work. His new compilation of reading material will have lasting value for our curriculum.”

The evaluation should cover the entire review period, not just the most recent few weeks or months. Normally the department chair shares the written evaluation with the candidate. In a meeting to discuss the evaluation, the department chair should take the opportunity to engage the faculty member in a substantive discussion about work to date and realistic prospects for the future. Use the meeting as an occasion for two-way communication, not just a one-way critique.

Most flawed academic evaluations tend to be excessively positive. A sugar-coated review is easiest for the chair to dispense and for the candidate to swallow. But over the long run, it can prove harmful to everyone.

William Tierney and Estela Mara Bensimon have explained the importance of constructive criticism of tenure-track faculty:

[C]andidates should not be betrayed by the system. If evaluations throughout the first five years have been positive, yet the candidate is denied tenure, then a mistake needs to be rectified. Formal evaluation can be helpful to an individual if it deals with areas for improvement as well as strengths. An organization that does not take evaluation seriously is apt to disable a candidate for tenure because he or she has never received adequate feedback. In effect, the greater blame goes to the organization, but the unsuccessful candidate must pay the penalty.\(^\text{15}\)

In today’s legal climate, the institution can pay its penalty in the lawsuit that the unsuccessful candidate brings against it.

Evaluators should state their constructive criticism in plain English rather than couched it in the argot of diplomacy. Consider this example. A chair tells a candidate that her most recent published article was “good.” The chair means that, while the article was basically acceptable, it did not meet the department’s high standards of excellence. The candidate, for her part, perceives the comment as praise. A jury later deciding a lawsuit would likely interpret “good” in the same way as the candi
Annual Faculty Evaluation
Professor Pam Poe

Teaching
The student evaluations place Pam right at the median within the department. She continues to teach the sophomore introductory lecture course every fall. In addition, her development of the new critical methods seminar for department majors has been a big project. She rolled up her sleeves last summer and produced the new course, offered this spring, that has contributed substantially to the quality of our program.

Research
Pam's research has been showing good progress. We look forward to the publication later this year of the book version of her dissertation by State University Press. In the past year, she has submitted two papers that are under consideration by The International Bulletin of Methodology, one of the leading journals in her field.

Service
Pam’s service record is outstanding. She chaired the committee that conducted the campus-wide study of life and learning issues for female students. She was the primary author of the committee’s report, which made major recommendations for reform in the areas of curriculum, housing, and student activities. On campus, both female and male students eagerly seek her assistance with academic counseling. In the local community, her effective work on the board of the local United Way has brought credit to the college.

Pam is in her fourth year in a tenure-track position. In addition to the across-the-board salary increase, I am pleased to recommend her for an additional 1.5 percent for merit.

Dr. Paul Murky, Department Chair

Sample Evaluations
These are two evaluations of a tenure-track faculty member. Consider their relative candor and usefulness to Professor Poe.

The evaluation should include guidance for the future.
A good evaluation will include some guidance for the candidate's future efforts. A department chair may encourage a candidate whose teaching is acceptable to devote attention to publishing articles in peer-reviewed journals. The chair might encourage a candidate who has only co-authored publications to write as a
Annual Faculty Evaluation
Professor Pam Poe

Teaching
The student evaluations place Pam right at the median within the department. She continues to teach the sophomore introductory lecture course every fall. In addition, her development of the new critical methods seminar for department majors has been a big project. She rolled up her sleeves last summer and produced the new course, offered this spring, that has contributed substantially to the quality of our program.

Over the next two years, I hope to see Pam devote attention to honing her teaching skills. One area she could usefully address is finding ways to encourage broader student participation in discussions. She is not undertaking any new course preparations in the coming year, which will give her an opportunity to consider new creative approaches to student involvement. I would be glad to consult with her on strategies and, if she wishes, to visit her classes occasionally.

Research
Pam's research has been showing good progress. We look forward to the publication later this year of the book version of her dissertation by State University Press. In the past year, she has submitted two papers that are under consideration by The International Bulletin of Methodology, one of the leading journals in her field.

Pam understands that the college does not place substantial weight on the publication of dissertations or other research projects undertaken elsewhere before a scholar joins our faculty. For a successful tenure candidacy, she will need to show a strong record of publication in peer-reviewed journals. At a minimum, the publication of three substantial articles will be required.

Service
Pam's service record is outstanding. She chaired the committee that conducted the campus-wide study of life and learning issues for female students. She was the primary author of the committee's report, which made major recommendations for reform in the areas of curriculum, housing, and student activities. On campus both female and male students eagerly seek her assistance with academic counseling. In the local community, her effective work on the board of the local United Way has brought credit to the college.

Pam and I have discussed the weight that the college gives to service in evaluating faculty. While important, it stands behind teaching and research in our priorities.

Pam is in her fourth year in a tenure-track position. In addition to the across-the-board salary increase, I am pleased to recommend her for an additional 1.5 percent for merit for her role in the development of the new seminar.

Dr. Charles Candid, Department Chair

sole author. The conscientious chair will anticipate the needs of the candidate and the department and will guide the individual in how best to direct his or her energy.

Future guidance should not, however, take the form of promises. For example, "If you get your book out within the next two years, I'm sure you'll be a shoo-in for tenure." Many things can change over two years. The book, when published, may not be good. The institution may decide it does not have a long-term need for the candidate's specialty. A different department chair may assess the candidate's research productivity differently. So, while future guidance is an important element of an evaluation, the chair should couch it as guidance rather than a guarantee.

An institution is vulnerable to challenge if
it gives short shrift to any of the elements of

candor. Particularly dangerous is the situation

in which the institution has offered a candi-
date glowing evaluations for five years but

denies tenure on the basis of some inade-
quacy that no one ever communicated during

the entire probationary period.

Every tenure-track faculty member
deserves:

✓ A clear explanation of the requirements for

reappointment and tenure, including any

criteria specific to the department or school.

✓ Periodic evaluations of his or her progress in

meeting the requirements.

✓ Candor in all evaluations.

✓ Specific examples that illustrate the quality of

his or her performance.

✓ Constructive criticism outlining any potential

areas for improvement.

✓ A review covering the entire evaluation period,

not just the recent past.

✓ An evaluation in plain English.

✓ Practical guidance for future efforts to meet

the requirements, without promises or

guarantees that the institution may not be able
to honor.

✓ An understanding of how a review (or reviews)
during the probationary period differs from a
later tenure review.
Chapter 4
Caring for Unsuccessful Candidates

Almost no one in the history department has talked to me this entire semester. I'm like someone who has been airbrushed out of a Kremlin photograph."
– Historian denied tenure at Yale University

"It's like you have leprosy."
– English professor denied tenure at the University of Michigan

At most institutions, a denial of tenure means that the unsuccessful candidate will remain one final year and then depart. Faculty and administrators should continue to treat a candidate who has been rejected for tenure as a professional colleague. The institution can take many steps to help the individual with what may be a difficult transition. If the institution provides assistance and expressions of concern, it may reduce the anger and desire for revenge that some unsuccessful candidates feel. Caring for unsuccessful candidates is a humane and decent thing to do. It is also a good way to prevent some lawsuits.

Deliver the bad news with compassion.
Consider how your institution notifies candidates that they have been denied tenure. The most impersonal way is a short letter. How would you feel if you received this letter?

Dear Professor Jones,

It is my responsibility to advise you that the governing board voted last week to deny your application for tenure and promotion. You will receive a terminal one-year contract running through next June. Let me offer thanks for your years of service to our college and wish you well in your future professional endeavors.

Sincerely,
President Smith

One immediate question would be why the president did not send the letter more promptly after the board voted. But beyond that relatively minor detail, the letter is highly impersonal. It essentially abandons Professor Jones to face the future alone.

Written notice of the tenure denial is important from a legal standpoint. A better letter would provide an opportunity to meet with the provost or other high-level academic administrator to discuss the decision and any relocation assistance that the institution could provide.

Experience suggests that the provost, or similar official, should meet with each candidate denied tenure as soon as possible after the decision. The meeting can begin the process of repairing damage to the individual’s self-esteem. The provost uses the meeting to say, in effect, "You're still a good person. You have many fine skills and talents."
At the present time, unfortunately, you and the institution were not a good long-term match." The provost should allow the candidate to express feelings about the situation, which can provide the individual with some catharsis. The provost can also begin to outline ways in which the institution may be able to assist with the candidate's transition.

**Encourage colleagues to interact professionally with the unsuccessful candidate after the denial of tenure.**

Social isolation can exacerbate the unsuccessful tenure candidate's sense of failure. Colleagues should take care to interact sensitively and professionally with the individual after a negative decision. Take time for conversation and social interactions. Common courtesies can reduce some of the sting of the outcome.

One unsuccessful candidate described the awkwardness of hosting at her home a gathering for prospective students. She was obliged to "sell" them on the value of an institution that had recently rejected her. Should the gathering have been held elsewhere? The best approach probably would have been for the chair to ask whether she preferred to host what was an annual event one final time or to let the task fall to someone else. Unilaterally shifting the function without consultation probably would have been unwise. Open lines of communication can help the candidate through a difficult period and reduce the prospect of disputes over small or large issues.
Checklist on Caring for Unsuccessful Candidates

The institution can take many steps to help the unsuccessful tenure candidate get back on his or her feet elsewhere. Here are some possibilities:

✓ Networking about available positions at other institutions. Senior faculty in the department can be an enormous help in identifying possibilities at other institutions. They can contact colleagues nearby or in other parts of the country and urge them to consider the candidate for open positions. If the department, however, was strongly opposed to the award of tenure, the networking function might be better performed by a senior academic administrator. If the tenure denial was based on malfeasance, it would be irresponsible for the institution to help the individual relocate to another campus without adequate disclosure of the problem.

✓ Funds for travel and attending conferences. The unsuccessful candidate may find it helpful to have access to funds for attending conferences that have a recruiting component, other travel related to the job search, or maintaining professional contacts. The institution can specifically earmark a reasonable amount for the candidate’s use.

✓ Subscriptions to periodicals that have vacancy announcements. A personal subscription may relieve the candidate from the burden of hunting down the department’s shared copy of any publications that include position listings.

✓ Photocopying assistance. The search for an academic position requires large amounts of photocopying. The institution can designate someone to assist with this function. If the institution closely monitors copying charges, the candidate might be given a special allotment.

✓ Advice about academic job searches. Some candidates may be out of touch with the logistics of finding an academic position. Colleagues or the placement office may be able to offer “how to” advice on current techniques. The candidate might, for example, welcome advice about online information and networking resources and how to prepare a resume for electronic distribution.

✓ Release time, if the candidate desires it. The institution and the candidate may mutually decide that their interests would be best served if the candidate were relieved of certain duties during the terminal contract year. The candidate might, for example, be offered a reduced teaching load. Take care, though, that the decision is mutual. Irresponsibly imposing a substantial change in responsibilities on someone denied tenure may create risks. Such action may anger the individual and increase his or her readiness to sue. The faculty handbook may limit the institution’s ability to change faculty responsibilities at particular times or in particular ways. If the institution relieves the individual of teaching, the action may violate AAUP’s recommended standards on suspension. Mutually agreed-upon release time is, however, acceptable.

✓ Portable research support. Occasionally, institutions have provided financial support to continue the faculty member’s research at another institution. Such “portable” support can signal the perceived value of the research and enhance the candidate’s attractiveness for another position.

✓ Other support that fits the individual’s unique circumstances. Take the time to learn about the candidate’s needs and desires for future professional employment. Then consider whether the institution can help satisfy them. Retraining, tuition waivers, the payment of professional society dues, and library access are but a few resources that the institution may be able to deploy. Every situation is different, so examine each with care.

Take care that any oral or written recommendations are consistent with the grounds for the tenure decision. If the candidate files a lawsuit, those recommendations may crop up as evidence.
Conclusion
Moving Forward

How can an institution move forward in refining and improving its evaluation process? Collaboration among faculty and academic administrators is a key ingredient. Advice from legal counsel may also be appropriate. We offer institutions the following approaches:

- Conduct workshops for department chairs on the appointment and evaluation of tenure-track faculty. Cover topics such as the importance of following institutional procedures, communicating well with tenure-track faculty, and preparing and retaining appropriate documentation. Possible presenters include experienced chairs and administrators, legal counsel, and outside experts. This report could serve as a basis for discussion.

- For smaller colleges, collaborate with neighboring institutions to develop joint annual or semiannual retreats or workshops for chairs and senior faculty.

- Encourage faculty and chairs to attend external programs on evaluation and tenure practices. Some ongoing workshops are listed in the bibliography. Disciplinary association meetings also sponsor occasional sessions. To compound the benefit of external programs, ask the attendees to share the insights they learn with others back on campus. Institutions often overlook the steps of sharing information and promoting campus dialogue with people who return from external programs.

- Have a small working group analyze situations of tenure denial that have occurred in the recent past and formulate recommendations for improvement. Don’t limit the recommendations just to revising the wording of campus policy. Also address the behavioral issues of how candidly and consistently the evaluators apply tenure standards.

- If lawsuits or other disputes have occurred, learn from those experiences and make appropriate changes. Calculate the intangible and tangible costs of dispute and devote comparable resources to preventing the next problem that might otherwise occur.

- Engage in a dialogue with tenure-track faculty about their perceptions of the tenure process. Ask about their understanding of the tenure standards and procedures, as well as the quality of the ongoing evaluations they are receiving. The information could be solicited informally through conversations or more formally through surveys. Use your findings to identify areas for possible improvement.

Consideration for tenure is a pivotal moment in the life of the candidate and the institution. The good practices detailed here
are designed to avert problems that can
detract from the hard work of evaluating
academic achievement. They are also designed
to enhance the fairness of the tenure process.
A few of the suggestions address institutional
policy. Most speak to the words and deeds of
the people who implement that policy. We
commend these practices to the serious atten-
tion of department chairs, other faculty
involved in tenure evaluations, and academic
administrators.
Endnotes

Introduction

1 The tenure process has evolved over time. Today, for example, senior faculty colleagues typically vote at the department level on a tenure candidate. In 1959, however, only 26 of 80 institutions surveyed involved faculty in tenure recommendations. The survey authors proposed that tenure procedures “should provide for official action by the faculty, at one or more levels, on all decisions about acquisition of tenure.” Commission on Academic Tenure in Higher Education, Faculty Tenure (Jossey-Bass, 1973), 218. Yesterday’s recommendation has become today’s reality.


3 Those involved in the session, held in October 1998, were: Dr. Michael Baer, Senior Vice President for Programs and Analysis, ACE; Peter Byrne, Professor, Georgetown University Law Center; Donald Hood, Professor, Columbia University; Dr. Jonathan Knight, Associate Secretary, AAUP; Sheldon Steinbach, General Counsel, ACE; Patricia Sullivan, Chancellor, University of North Carolina-Greensboro; Donald Wagner, Professor, State University of West Georgia; David Lasell, Esq., Harter, Seccesset & Emery, LLP; and, from United Educators, Janice Abraham, President; Robb Jones, General Counsel; Laura Kumin, Vice President; and Ann Franke, then-Director.

Chapter 1

4 Relatively little has been written about the intersection of misconduct and tenure evaluation. A few accounts, however, discuss specific situations:

• Koertsman v. Rhynard, 875 S.W.2d 347 (Tex. App. 1994). When Professor Rhynard was evaluated for tenure, his senior colleagues inquired about rumors of sexual harassment allegations against him. The case details the actions of the department chair and dean in handling the allegations and their documentation.


Chapter 2


10 *Ganguli v. University of Minnesota*, 512 N.W. 2d 918 (Minn. App. 1994).

Chapter 3


Chapter 4

Bibliography

**Books**


**Articles**


**Programs, Workshops, and Conferences**

*Chairing the Academic Department*

The American Council on Education annually sponsors workshops at several locations around the country. Each workshop features five or six expert presenters who lead in-depth sessions. The two-and-a-half-day interactive program attracts chairs and deans from all types of institutions. For more information call ACE at (202) 939-9415, or visit them on the web at www.acenet.edu.

*Annual Conference for Academic Chairpersons*

Kansas State University sponsors an annual conference every February in Florida for academic chairs. The overall goal is to help chairs better fulfill their responsibilities. The program format consists of general sessions, paper presentations, panels, and workshops. The proceedings are published annually. For more information, call Kansas State University at (785) 532-5575, or visit them on the web at www.dce.ksu.edu/dce.

*Council of Colleges of Arts and Sciences (CCAS)*

CCAS sponsors annual seminars for deans and department chairs in eastern and western locations. For more information, call CCAS at (480) 727-6064, or visit them on the web at www.ccas.net.

*Others*

The American Association of University Professors (AAUP), the American Conference of Academic Deans (ACAD), and many disciplinary associations such as the Modern Language Association are among other groups that sponsor occasional programs and sessions on tenure evaluation practices.