Preparing for the Not-So-Unexpected: Litigation Related Actions, Documentation, and Depositions

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Sigh.

You just received notice of a lawsuit involving your university or national organization along with a list of things you must provide to the plaintiff. We know what you are thinking:

"I'm just the Campus Professional—I didn't have anything to do with this! I wasn't even here when this happened! You're kidding, right? You want EVERYTHING from 2006 to the present? I was a sophomore at another school when this happened! Those are my personal emails! I don't have time for this—we're in the middle of Panhellenic recruitment!"

While you are orchestrating your excuses, explanations, and rationalizations, our advice is to begin gathering the information, documentation, and communications the attorneys for the plaintiff have requested.

Here's how this works.

The plaintiff files the lawsuit. Your university or inter/national organization defends.

Most lawsuits against universities and inter/national organizations involving injuries or deaths are premised upon negligence—that the inter/national organization and/or university acted in a careless or negligent manner; that the negligence led to or resulted in the situation and that the university or inter/national organization should be required to compensate the plaintiff for injuries. Or worse.

The plaintiff then requests anything and everything that may—emphasis upon the "may"—be relevant. This is entitled, "Discovery."

Your job? Get whatever is requested. Reminder: Litigation is root canal without an anesthetic. And it sucks up the most precious of commodities—our time—by the barrel.

Examples of requested items I encountered when I was CEO of my international men's fraternity:

- Every document produced over a 10-year period related to risk management. This included handouts, letters, memoranda, minutes from the risk management committee meetings, the new member manual…the list was long.
- Copies of every program, outline, notebook, folder, handout, and file used at regional and national events over a 15-year period. The plaintiff wanted 20 years but we were able to convince a judge 15 was more reasonable.

- Any and all educational initiatives—including electronic/social media—relating to whatever topic may be involved.
- All correspondence involving anyone and for any reason relating to that chapter. In these days that may well include all electronic communication and social media.
- Meeting minutes from staff meetings, board meetings, and committee meetings.

In brief: You don't have any choices here. Your job is to provide the items required. No excuses accepted. And you don't make the choice as to whether an item is relevant.

And you do not want to be caught attempting to hide, conceal, destroy, or "lose" something that falls within the requested item category. Your attorneys must comply with the court order or requirements of civil procedure in that state, and you in turn must comply with what your attorneys communicate to you.

Keep in mind the following tips regarding documents that may be requested:

1) **Your institution should have a document retention policy.** Translation: You don't have to save everything. Some inter/national organizations use three years as a standard. This decision is above your pay grade, but it will help you understand what you need to save or retain and what can be shredded or deleted.
2) **"Delete" doesn't.** If it is a sensitive topic, better to talk about it over the phone. Deleting messages does not necessarily delete messages—see the recent situation at a Big Ten university regarding a faculty member.
3) **With the approval of university counsel, keep the educational materials and records.** This is up to your attorneys, but I like the thought of demonstrating to a jury that we did in fact educate and assist our students in understanding risk management, for example, and the importance of doing good things.
4) **The law regarding electronic records is developing and growing.** One of the key questions in the case noted in #2 was, "What emails are subject to Freedom of Information Act (FOIA) requirements?" Excellent question. Our advice: Err on the side of caution and don't put anything in electronic media you do not want to see in a courtroom. You may get a visceral reaction from sending an email that describes a chapter as a "risk management nightmare"…but that shows you knew or had reason to know the chapter posed a risk or threat. What action did you take as a result? Oops.
5) **Meet with your university attorneys. Every year.** Folks in student affairs are front and center with trends and challenging situations. Case law, statutory law, and expectations change each year. Your attorneys need to understand what you do and more importantly why you do certain things. They need to understand the powerful force of culture.

Next step: Interrogatories. These are written responses to questions posed by the plaintiff. Your attorney will work with you on these but develop this habit: Answer the question. Don't over-answer the question. If "Yes" or "No" will work, then use those.

Let's assume the case proceeds to depositions. These are live question and answer sessions that will be recorded and may be videotaped. Your attorney will be present along with the attorney for the plaintiff, a court reporter, and sometimes other folks. A judge will not be present but these

proceedings will be recorded and/or transcribed. Every "Ah," every "Hmmm…" And if video is used, every eye roll, every twitch, and every averted glance.

Your attorney cannot tell you what to say but she or he should be working with you beforehand: preparing you for questions, observing your demeanor, assessing your responses.

Key points for depositions:

- Take your time. Breathe. Pause before responding to a question. And do not attempt to impress with your knowledge of the Seven Vectors of Identity Development.
- Do not try to be cute or funny. Do not be snarky, hostile, or argumentative. Leave that to the attorneys.
- Answer the question in as few words as possible. You may ask for clarification.
- Your attorney may object—for example, to the form of a question. Wait for the attorneys to finish their discussion before you respond.
- You are allowed to ask for a break. Our advice: break every 45 minutes or so. Smart attorneys like to wait until you are tired or bored and then pop a difficult question.

Trial: Very few cases proceed to trial. If it does, your attorneys will spend even more time with you, and they will reiterate the points from above. Remember members of a jury tend to sympathize with "likeable" people. It will not help if you take the witness stand with an attitude.

Litigation. It isn't enjoyable but it is a part of what we do. In these days and times it should not be unexpected. You can prepare, and we encourage you to proactively meet with your attorneys and educate them as to what you do day-to-day. That will help them…and you.