



Department Chair Online Resource Center

Agency and Indemnification

Mary Ann Connell, Ann H. Franke, and Barbara A. Lee, "Agency and Indemnification," *Nobody Said This Was Going to Be Easy: Legal and Managerial Challenges for Department Chairs and Other Academic Administrators*. Originally prepared for Stetson University Law School conference on law and higher education, February 2001.

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 ongoing basis. Some exceptions exist, as when a department chair makes a promise of future tenure that is beyond the scope of his specifically delegated authority.¹

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.² This limited perspective, however ignores the legal realities.

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 topnotch 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.³ Some threat of personal responsibility exists, though, so the question is not merely abstract.⁴

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.⁵ 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."⁶ 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.
- 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.⁷ 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.
- 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.⁸

(Further ideas about institutional guidelines on indemnification may be found in the AALT 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 responsibilities, subject to the terms of state law and institutional policy.

¹ *Johns Hopkins University v. Ritter*, 114 Md. App. 77, 689 A2d 91 (Md. App. 1996). Relates to a department chair who recruited medical professors and was not authorized to bind university to an assurance of tenure.

² One setting in which the respective roles of chairs and faculty arise 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 University* 193 NLRB 134 (1971), in which chairs who made no decisions on appointment, promotion, or tenure were included in faculty bargaining unit, with *.C.W. Post Center for Long Island University* 189 NLRB 904 (1971), in which chairs who coordinated work and reviewed and passed on all budgetary matters within their unit were excluded.

³ See Edward Lee Isler et al., "Personal Liability and Employee Discipline," *Legal Report*, Society for Human Resource Management, September/October 2000, 1, which states, "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," *The Labor Lawyer* 357, 1998.

⁴ See *Harris v. Howard University*, 28 F.Supp.2d I (D.D.C. 1998). In this case, a university vice president served on a bank board at the 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. And, in *Buchwald v. University of Minnesota*, 573 N.W.2d 723 (Minn. App. 1998), a 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.

⁵ Pamela J. Bernard, "How Administrators Can Avoid Personal and Institutional Liability," paper presented at Legal Issues in Higher Education conference, University of Vermont, October 7, 1997.

⁶ Quoted in *Educators Guide to Controlling Sexual Harassment* 440, Thompson Publishing Group, February 1997

⁷ Courtney Leatherman, "State Is Not Liable for Professor's Legal Tab in Grade Dispute, N.J. Court Rules," *The Chronicle of Higher Education*, June 4, 1999. This relates the case of a professor who ignored the legal position of the college administration and the state attorney general's office and forfeited her right to indemnification.

⁸ University of Tulsa, Policy Statement on Indemnification and Defense, approved June 5, 1996.