

Tales from the Trenches

A Report From UCI Outside Counsel on Legal
Issues Facing Department Chairs in Recent
Cases

December 8, 2015

Part 1: TIPS for Avoiding Liability and
Enhancing Effectiveness in Faculty Matters

The Role of the Department Chair

- Changes and challenges
 - Short term service
 - New structural role
 - The vortex theory
- Resources and partners
 - Departmental resources and partners
 - Campus resources and partners
 - External resources and partners

The Role of a Chair at UCI

- ❑ Legal status and protections
- ❑ Duty to take reasonable steps to ensure compliance with policy
 - Duty to know policy
 - Duty to respond to and correct deficiencies
 - Duties generally
- ❑ Roles
 - Creator and supervisor of tasks
 - Counselor
 - Communicator of expectations
 - Coach and motivator
 - Correctional officer

5 Basic Employment Law Concepts That Lead to Good Decisions

- The equality principle
 - Brest v. Fiss
 - Affirmative action distinguished
- The due process principle
- The accomodation principle: protections for disability, family rights and workplace injuries
- The principle principle
- The dignity principle
 - protection of reputation
 - protection of privacy

5 Administrative Tips that Lead to Good and Defensible Decisions

- Find the rules and follow them
- Understand privilege
 - Discoverability: Fenner's Rule
 - Avoiding Email suicide
 - Under and over communication
 - Sharp, pointed and personal language
 - Alternatives
 - Privilege: The exception
- Limiting discussion to the need to know
- Be hard on the facts, not the people
- Show your process and rationale

Applying these ideas in key stages of the relationship

- Hiring Faculty
- **Managing Faculty**
 - Behavioral
 - Developmental and Professional
 - Managing Dissent and Criticism
- Performance, Evaluation and Promotion
- Managing Disabilities
- Redeployment

Faculty Behavioral Management

□ Core Issues:

- Acting up
- Dropping out
- Dropping off
- Disability management (January, 2016)
- Politics and politicking
- Compliance related complaints, see below

Acting up, dropping out, dropping off

- Acting up: Faculty become emotionally wrapped up in conflict, stirring tensions.
 - Examples for discussion
 - Doe v. University A; Roe v. University B
 - Free speech or actionable poor behavior?
 - Tips and strategies
- Dropping out and dropping off
 - Examples for discussion
 - Doe 1 v. University C; Roe 1 v. University D
 - Tips and strategies

Faculty Behavioral Management – Best Practices

- ❑ Spot, articulate and categorize these problems early
- ❑ Don't ignore it; be sensitive to other faculty who are affected
 - How do you address rumors?
- ❑ Continue to articulate expectations
- ❑ Get help in perceived disability cases
- ❑ Examples and tips from your peers

Departmental Professional Tensions

- Some recent issues:
 - Managing schisms and polarity:
Professional and personal
 - The role of collegiality
 - Discussion: Unequal contributors
 - Changing department standards or directions
 - Emerging, new or unstated criteria
 - Avoid confusion about process

Dealing with Departmental Tensions— Best Practices

- ❑ As Chair, chart your own course
- ❑ Be clear on department standards and applicable rules, and enforce the
- ❑ If standards/enforcement change, be clear on how they apply and to whom
- ❑ Manage collegiality like any other issue, but separate form from substance
- ❑ Articulate principles in writing and in detail, early and often, if needed

Managing Gossip and Complaints

- ❑ This applies to complaints by faculty, staff, and students
- ❑ The University's commitment to open criticism and protection of the right to protest is substantial, but has limits
- ❑ Key: Embrace dissent, frown on whining, and turn conflict into energy for change and growth
- ❑ Key: Avoid the reality, or perception, of punishing the messenger, but
- ❑ Key: Do not become a dumping ground for unresolved griping. The UCSD Com's Rule

Compliance complaints and Whistleblowing

- The problems

- Common Issues:

- What triggers the need for WB analysis?
- WB speech or just talk?
 - Examples
- Who investigates?
- How do I manage surly protest?



Complainers and Whistleblowers – Best Practices

- ❑ Take a broad view of what qualifies
- ❑ The Sunshine strategy
- ❑ Don't take it personally
- ❑ Don't ignore it
- ❑ Get help in assessing what it is
- ❑ Continue to run your department –
whistleblowing is not a free pass on duty

The highest risk areas: *Accusations affecting integrity and career*

- What contexts?
 - Research integrity
 - Professional disputes and rivalries
 - Letters of evaluation or comment
- What are the best strategies?
 - Keep an eye on areas of possible tension
 - Beware of high principles; they may be right but sometimes are a cover for other motives
 - Avoid email sniping or venting
 - Get help



Overall Best Practices

- Good investigations

- Avoid email suicide

- Documentation

- Eliminate carping

- Presentation

- Use of counsel

- Motivation

- Use of outsiders