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The Rest of the Story: The Costs of Tenure Litigation are Far Greater than the Dollars You Spend

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Indulge in a fantasy—that litigating a tenure case won't cost a penny. Forget about million-dollar attorneys' fees or six-figure settlements. Ignore the costs of insurance deductibles, higher insurance premiums, or verdicts that are not paid by insurance. As you engage in this fantasy (and fantasy it is), think only of the non-monetary havoc that tenure litigation wreaks. Tenure denial litigation consumes precious time, diverts energy, and disrupts the academic mission. It can also impose serious human costs that affect many participants and can undermine an institution's quality of life.

Although most tenure denial challenges start elsewhere, eventually the most serious ones end up in the courts. The judicial arena is genuinely foreign to academic personnel decisions. While the tenure evaluation process is usually nuanced, thoughtful, and balanced, tenure litigation is blunt, simplistic, and intentionally provocative. Litigation is to academic decisionmaking as politics are to public policy. Sound bites and image making transcend any thoughtful search for truth. Rough and tumble replaces the academy's (usually) more genteel relationships. Once a tenure dispute lands in the hands of a savvy plaintiffs' lawyer, she will use "slash and burn" litigation tactics to exploit the vulnerabilities of academic institutions. Even though rules regulate the process, the supervising judges are often distracted, and much abuse can happen before they finally step in.

The lawsuit begins with the service of process and with it the institution first confronts the human and management costs of tenure litigation. An increasingly popular tactic is to sue all the participants in a tenure decision. The lawsuit will name as defendants the institution, the president, the provost, the tenure committee, the department chair, and frequently others as well. Under most jurisdictions' procedural rules, each named defendant must be personally served with the lawsuit. Being confronted by a process server is not a pleasant experience, and it often evokes an instinctive fight or flight response. Some individuals become unreasonably combative and do undesirable things. Others begin to distance themselves from responsibility, a process that is itself destructive to the interests of an effective defense. Immediately upon a lawsuit's beginning, therefore, the institution is called upon to make a multi-faceted response. Some individuals have to be calmed down and others have to have their fears assuaged (i.e., that insurance exists and they don't have to transfer their house to their spouse). Others have to be reminded that they took part in the decision and have to accept responsibility. The process of handholding and answering questions must begin at this point, and the process demands precious time.

The beginning of the lawsuit also creates public relations problems. Plaintiffs' lawyers often write the legal complaint in purple prose, creating a lurid and one-sided view of the events that led to tenure denial. If the allegations involve discrimination, the complaint

will be peppered with alleged comments and incidents that place the institution and its decisionmakers in the most unfavorable light. Motivations will be impugned, reputations will be attacked, and cheap shots will be taken. The qualifications of faculty will be challenged, and all manner of wrongdoing may be tossed in.

At the same time as the institution blunts the plaintiff's media impact, a coordinated legal response must begin. Insurance and indemnification issues must be addressed, and all defendants and key decisionmakers must be informed about the lawsuit, "do's and don'ts", and what they should expect. Intense human reactions must also be defused, lest worse harm befall the institution. Tenure denial lawsuits almost inevitably create conflicting loyalties and notions of betrayal. The disappointed tenure candidate may still be at the institution, and those attacked in the lawsuit must be counseled against retaliation, defamatory comments, or thoughtless remarks that will make the defense more difficult. It's also often important to remind those inclined to outspokenness that the tenure lawsuit places important issues at stake and that this is not a time for careless public commentary on the Dean's or President's motivations.

Tenure litigation also begins a process of institutional and individual soul-searching. Tenure denial reflects a failure of expectations. The tenure outcome may have been attributable mostly to the tenure candidate's personal failings, but institutional failings may have also played a role. If the institution was even partially at fault, its wrongs may not be legally actionable, but the situation may call into question process defects, institutional judgments or individual actions. Even if the institution made the right judgment, the decision may have been a close one. The lawsuit will accentuate normal human feelings of sadness about unmet expectations, regret for the failure of scholarly promise, or simply disappointment over an unsatisfactory fit. It may also call forth substantial feelings of guilt, empathy and second-guessing. The institution must undertake the sensitive task of recognizing and handling these feelings without jeopardizing the defense of the lawsuit.

Damage Control

The need for damage control starts at the beginning of the tenure challenge, but the lawsuit and its attendant publicity heightens that need. Damage control will be an ongoing task as long as the litigation drags on, and will often continue long afterward. The first damage control task begins with the tenure candidate's colleagues and evaluators. Frequently, votes are split and the candidate has strong supporters within his or her department. Contentious tenure decisions can badly fracture departments or schools, or bring out into the open long-simmering conflict. Departmental colleagues will struggle with how to treat each other once the litigation requires them to go public with disagreements that may have only been expressed privately before. The process will also strain collegiality by exacerbating existing interpersonal tensions. No faculty member wants to be accused of discrimination, and it may be hard to separate legitimate differences in opinion from fingerpointing. Intrafaculty relations issues may thus require sustained attention, and controversial tenure denials almost always will exacerbate existing tensions between faculty and administration. Students may also be drawn into the fray, especially if the tenure candidate was a popular teacher or if student evaluations figured prominently in the tenure denial.

The more public the controversy, the more likely that outside stakeholders will become involved. If tenure candidates or their lawyers stir up public support, external damage control can be a Herculean task. Trustees may be drawn in, alumni may have to be addressed, and inordinate attention may have to be paid to defusing bad publicity or explaining the institution's position. The upshot is that a tenure denial lawsuit can wreck a department, ruin years of patient efforts to recruit minorities and women, upset a capital campaign, or derail a legislative initiative.

Providing Information

Another cost of a tenure denial lawsuit is the compelled process of providing written information, called document discovery. The plaintiff's lawyer will make broad, overreaching requests in the hopes of unearthing a "smoking gun" document. The lawyer will also hope to make the discovery process so burdensome and painful that the institution cries "uncle." Even in its less oppressive form, however, discovery is akin to dental drilling—an unpleasant experience in the best of circumstances. It requires a search of files from every conceivable decisionmaker or participant in the process. Increasingly, savvy plaintiffs' lawyers are also asking for electronic records from all participants, including e-mails and document drafts residing on hard drives.

The process of physically searching for and producing these documents can be disruptive and burdensome, but discovery has more far-reaching implications for confidentiality and its impact on candor and intellectual honesty. Every tenure lawsuit raises confidentiality issues, and courts vary in their willingness to protect confidentiality interests. Nonetheless, general approaches have emerged to the most common recurring questions and the bottom-line is that very little can be kept absolutely confidential:

- **What about the tenure candidate's tenure file?**
  This must be turned over, which means internal evaluations, judgments and recommendations will become public and open to examination and second-guessing.
- **What about outside evaluators' judgments?**
  These probably will also have to be turned over.
- **Must the tenure files of other faculty be turned over?**
  Almost all tenure denial discrimination litigation comes down to comparing the unsuccessful candidate against other successful and unsuccessful candidates. The tenure files of these "comparators" must usually be disclosed.
- **What about the tenure files of those who are conducting the evaluations?**
  By and large, courts have frowned on this type of document discovery and it will be a rare case where it will be allowed. Nonetheless, often considerable effort must be spent in order to combat these tactics and help a court to draw the appropriate line.

Document discovery thus imposes significant costs on the institution's interests. It will eventually turn over extensive amounts of documents, the authors will have to explain what they have written, and much of the information will become public. The tangible cost will be the time involved and the diversion of energies from other more important

matters. A less certain cost is the effect on future tenure decisions. Candor may be lessened, departments may be more reluctant to make hard decisions, and outside reviewers may be disinclined to volunteer their services. There is also a human impact on the "comparators" in the faculty, who find their academic warts exposed and dissected as plaintiffs attempt to prove themselves more worthy of tenure than those who received it.

Depositions

Depositions are where the opposing attorney questions a witness under oath. A court reporter is present to transcribe the testimony, and the deposition may also be videotaped. The ostensible goal is to develop information for use at trial, although the deposition process is often abused. Although courts in recent years have attempted to place limits on depositions, abuses continue to occur and the process exacts a high cost on the institution. In a tenure denial case, it's not unusual for the plaintiff to take 12 to 15 depositions. Every deposition requires preparation. The deponent must review all the documents that he or she may be asked about. Time must also be spent working with the defense lawyer in order to understand the likely avenues of inquiry, recognize the potential traps, and learn how to express nuanced thoughts and judgments in a straightforward way that won't invite distortion or lead to confusion.

The deposition itself can be an uncomfortable personal experience. Key decisionmakers are occasionally examined for two or three days. It's an alien Once depositions are complete, the institution's lawyers will attempt to get the case dismissed before trial by filing a summary judgment motion. Summary judgment forces both sides to set out the basic evidence they would use at trial to prove their case. At this stage, plaintiffs must explain to the court their legal theory and why there are factual issues that require a trial. In the past, many judges would routinely grant summary judgment and dismiss the case, reasoning that they should not second-guess academia's subjective judgments about who should teach. Now, however, summary judgment is harder to get. Although judges remain reluctant to substitute their judgments for those in the academy, they often reason that individuals should be allowed their "day in court" before a jury. In these situations, summary judgment will be denied.

The summary judgment process imposes additional adverse publicity costs on the institution. Savvy plaintiffs' lawyers use summary judgment to generate publicity. Documents filed with summary judgment motions become public records, and often the plaintiff's brief neatly crystallizes her theory of the case and makes yet another attack on the institution. The media, including the campus press, are often "tipped off" to the summary judgment motion, and it presents one more public relations issue that has to be managed.

Mediation

Mediation is a procedure for a facilitated, negotiated settlement. Both state and federal court systems are requiring it with increasing frequency. It is always non-binding—even though the parties must participate in mediation, they cannot be forced to agree on any result. In mediation, a neutral third party, usually a lawyer or judge, acts as an intermediary and attempts to facilitate a negotiated resolution. Many tenure denial suits have been

successfully mediated, and mediation can be an effective tool when both sides see that they have a mutual interest in getting the litigation behind them.

Mediation has little adverse impact on the academic mission, and its less adversarial nature may fit well with academic culture. Successful mediation requires time and compromise, however, and consequently it is not cost-free. Most successful mediations involve the participation of a high-level decisionmaker, so the attendance of one or more key people—president, provost, or dean—may be required. The process also demands a high degree of candor, listening, and problem solving, along with the identification of and mutual respect for the respective parties' key interests. Once those interests are identified, the mediator tries to work with both sides to fashion a mutually acceptable compromise. In the tenure denial situation, this often requires something more than money. Because the most important interest of the failed tenure candidate is usually to move on in his or her career, the institution may have to identify and agree to creative, non-monetary components to a settlement. These could include securing references, extending the terminal year, offering a leave of absence, altering records, making provisions so that research is not interrupted, or other elements tailored to the unique situation. In a successful mediation both parties may need to swallow their pride and make an about-face from their previous positions. Key stakeholders have to be informed and brought into the decisional process. Sometimes, difficult and pragmatic business decisions have to be made.

Moving Toward Trial

If settlement proves impossible, the case will move toward an eventual trial date. By this time, some will have forgotten that the case still exists and others will wish it had gone away. Almost inevitably, the trial date will be set at an inconvenient time—in the midst of the academic year, in the middle of a capital campaign, or during the appropriation process. As trial preparation begins in earnest, the time demands on key witnesses will increase. Documents must be reviewed, deposition transcripts must be read, and testimony must be prepared. Given the increasing mobility of higher education careers, key decisionmakers frequently have moved to other institutions and they must put their new jobs on hold to focus on what happened in the past. Even potential witnesses who are still on campus may have forgotten a large amount, and the passage of time will have caused others to lose their fervor for the fight. The imminence of trial may, for the first time, capture the attention of other key stakeholders. New presidents or new provosts may resent the disruption caused by a decision that was not made "on my watch," and frequently they may seek to avoid the distraction of a trial or the monopolization of a key subordinate's time.

Finally, the day comes to pick a jury. The week leading up to trial is usually the most intense period in terms of disrupting participants' lives. First, last minute settlement discussions and cluttered court calendars may place the trial in a frustrating holding pattern for days or weeks. The actual commencement of the trial will be subject to the court's criminal docket and the whims of the judge's schedule. The time immediately before trial will also likely be a time where publicity, if it faded, will start again. It's also a period of maximum stress and uncertainty, as previous interpersonal tensions will be re-energized. Those stresses will continue for the duration of the trial, which will usually last

at least two weeks. More complicated trials can go on for a month or more. All this time, key participants will find it difficult to concentrate on anything other than the trial.

The trial will require an extraordinary educational task from the defense lawyers and key witnesses, as they must teach a jury about tenure, why it exists, and why it's not granted easily. They then have to explain why the decision in the particular case went the way it did and rebut the attempts by the plaintiff to distort what happened. That process again requires an inevitable "dumbing down" of complicated and nuanced information. The trial itself creates its own set of psychological stressors, as there will be good days and bad days. There will also be surprise developments, as some witnesses may say unexpected things and others will perform better or worse than expected under the stress of trial.

If the verdict is adverse, a whole new set of problems will arise. Although exceedingly rare, a court could order tenure to be granted or the tenure process to be conducted again. Alternatively, because tenure provides lifetime job security, the verdict could be huge. Difficult issues of individual responsibility may arise. In the worst of circumstances, the jury finds a basis for punitive damages. This necessitates resumption of the trial in a "damages phase," where the jury will consider the institution's finances (including its endowment) in order to determine an amount of money that will punish it for its wrongdoing. That circumstance puts inordinate pressure on the institution to reach an expensive settlement in order to avoid the threat of a multi-million dollar judgment. Under more routine circumstances, the jury will come back with a simultaneous liability and damages award. Even at this stage, however, the ordeal is not over, for there will be decisions to be made on post-trial motions and a possible appeal. A whole new set of communications and public relations issues will also be presented.

If the verdict is for the institution, and juries have decided many tenure denial cases this way, the institution still may feel that the victory is hollow. Tenure review is a process best conducted in private and the litigation process will have exposed the institution to the harsh glare of public scrutiny by those who have little understanding of the facts, the purpose of tenure, or the process itself. The process will also have laid bare any internal reservations about the specific tenure decision and fostered second-guessing and finger pointing. The information disclosed may have scarred a number of careers. The demands of litigation would have diverted the institution from its primary mission of educating students and conducting research. Future tenure decisions may be changed for the worse because of the experience, and the human costs inevitably will have been huge.

Conclusion

Tenure litigation threatens numerous interests of the academic institution. An adverse verdict, or the fear of incurring one, may prevent the institution from controlling its own destiny. It will certainly diminish what has been recognized as one of the essential components of academic freedom—deciding who should teach. It also threatens the fragile value of collegiality, and diverts institutional resources from the primary missions of research and teaching. Finally, it can complicate and threaten important institutional initiatives such as faculty recruitment, development efforts, and meeting student admissions goals.

The process of litigating a tenure case also affects important human values. Individuals on campus should be free from the stress of being sued, free from having their motives impugned, free from having their words twisted, and free from having their competence called into question. Tenure litigation brings all of these negative human dynamics into play, with a heavy emotional cost.

Far better to undertake preventative measures than to face the certain hazards and the uncertain outcome of litigation. In assessing the complete balance sheet, much can be gained from establishing sensible, preventative measures. Litigation can be avoided, and the tenure process itself can be made better, by communicating realistic expectations, helping department chairs with the ongoing evaluation of junior faculty, doing the process right, teaching tenure committees how to be better evaluators, and adding human resources principles to tenure evaluation. The choice is the institution's. Manage the tenure process better or face tenure litigation with all of its costs. Few institutions that have lived through tenure litigation would argue about which is the better course.

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