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MICRO-SYMPOSIUM:
ERIC GOLDMAN'S "WRITING TENURE REVIEW LETTERS:
MY TOP TEN SUGGESTIONS"

CONFIDENTIALITY IS WISHFUL
THINKING . . .

BUT GET IT IN WRITING ANYWAY

Suzanna Sherry

WE ARE LAWYERS. We put *everything* in writing, except the things for which we don't want to be held accountable. And giving up the hope of confidentiality is essentially abdicating accountability for keeping the tenure process honest. We might as well just abandon the charade of tenure review letters and let each faculty evaluate its own candidates' work.

When I receive a request to write a tenure review letter, I always ask whether the candidate will be able to see it.¹ If the answer is positive, I decline to write a letter and explain my reason:

Suzanna Sherry is the Herman O. Loewenstein Professor of Law at Vanderbilt University. She has written (and read) countless tenure review letters in her 35-year career.

¹ Short of litigation. I recognize that we can't do anything about the discovery process, although the Rules Committee may be doing it for us. See, e.g., 2015 Year-End Report on the Federal Judiciary, at 6-11 available at www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (highlighting changes to discovery rules to increase judicial supervision).

Suzanna Sherry

Please do not take my refusal to write a tenure letter for Professor X as a negative comment on her work. On principle, I agree to write these letters only if they are completely confidential, because allowing a candidate to see the letter taints the whole process. No one will write an honest letter if they know that the candidate will see it – both because identities have a way of leaking out and because it feels mean to write something really negative if you know the subject of the negative comments will see it. So a lack of confidentiality just exacerbates the tendency of law professors to write only positive letters and of law schools to tenure everybody regardless of merit.

At least twice in the last few years, the person requesting the tenure letter has responded to my refusal by agreeing to keep my letter confidential from the candidate despite the school's customary practice. Both times I insisted on having that agreement in the official letter asking for my evaluation of the candidate.

Imagine if we all refused to write tenure review letters unless we were promised in writing that the letters would be kept confidential. Any school that chose to make tenure review letters available to the candidate would quickly find itself unable to get letters at all. Confidentiality would no longer be wishful thinking, and the tenure process would once again be actually evaluative instead of a formulaic exercise with a foregone conclusion.

One last important point: When I refuse to write because of the lack of confidentiality, my refusal always includes a note that the requester of the letter should feel free to forward my explanation to those in charge of the tenure process. This is an especially important addendum for those law schools whose anti-confidentiality rules are imposed by the university administration or by the state legislature. The hapless Associate Dean or Tenure Committee Chair whose job it is to solicit letters usually doesn't have authority to change the procedural rules governing the tenure process. But if enough of us explain that the anti-confidentiality rules are negatively affecting the whole process, perhaps those in power will be persuaded to make a change.

Professor Goldman apparently thinks that forcing schools to promise confidentiality is only half the battle. He argues that "even when a school represents that tenure review letters are confidential, that's more of a hope than a promise." But that's why getting it in writing matters. Getting it in writing will make everyone think twice about exactly what they reveal to

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the candidate. Getting it in writing will turn previously ordinary revelations into furtive rule-breaking. Getting it in writing makes the promise of confidentiality more likely to be kept and more easily enforceable.

In other words, let's act like the lawyers we are (or at least once were): lawyers who put everything from contracts to constitutions in writing, so that agreements "may not be mistaken, or forgotten."² If we get it in writing, it may actually become a promise and not just a hope.



² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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