

Litigation Mitigation

by Richard Rafes

Early in my career, I served as the general counsel to a distinguished and principled president. During a particularly frustrating moment when we could have settled a clearly frivolous lawsuit for a nominal amount, the president recited the famous misquote from the Quasi War: “Millions for defense, sir, but not one cent for tribute.” The result? Nine years and three lawsuits later, we successfully closed the dispute with the plaintiff. I doubt we spent millions (at that time the attorney general represented us at no cost), but in terms of time, negative publicity and stress, we experienced the agony of litigation.

Regardless of whether you are a plaintiff or a defendant, litigation is agony. The only real winners are the lawyers, who are compensated based on their time or on a contingency fee basis. Those of you who have been fortunate enough to avoid litigation may be unaware of the potential effects of lawsuits upon staff morale; the time commitment required to respond to discovery requests and depositions, as well as attending hearings and a trial; the harassment of being cross examined by a repugnant opposing counsel; and the stress of worrying about whether the judge and jury will understand the case and decide in the college/university’s favor. Consider yourself fortunate if you have never experienced the heart-wrenching moment just before a jury returns its verdict.

Here are 10 tips to help you avoid experiencing litigation.

1. Issues involving health and safety—including aberrant conduct by individuals—should be addressed immediately.
2. Except in cases of health and safety, most issues do not require an immediate response. Make sure you have all the facts from both sides. Rushing to judgment is often a prescription for disaster.
3. Acquire a general understanding of the law. While all areas could lead to litigation, some of the most common are employment issues, student dismissals, negligent torts, constitutional law (e.g. due process, freedom of speech, press and religion), and construction and contractual disputes.
4. Understand that each participant to the issue—you, your attorney, the opposing party and opposing attorney—has different interests. Most defense attorneys are risk-averse. If we avoided every risk we would have no sports programs, no field trips and no chemistry classes. Balance is important.
5. On the most difficult issues, consider getting a second opinion. Education law is broad, and few attorneys will be familiar with all aspects of the law. Ask your attorney to check with the system office attorney or the attorney general to get their perspective on the issue before making a final decision.
6. Acquire a general understanding of your institutional policies and important state rules. There is rarely a case where the plaintiff’s attorney does not revel in violating some college or university policy.
7. Try to resolve disputes before they escalate into a crisis.
8. Consult with your attorney regularly and whenever you are in doubt. While the buck stops with you, different perspectives are helpful in understanding the ramifications of an issue.
9. Be careful what you put in writing (or say, for that matter). With few exceptions (e.g. attorney-client privilege, certain health information), all documents and e-mails are subject to discovery disclosure and could also end up on the front page of your local newspaper.
10. Use common sense. Apply the “what would your mother say about this situation” test to your actions.

We live in a very litigious nation. While a contentious lawsuit can be interesting and sometimes entertaining to read about or to watch on television, it is pure torture to be party to one. I hope these tips will help avoid being a participant in legal controversies. **P**

Richard Rafes, J.D., Ph.D. is currently an AASCU senior fellow and special assistant to the chancellor of the West Virginia Higher Education Policy Commission. Previously he served as vice chancellor and general counsel at the University of North Texas System, as well as president of East Central University and West Virginia School of Osteopathic Medicine.

