How Do College and University Leaders Organize and Implement Policies of Risk Management to Prevent or Mitigate Institutional Liability?

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HOW DO COLLEGE AND UNIVERSITY LEADERS ORGANIZE AND IMPLEMENT POLICIES OF RISK MANAGEMENT TO PREVENT OR MITIGATE INSTITUTIONAL LIABILITY?

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Abstract

The goal of this research is to identify the methods, policies and procedures used by public and private college and university leaders to resolve conflicts, avoid court action, and limit risk factors that lead to institutional liability. In-depth, structured interviews of 30 higher educational leaders, including nine college/university presidents, 17 vice-presidents, two university foundation presidents, and two in-house counsel were conducted regarding their perceptions of risk, appropriate means for reducing risk, crime prevention techniques, insurance protection including choices of deductibles, views on self insurance, crisis management, views on faculty termination, thoughts on tenure, ways to prevent sexual harassment, ways to maintain student discipline, views on accounting methods including best practices of Sarbanes-Oxley, views on The Higher Education Opportunity Act of 2008, and use of legal counsel including conflict of interest of governmental lawyers (for public institutions). Colleges and universities have been reacting to increase size, frequency, and types of litigation by taking a proactive approach. Administrators have increased their emphasis on student psychological counseling since the Virginia Tech massacre. Many leaders see a shift in policy towards campus protection verses FERPA privacy rights. A content analysis of publicly available college documents was also conducted. The research will provide insight into limiting liability to help future leaders plan their decisions.
Data Gathering

Thirty college/university leaders from Upstate New York took part in this research study. Each leader chose the time and location of the interview. The leaders included nine college and university presidents, 17 vice-presidents, two foundation presidents, and two in-house counsel. Each in-depth interview was semi-structured following a specified protocol list of questions. The 30 leaders represented 26 colleges and universities including 16 private and ten public institutions. The ten public institutions included five four-year colleges and five community colleges. Although the sample was intended to include leaders from a variety of institutions, the individual leaders were considered to be the basic ecological unit of analysis rather than the institutions. Each leader signed a release allowing for their data to be used. The leader’s names, genders, and institutions are left anonymous to provide the highest possibility of frank honest discussions regarding institutional liability and protections from claims. All 30 interviews took place between October 2008 and May 2009.

Overview of findings

Higher educational leaders provided their answers to questions of campus risk management. It is difficult to summarize their many important points. There are common concerns described by leaders of higher educational institutions of all sizes, levels (two-year or four-year) and type of financial control (public or private). There were also specific differences.

After review of the leaders many issues, comments, and thoughts, four main areas of risk management developed. These four areas are insurance coverage, handling and
prevention of incidents, attorney conflict of interest in public institutions, and financial controls. There are priorities in their answers based upon frequency, common themes, and detail of response.

Common concerns

There were common concerns for all institutions particularly sexual harassment, employment termination, student mental health, and slip and fall injuries. Private colleges had additional concerns of Sarbanes-Oxley accounting best practices, and student/parent consumerism. Public institutions had additional concerns of intergovernmental conflict, attorney-client privilege, and governmental attorney conflict of interest.

Differences based upon level, size, and control

The level of colleges showed a distinction. Although crime was a concern throughout the colleges in the survey, two year-colleges had a stronger concern for campus crime than four year-institutions. One community college leader mentioned that over 50% of the first year students had a previous family court/juvenile, or adult criminal history. None of the four-year college administrators mentioned accommodations for students with disabilities as a problem while one community college leader mentioned that 70% of the institution’s students had some form of learning disability that may or may not have needed special accommodations.

Size of institutions mattered with respect to availability of in-house counsel, size of insurance deductible and ability to be self insured. The larger private institutions had larger insurance deductibles. The largest private university in the study was completely
self insured. Union grievances were a larger problem at public institutions. All ten public institutions were unionized while only 11 of 16 private institutions were unionized.

**Insurance coverage**

First, costs can be mitigated by insurance. Twenty-five of the 26 institutions in the study had some form of insurance. Public entities had governmental support as insurance. Community colleges are financially insured by their counties while state institutions are insured by the state. State institutions had additional insurance on their dormitories, stadiums and construction projects through the State Dormitory Authority that contracts with private carriers and bills each campus a proportionate share of the expense based upon campus enrollment and the square feet of buildings covered under the policy. A state college vice-president for finance indicated that s/he allocates 1% of the 85 million dollar annual budget ($850,000) for accidents and other claims. Two community colleges took out insurance through a private carrier because they were in rural counties. The presidents of both community colleges stated that their counties had too small a tax base to be able to financially insure their institutions. Of the 16 private colleges that participated in the research, 15 had an outside insurance carrier. All ten public colleges and universities were either governmentally insured or had additional outside carriers. The only institution of the 26 reviewed in this study to have no insurance was a large scale private university.

Of the 15 private colleges and universities that used insurance 12 used stepped-up deductibles. Each institution reviewed their choices of deductibles and their unique risk of claims to make a determination as to the size of the deductible. Some institutions had
large deductibles of $100,000 or greater. The insurance is only available for catastrophic incidents. These institutions tended to have enrollments greater than 10,000 students. The large deductible means that these institutions handle almost every claim in-house. Typically, the vice-president for business and finance would meet regularly with a retained attorney, law firm, or in-house counsel to determine the merit and value of each claim.

A more moderate stepped-up deductible of $10,000 was used by the majority of private colleges. Institutions with a moderately stepped-up deductible handled small day-to-day problems in-house and turned over the larger claims to commercial carriers.

The private self insured university posted an insurance bond with the State Insurance Commission the way a captive insurance company would. The bond was based upon the anticipated claims for one year. The bond was similar to a captive insurance company; however, the university hired an outside group of insurance consultants as their claims adjustment team, where a captive company would have its own claims adjusters. The director for risk management indicated that the outside adjusters and claim specialists were more experienced than any of his in-house personnel. The private university verified that even with the cost of the outside consultants as claims adjusters the self insurance saves about one-third of the total cost of a private carrier. The risk manager found that the total cost of self insurance is between 65% and 70% of the insurance premiums for an outside carrier. Only a very large scale university would be able to pool money to protect against a catastrophic claim.

*Handling and prevention of incidents*
Second, courts are more likely to side against colleges and universities for improper maintenance of real estate, as a landlord, than for any other reason. Fourteen of the 30 leaders interviewed listed “slip and fall” as an area of frequent litigation. The leaders are keenly aware of the problem of snow removal, stairwell maintenance, parking lot ingress/egress, doorway clearance, and building maintenance. One vice-president for business affairs and human resources instructs every snow plow crew when to plow, every gardening crew when to water, and every construction crew when to work to avoid pedestrian traffic. A vice-president for risk management limited overnight parking to one lot to aid snow removal crews. A vice-president for business and finance had workers move a crane in the evening in order to avoid student pedestrian traffic.

Third, institutional leaders should take prophylactic action to prevent future injury by repairing any broken sidewalks, staircases, railings, scaffolding, fences, equipment that have caused or might cause injury. Courts will not admit evidence of repairs as admission of negligence (Kreinder, Rodriguez, Beckman, and Cooke, 1997, p.221). The justification for the rule is that the law should not discourage institutions from correcting unsafe conditions by allowing evidence of corrective measures. Public policy favors protecting people from future harm rather than gathering evidence of previous neglect (Kreinder, Rodriguez, Beckman, and Cooke, 1997, p.221). Two vice-presidents at two different institutions stated that they take immediate action to fix broken staircases, cracked sidewalks, falling roof tiles, blocked staircases, broken door locks, without concern for previous claims.

Fourth, institutions should terminate unwanted employees on well written procedures that are explicitly followed. Unwanted faculty without tenure should not have
their contracts renewed. The problem occurs with the unwanted tenured faculty member. *Tenure does not give an absolute right to a job without any obligation on the part of the faculty member.* Tenured faculty that commit crimes, do not show up for work, or do not complete required tasks in their employment contract may be dismissed for cause, providing there is strong documentation and corroborating evidence to support the dismissal.

Tenured faculty can be terminated if their entire department is discontinued. One private college in 2008 discontinued several foreign language professors, including some with tenure, when the institution decided to end foreign language majors and limit choices of foreign languages from seven to three. A state college terminated the employment of an entire department of industrial arts education in the 1980s when the state ended the high school requirement for industrial arts education. Yet separate from the trend, a prestigious private college decided to keep their entire physical education department after the institution ended physical education as a course requirement in their core curriculum. There was no contractual obligation; however, the vice-president for business and finance did not believe that a college of national reputation should hurt faculty morale.

A college president at a small private institution fired a tenured faculty member that was not performing his/her duties but failed to obtain a vote from the faculty senate, faculty tenure committee, or the faculty union before terminating the tenured professor. This action eventually led to the non-renewal of the president, because s/he did not allocate sufficient funds in the budget for a protracted court challenge. The president not being renewed over the dismissal of a tenured faculty member shows how emotional the
issue of tenure has become. The president lost a vote of confidence from the faculty senate just before renewal negotiations for the president’s contract. One senior vice-president at another university said “do not expect the faculty union to defend the university even if the professor was disliked by his/her peers. The union will defend the professor because they will fear that tenure itself is at stake”.

A state college had a dilemma of a tenured faculty member constantly quarrelling with the rest of his/her department. The vice-president for business, financial, and administrative affairs said the situation was “toxic”. Faculty meetings were being disrupted. The administration met with their legal team. The attorneys provided several alternative remedies as possible solutions, give the tenured professor their own department with one member, ask the tenured professor to transfer to an equal position at a different state college within the system, or create an administrative post for the tenured professor. Any of these choices would have to be agreed upon by both the institution and the professor. The individual accepted an administrative position and gave up teaching. The vice-president said, “we were unaware we had all of these possible choices as remedies. The legal team gave us wonderful options”.

On a community college campus, a new president has been brought in to cut the budget. S/he has reviewed untenured faculty files and has been disappointed by the lack of specifics. S/he has instituted a campus wide policy of reassessment of each employee including each faculty member with specifics lists of strengths and weaknesses on a series of uniform coordinated criteria. The new president is emphasizing that the performance files must be detailed. The president stated, “Each dismissal is a potential lawsuit. I [president] will go over each employment file with the county attorney for all
persons that might be terminated before a decision is made.” The county attorney will review every file for sufficient documentation. The administration deals with each dismissal as a likely court action.

Fifth, administrators should give unwanted faculty, staff, administrators, and students a chance to withdraw or quit prior to a dismissal. Two different state college vice-presidents on two different campuses indicated that SUNY attorneys “rehearse” the termination conversation with department chairs, supervisors, and deans before they meet with the faculty member. The department chairs, supervisors, and deans actually recite what they will say to various types of questions. The attorneys include the option to withdraw in the dialogue. Many persons would rather resign than be fired. If the person quits they have no recourse for court action. This applies to faculty, staff, construction workers, and administrators. The tenured faculty member (described above) that gave up his/her post for an administrative position at a state college effectively resigned from the tenured faculty position to take a new post.

Sixth, campuses must write down a carefully constructed sexual harassment policy. The largest growth area in litigation has been sexual harassment. (Secunda, 2005, p.55). Four of the 30 leaders indicated that sexual harassment is a growing area of concern on their campuses and a growing reason for faculty and staff termination. All four of the leaders that were concerned about sexual harassment as a growing area of concern, indicated that the problem exists at every level of personal contact. The combination of persons involved with sexual harassment include a wide distribution of pairings including administrator/staff, administrator/faculty, faculty/faculty,
faculty/student, and staff/staff. With regard to non-employees there is a growing problem of sexual harassment between student/student.

One community college vice-president said that the sexual harassment concern on his/her campus is due to large numbers of non-traditional students that are the same age as faculty. The vice-president indicated that there is greater problem with sexual harassment on community college campuses due to the large numbers of part-time or adjunct faculty that are either not as sensitive to the issue or are not afraid of losing their jobs. The vice-president also indicated that female faculty are in smaller numbers than male faculty for this problem but sexual harassment incidence for female faculty with non-traditional male students is “catching up to the male numbers in proportion of incidence”. Community colleges have increased their numbers of both non-traditional students and part-time faculty which may be a formula for increased incidents of sexual harassment. However part-time faculty should not be scape-goated since the four institutional leaders that listed sexual harassment as a problem stated that it is pervasive throughout the culture at all levels of interpersonal pairings.

According to the literature, sexual harassment policies at institutions of higher learning fall into three categories--- laissez-fair/advisory, ban on relationships for persons with direct supervisory roles, and total ban. Each of these three sexual harassment policies require some description. Laissez-fair or free license to date leaves only state stalking laws, disorderly conduct laws, or other criminal laws as governing human behavior. All 30 leaders found that criminal penalties were not enough to lesson the frequency of improper conduct and state laws that implied that employees were acting on behalf of the employer prevented institutions from maintaining a laissez-fair approach.
The middle level administrative approach to sexual harassment prohibits faculty from having sexual relationships with any student that s/he supervises, evaluates, or in the future, will evaluate. This is sometimes called the “wait until the end of the semester rule”. The purpose for the rule is to prevent undue influence and a compromise of professional judgment. There are two problems with this rule. First, the faculty member could easily be accused of flirtation during the semester. It is impossible for the determiner-of-fact to determine the exact moment when the relationship changed from professional to sexual. The second problem with the middle level compromise of professional judgment approach is that it is impossible to determine if a student in the future will be evaluated by the faculty member. This is often the case when students change majors. The third approach to sexual harassment policies is a complete ban for all faculty with regard to all students. This is sometimes referred to as the “wait until graduation rule”. Some legal scholars believe that this total ban on all relationships including students that are not within the same program or same division in which the faculty member works violates the U.S. constitutional rights of privacy, free association, as well as federal labor law for unnecessary restrictions on work force behavior (Secunda, 2005, p. 55-85).

The best possible rule for sexual harassment policy would be based upon the middle level compromise of professional judgment that includes a waiting period of more than one semester. The compromise of professional judgment rule not only protects the institution from improper conduct; but also, protects the weaker party of the two participants from undue influence. The time period of one semester in the traditional rule
is insufficient. Each campus should determine the time duration based on input from faculty committees that understand the culture of each institution.

Seventh, bargaining prevents larger conflicts. Leaders should use “integrated bargaining” rather than “distributive bargaining” when dealing with disputes (Miller, 2006, p.193). Bargaining is an important tool to lesson the impact of conflict resolution. Integrated bargaining prevents a win/loss conclusion. Integrative bargaining attempts to maximize the total cumulative position of both sides by allowing joint gains and trades for desired goals. Integrative bargaining occurs within families or within branches of the same institution wanting to not harm the other side (Putnam and Pool, 1987, p.549, see also, Miller, 2006, p.193). Leaders should avoid the opposite of integrative bargaining known as distributive bargaining, which has clear winners and losers.

Two college presidents encouraged parties to write down their concern with several possible compromise solutions. Compromises work best when originated by the parties. Participants will feel ownership in the solution. The two presidents both emphasized that compromise is necessary for running an institution.

A third college president, that was also a former dean of a law school, would like to see law school curriculum include alternative dispute resolution to avoid litigation. The president believes the court process is too adversarial, protractedly long, dilatory, and needlessly tense. The former dean of law believes that many more situations could be resolved before the commencement of litigation. Parties involved in a matter are far more likely to accept a solution when it is negotiated and agreed upon by both sides rather than imposed from an outside entity.
Eighth, institutions should have accessible information for each employee both in seminars as part of on-going training and in web sites where employees may have their questions answered by their institution’s legal counsel (Franke, 2003, p. 22-29). Twenty of the 30 leaders interviewed included training workforce, having workshops, having sexual harassment classes, training resident assistants on methods that work on their campuses to reduce risks of problems. One community college president with a large faculty on three campuses instituted mandatory sexual harassment classes for every employee including faculty, staff, and administration. The president said, “We did not want anyone testifying that they did not know that certain words, actions, or activities were inappropriate on a college campus. We wanted to cover the institution against improper conduct of individuals.” While the awareness and prevention classes by themselves do not insulate the college against law suits caused by inappropriate actions of employees it may be a bar preventing punitive damages against the institution for inappropriate actions of a single employee.

Training institutional workforce must be juxtaposed with a good communication network. Seven of the 30 leaders interviewed listed good communication, follow-up telephone calls, and daily use of e-mail as helpful in risk reduction. Web sites are useful to connect employees to administration as well as linking the entire campus to legal counsel. Campuses should maintain ongoing relationships between campus counsel and administrators.

Along with training and good communication, leaders include constant advisement with legal counsel to both inform counsel and to receive counsel, as an essential part of the risk prevention process. The goal is not to make administrators as
knowledgeable in law as lawyers or to make lawyers as knowledgeable in administration as administrators. Instead, the purpose is to keep lines of communication open for the free exchange of ideas (Ward and Tribbensee, 2003, p.16). All of the vice-presidents within the SUNY system said they regularly telephone SUNY legal counsel in Albany for advice. The private colleges with in-house counsel use their legal counsel regularly. The only group that is not using their legal counsel to answer questions from faculty and staff are small private colleges without an in-house counsel or a bank of state attorneys; therefore, they must pay each time counsel is used.

Ninth, institutional leaders should have campus legal counsel aid in the assessment of risks before any policies are put in place (Bickel and Lake, 1999; see also, Kaplin and Lee, 1995). Legal counsel should not be limited to the treatment of ongoing cases but also included in prevention and anticipation of risks before problems arise. Kaplin and Lee refer to this as preventative law. Bickel and Lake refer to institutions of higher education which undertake this form of risk management as facilitator universities. Twenty-two of the 30 leaders interviewed have legal counsel assess risk prevention. Twenty-one of the 30 leaders interviewed have campus counsel review policies before they are implemented. Fifteen of the 30 leaders list one of the following: hire an attorney on staff, send more issues to attorneys to review, or have attorneys that concentrate their practice in certain specialized fields including education law, labor relations, construction law, and contracts as ways to avoid litigation and mitigate problems.

Tenth, administrators must be made aware that the vast majority of suits are defeated by university legal counsel or insurance counsel. This will provide administrators with confidence. Attorneys defeat claims in motion practice for failure to
state a proper cause of action, improper defendant named, untimely action, failure to support a claim (lack of evidence), improper service, or no damages. According to a national review of federal court cases, 80% percent of cases against institutions are defeated on pretrial motions (Grace, 2008, p.24). Of the remaining 20% that are not dismissed, 61% were settled before trial. Therefore, 39% were not settled. Using mathematics to determine the percent of cases that go to trial (0.20 X 0.39 = .078) provides a product of 7.8% (Grace, 2008, p.24). Of the 7.8% of cases that go before a jury, the court decides 56.9% in favor of the defense or 46.3% of jury awards for plaintiff (Grace, 2008, p. 24). Using mathematics (0.78 X 0.463 = 0.036), this leaves only 3.6% of claims that are awarded a jury decision for plaintiff, based on a federal court review of a national sample. If administrators know the volume of cases that are defeated in motion, which are settled before trial, or are defeated at trial, there will more likely be a calm, professional response to accusations against institutions. A college president that had previously served as a law school dean stated that s/he believed the figure of 3% to 4% as the amount of claims that actually receive a court judgment award concurring with the math from the literature. The president also believed it would be helpful if administrators became aware of the small amount of claims that are successful.

Eleventh, there must be well written policies for student dismissals that are explicitly followed. Thirteen of the 30 leaders interviewed included well written policies and adhering to the policies as helpful to prevent litigation. One vice-president for student affairs indicated the only times the campus attorney scolded his/her staff was when campus procedures for student dismissals were not followed verbatim. There is no
requirement that institutions provide full due process rights to students in cases of
dismissal, Board of Curators of the University of Missouri v. Horowitz 435 U.S. 789
(U.S. Supreme Court 1978) see also, Matthews v. Eldridge 424 U.S 319 (U.S Supreme

Even though courts do not require the full panoply of due process for institutions of
higher education, there should be some structure that provides for neutral decision
makers, fact finding, and equal treatment for persons similarly situated.

Twelfth, leaders should have every complaint reduced to writing. A written
complaint or incident report is less likely to be changed by a complainant, provides a
basis for investigation, can be given to a second person for review, can be turned over to
an insurance company, can show that the administration was using due diligence to
discover the truth, can dissuade those who are not serious, can be used against those who
falsely make a claim. The legal expression “reduced to writing” is used because it limits
the investigation to what is written. Therefore, the investigation has defined parameters
with limits. Writing down thoughts of investigators as to various inconsistencies or
various possible remedies will also help subsequent investigators. The overwhelming
advice of leaders was to be honest, document everything, let people know an investigation
is underway, and that a claim is being taken seriously.

Thirteenth, the emphasis to have written evidence of all dealings extends to
student services. A vice-president for student services indicated that college psychology
counselors have students in distress write down their treatment plan as contracts.

Contract terms often include, the student will take their medication at a specified dosage
in a specified time period as directed by doctors, the student will avoid mixing
medications with alcohol, the student will stay away from specific persons that cause
them anxiety, and the student will keep their periodic appointments with counselors. If
the student fails to follow the written contract with counseling services they can be
suspended for a time or expelled in more serious infractions for violation of student ethics
code. *The student is not being expelled for a handicap but instead for breaching their contract with counselors.* Since there is no constitutional requirement for a college or
university to provide an education to everyone the only obligation between the institution
and the student is contractual. If the student breaches their contract then the relationship
is easy to terminate.

Fourteenth, a president at a state college indicated that the emphasis on student
mental health has grown substantially since the Virginia Tech massacre. The president
indicated that SUNY legal counsel has instructed him/her that privacy rights are being
intentionally deemphasized by the United States Department of Education with regard to
FERPA guidelines in favor of campus security. The state college president indicated that
s/he has always placed campus safety above individual rights of privacy. Six years ago
the president implemented a policy where faculty took computerized attendance to the
registrar’s office. The registrar provided the names of any student that missed every class
for three days or the majority of classes for one week to the campus health office. The
campus health office has a health-care-aid knock on each student’s door (if they live on
campus) to evaluate the reasons each student has been absent. The student may be sick,
may be fighting depression, may have left the campus, or may be having academic
problems. The president indicated that three times in the past six years people who were
depressed had guns in their room recognized during the absent student health-care-aid
check-ins. Each time mental health personnel were brought in to aid the student and to discuss surrendering of the firearms. On all three occasions the student turned over their guns to campus security at the request of mental health professionals.

Fifteenth, the leaders interviewed recommended *many layers of appeal* for both student and employee complaints to keep people talking, keep matters in house, provide new sets of mediators for compromise, give parties a chance to calm their fears and lower their tension. One college president said “anyway to keep people talking is helpful.” Two college presidents encouraged many layers of appeal to keep matters in-house and, therefore, out of the jurisdiction of the courts. No civil action can be taken until a final decision is made. Each layer of appeal encourages compromise, keeps people talking, and provides a fresh set of ears for the determiner-of-fact. These findings of Upstate New York higher educational leaders are directly opposite from the findings of Lipka (2009) which showed a national trend against student appeals in discipline and expulsion hearings. This could be revealing a regional difference between Upstate New York and the national trend or a legal difference between New York State Courts and other states. However, it is possible that the educational leaders were describing student/faculty complaints rather than discipline.

Sixteenth, leaders should make deliberative decisions. Four leaders stated that decisions should be considered after careful reflection. Slower more deliberative decisions are less likely to be problematic than decisions made in haste. Leaders should make deliberative decisions following a four step process. This process includes a conflict awareness phase, an investigative phase, a resolution phase, and a reinforcement phase (Pool and Roth, 1989). The conflict awareness phase is the first time the
organization receives notice of a problem. Most institutions have a formal notification process with formal officers who must receive word of the problem. The investigative phase should include processes for open impartial fact gathering in order for the leaders to understand all sides to a problem. The resolution phase is the determination of a proper solution for the good of the organization and all participants. The reinforcement phase includes procedures to prevent future problems and education of employees to aid in future decisions (Pool and Roth, 1989).

Orlitzky and Hirokawa found that Pool and Roth’s four stage process for good decisions is not always followed due to time restraints and budgetary limitations. (Orlitzky and Hirokawa, 2001, p.313). A community college research project found that four factors lead to bad decisions. These factors are lack of communication, decision context (or consideration of secondary collateral issues) not well thought through, decisions made in haste, turn-over of essential personnel (Wood, 2006, p. 4-5). Leaders interviewed were concerned about all four of these factors, four leaders mentioned decisions made in haste, five leaders mentioned communication, one leader mentioned unanticipated collateral issues, and one leader mentioned turn-over of essential personnel. The most surprising unanticipated issue was provided by a vice-president for business and finance for a state college who approved a museum of modern art with modern architectural structure. A home-owners association, with neighborhood preservation concerns, in a historic neighborhood battled the decision in court for over a year. The college spent $ 75,000 in outside legal fees to fight the neighborhood preservationists. The vice-president believed s/he was helping the neighborhood with a beautiful art museum and never anticipated the collateral issue or collateral costs.
Seventeenth, administrators should write down their reasons for decisions contemporaneous with the decisions in order for future leaders to be able to understand the institutional history and thought process behind a decision. Ten leaders responded that documentation of every fact, or opinion, during every point in the investigative process is important. Administrators should be honest with bookkeeping. They must write down what is known and, also, what is not known at the time of a decision (Anderson and Davies, 2000, p.711-727). What is not known may be exculpatory. Ten of the 30 leaders interviewed indicated that they document every incident and every decision thoroughly to preserve all evidence that lead to a decision.

Eighteenth, leaders that follow precedent or patterns of administrative decisions will be protected in court by the doctrine of custom within an industry. This legal doctrine allows for standard practice to be admitted into court as accepted business activity. It can also be used against a complaint of arbitrary and capricious decisions. College leaders will often choose repeat patterns of resolutions drawing from memory of previous successes and failures (Zelma, 2006, p.6). Zelma found that decision makers will follow their instinct based upon personal or institutional memory. A community college president indicated that s/he favors the storing of possible solutions or potential remedies as s/he encounters them within his/her daily leadership before a potential problem exists. Marion (2002) describes the method of leadership, where solutions are “stored” in a “can” before a problem arises, as the garbage can model for leadership. The community college president was unaware that s/he was using a well known management style. S/he indicated that it is not always possible to find a perfect solution to every problem. However, if a good solution was possible in the past it is often useful to try the tested
solution again. Problems and solutions do not have to fit like a tailor made suit, as long as
they are practical to be worn they will be functional.

Custom within an industry is similar to precedent by courts. Both doctrines have
been established to encourage consistency; it is helpful to be consistent in decisional
outcomes. Consistency provides the appearance of equal treatment and provides the
faculty, staff, and students within the institution a range of expected outcomes preventing
surprises.

Nineteenth, one way to maintain consistent outcomes is to keep and retain
essential personnel within the decision making process and prevent turn-over. A
community college president that took office last year found it desirable to maintain
continuity of cabinet and administrators. The newly selected community college
president indicated that s/he kept the major cabinet positions in place to provide
“structure and continuity particularly in a time of fiscal crisis”. Therefore, institutional
memory of prior experiences, decisions, and institutional responses will be maintained
within the leadership collective. The president said “there is comfort in familiarity”. The
president indicated that institutions should prevent large scale turn-over of faculty and
staff as well. Institutional memory, institutional culture, and workplace morale are
damaged by turn-over (Rosse and Levin, 2003; see also, Marion, 2002; Miller, 2006;
Wood, 2006).

Twentieth, crime prevention has been handled by Upstate leaders in a wide
variety of ways. One small private college in the high tech Rochester Area, with a large
majority of female students, has a geo positioning system (GPS) for every student and
every staff member. Any student is able to just press a button on their key-ring which
sounds an alarm and locates their position on campus. Campus security is sent to the
signal location with an arrival time of less than four minutes anywhere on campus. The
system was provided free by a computer company that is using the campus as a pilot
study. At a large urban campus there are mounted security cameras and blue light phones
throughout the campus and parking lots to prevent crime. A small community college has
extended their security guard hours to 24 hours daily due to the construction of new
dormitories and the presence of people on campus at all hours. The president indicated
that over night security was not necessary when the community college was a commuter
campus without dormitories. In addition, the president has decided to arm security with
hand-guns due to several recent incidents with weapons. Another community college has
decided to keep parking lot flood lights illuminated all night to prevent crime.

Twenty-first, leaders should safeguard notes, records, computer files, employee
assessments, laboratory data with back up systems or hard copies kept in second locations
(Franke, 2003, p.22). Leaders should not destroy files for fear of unfavorable evidence.
Almost always the cover-up is worse than the negative evidence. Most unfavorable
evidence is also integrated into records that are exculpatory. The preservation of records
prevents any bad issue from getting out of hand. Three of the leaders interviewed
indicated that protection of records is one of the ways they protect their campuses. Ten of
the 30 leaders interviewed indicated that documenting each incident and maintaining
good records are ways to safeguard against problems and avoid unfavorable results. A
vice-president for business operations indicated that safeguarding computer files became
a priority on his/her campus to protect the privacy of transcripts after hackers broke
through a computer firewall.
Twenty-second, there must be qualified science instructors conducting on-site safety inspections of science labs and qualified bio-hazard professionals must inspect safe-guarding procedures at microbial life laboratories. One college president with a Ph.D. in epidemiology was very concerned about the removal and storage of bio-hazardous waste on his/her campus. “We did not have one system for the campus, every lab was removing waste differently. About seven years ago we initiated a plan to remove all bio-hazardous waste by a recognized national medical waste disposal company.” A second educational leader also found bio-hazardous waste removal a problem and decided to use an outside bio-hazardous waste removal company. Both leaders stated that waste removal was the only major problem their biology experts saw in their labs. The problem was identified and remedied. The leaders found the laboratory rooms well vented for fresh air, as well as having fire extinguishers, eye wash centers, water sprinklers, safety showers, and natural gas shut off valves.

Twenty-third, the leaders emphasized that no matter what the policy, it is always important that administrators both appear and in fact are, well meaning, ethical, sensitive and fair. A president of a small private college emphasized that people must have confidence that the decision maker will be impartial and that all complaints are being investigated thoroughly. The president said “it is important that all parties know that an investigation is on-going.”

A college president at a small private institution indicated that s/he has a complaint/question mailbox and his/her secretary answers every question every day. The same president indicated that s/he leaves his/her office door open for any person to be
able to walk in. The open door policy promotes the friendly transparent atmosphere of his/her administration. This may not work as well at a larger institution.

*Attorney conflict of interest in public institutions*

Twenty-fourth, *conflicts of interest* have been a problem in the two largest urban counties of Upstate New York with regard to county attorneys’ divided loyalty between community colleges and their county governments. In one large urban county a new county executive came in with an ambitious, comprehensive political agenda. The county executive wanted to use the community college to help rebuild the downtown area of a major city. The county executive’s urban renewal plan included merging three sprawling community college campuses (one in the city and two in the suburbs) into one large downtown campus. The community college board of directors voted down the proposal because the college would lose two suburban campuses with the largest and newest facilities on valuable land near major commercial business districts without any compensation from the county. Both suburban campuses had hundreds of acres of undeveloped land suitable for future expansion. Surveys of suburban students indicated that many would transfer to neighboring county community colleges rather than commute a long distance to the downtown urban center. The board of directors did not want to lose the valuable land, dozens of college buildings, and thousands of full time equivalent students (FTE). Federal and state matching grants would be lost if enrollment went down using FTE levels. Furthermore, the college had been previously sited for improper political influence by Middle States credentialing. Under the community college charter the county attorney represents the community college. The problem was that the county
attorney is appointed by the county executive as part of the executive’s cabinet and would not represent the college against the county. Furthermore, the community college could not hire their own legal counsel without permission from the county government (county executive, county legislature, and county attorney). The president did not have legal representation to challenge the county; however, his board voted to block the merger and loss of two suburban campuses.

The community college president came up with a creative remedy to the legal conflict of interest dilemma. The president chose to use state attorneys from SUNY to oppose the county attorney and block the merger. The SUNY attorneys were worried about the loss of accreditation of the programs at the community college due to a long history of political interference. The SUNY attorneys also did not want to lose federal funds on a possible decline in enrollment after the loss of the two suburban campuses. The state attorneys blocked the merger and a compromise was imposed through a quasi-judicial proceeding known as an article 78 hearing. Such hearings are in closed sessions with a panel of arbitrators including the state attorney general or his/her designate, the state comptroller or his/her designate, a member of the judiciary, and the governmental bodies in disagreement. The closed door compromise included the community college keeping all three campuses with all three parcels of land, the downtown campus doubling in size to include a major gymnasium and sports complex as well as all administrative and accounting offices. Several programs including paralegal studies and stenographic court reporting were consolidated to the downtown campus. The president’s office, admissions office, accounting office, and board of trustees were moved to the downtown campus. All new construction projects were agreed to be built on the downtown campus.
A similar problem of county attorneys’ conflict of interest was experienced in a second large urban county. In this second urban county the community college is in a central commercial business district between two state highways and the New York State Thruway. The community college had a large land mass on this highly valued property. The county government took land away from the community college section by section to add county buildings. The county legislature placed a jail/holding center on the community college land. Other county legislative action took land from the college to build a mental health hospital, and later an HIV/aids clinic. No compensation was given to the college for the loss of land. The college administrators wanted to take action against the county; however, their college charter required the county attorney to represent the community college. The county attorney had divided loyalty and could not take action on behalf of the college against the county. Recently, the community college has received permission to have in-house counsel to represent the institution rather than the county attorney. In the future the college may be able to take action with its own attorney separate from the county government. In the future, even if the college could not stop the legislative action the institution might be compensated for their loss of land. However, the law is unclear as to whether a community college could ever take action against its own county government.

Most community colleges are not specified legal entities or legal persons; therefore, they could not take legal action on their own behalf. However, a vice-president for student services at a state university believes it would not be hard to find a friendly plaintiff from a college foundation or faculty/staff union that could sue on behalf of a
community college or state university. Lawyers refer to these court cases as _friendly plaintiff actions._

**Financial controls**

Twenty-fifth, there was a strong concern from vice-presidents of finance at private colleges for sound economic practices and protection from Sarbanes-Oxley. The Sarbanes-Oxley Act of 2002, 116 Stat.745 also known as The Public Company Reform and Investor Protection Act of 2002 imposes strict criminal penalties including fines and _20 year prison sentences_ for members of accounting and management teams of any public entity with inaccurate bookkeeping (section 802). The act’s contents include eleven titles. Section 302 requires that a chief financial officer sign a statement attesting to the accuracy of financial books. Section 401, 404, and 409 requires the chief financial officer to safeguard records, perform risk assessment, evaluate controls for fraud, evaluate controls over fiscal year ending practices, evaluate the scale of assessment to the size of the institution, show safeguards for controls over computer records of personal data and show the adequacy of reporting. Governance of the statutory requirements are through the Security and Exchange Commission (SEC) 116 Stat.745, 15 U.S.C. section 7241, and also U.S.C. section 1350. However, the SEC in its initial formation does not have authority over non-profits nor does it have any expertise outside publicly traded stock companies.

There may be a future challenge to the law with regard to enforcement by the Security and Exchange Commission in areas outside their traditional authority and expertise. Federal courts may limit the law’s focus, strike down the law entirely, or
require Congress to change the supervising authority to the Internal Revenue Service (IRS), other governmental agencies, or the states.

It appears that all of the vice-presidents for finance and administration interviewed have settled on a compromise that makes sense out of Sarbanes-Oxley and was commonly referred to among chief financial officers as best practices of Sarbanes-Oxley. Since colleges are not subject to the Security and Exchange Commission, educational leaders do not believe that, at present, Sarbanes-Oxley legislation applies to colleges. However, all financial officers interviewed have settled on the best practices model which incorporates the favorable aspects of the legislation without the signing of books under the penalty of fraud. The best practices model includes a second financial person or group of accountants to audit the books of the original bookkeeper. This is usually conducted by an outside accounting firm that reviews books written by the vice-president for finance. The audit is usually sent directly to the board of trustees and the president by-passing the vice-president for finance. Public institutions have a second outside source, usually a county comptroller for community colleges or state comptroller for four-year institutions; therefore, they are using the best practices with regard to a second review of finances.

Another aspect of best practices is that the board of trustees must have a well written conflict of interest policy as to when board members must recuse themselves or disqualify themselves from voting. The conflict of interest policies should also extend to administration (signing contracts from which they may receive a profit). Other institutions which may have a shared venture with a college would also require a specific conflict of interest policy as well as a written statement describing with detail the
financial contributions of all parties and the duration of the partnership. Every joint venture should have either a written contract or a written memorandum of understanding describing all relevant details as well the responsibilities of all parties during the venture and at the conclusion of the venture.

Twenty-sixth, the Internal Revenue Service has made their not-for-profit form 990 more comprehensive. The IRS form may have a greater impact than Sarbanes-Oxley and may institute Sarbanes-Oxley through a backdoor. IRS form 990, Instruction XI, page 39, line 2, requires an independent accountant for all not-for-profits that receive $500,000 or more in governmental funds. All 26 institutions that contributed to this study exceeded this minimum level of funds that trigger the independent accountant. The form also asks for description of the accounting methods used, safeguards used, and conflict of interest policies. A vice-president for finance indicated that s/he interprets the instructions to mean that all conflict of interest policies must be in writing and attached to the form 990. These attachments must be resubmitted every year as the IRS form is mailed. The IRS form 990 has affectively imposed the main elements of Sarbanes-Oxley upon all not-for-profit colleges.

Twenty-seventh, another financial concern that is gathering attention of administrators is the new regulatory powers of the TITLE IV student loan administration and their new guidelines. Any college or university that increases tuition to levels beyond what the program administrators believe are present inflationary levels may lose their eligibility to participate in the federal student loan program. The guidelines state that any increases in tuition below 6% in a fiscal year will not be reviewed by federal student loan administrators. Increases between 6% and 10% may be questioned by administrators.
Increases greater than 10% require written justification by the institution to the federal program. The program reserves its right to discontinue participants. A vice-president for business and financial affairs said that s/he does not think that any college will raise tuition to an 11% rate while the guidelines are in effect.

These guidelines may be replaced by a new set of guidelines in a new piece of legislation known as The Higher Education Opportunity Act of 2008, PL. 110-315, 122 Stat. 3078, 20 U.S.C.1001. Rather than using the TITLE IV guidelines on tuition increases (described above) the new statute uses net tuition for each college. Each institution must voluntarily prepare a calculation of tuition and fees minus awards given by the institution to all students in order to determine a net tuition. The Secretary of Education is to prepare a national Higher Education Price Increase List which will include the institutions with the highest net tuition and fees. Sections 111, 120, and 132 require that the Secretary of Education prepare five lists for consumer protection.

- a list of the 5% of institutions in each category (public and private) that have the highest tuition and fees for the most recent academic year.
- a list of the 5% of institutions in each category that have the highest net tuition and fees for the most recent academic year.
- a list of the 5% of institutions in each category with the greatest increase in tuition and fees for the most recent academic year.
- a list of the 5% of institutions in each category with the greatest increase in tuition and fees for the most recent three years.
- a list of the institutions in each category with the least tuition in the most recent year.
Language referring to the higher education price list as the *watch list* was removed due to concern that the language was too similar to the punitive terminology in *No Child Left Behind Act* which has been used to close primary and secondary schools. The vice-presidents for financial and business affairs were most concerned with section 132-J that requires each institution of higher education to prepare a four year projection of future tuition to aid consumers in making college choices. Most institutions have not made four year budgetary estimates in order to know tuition. However, two vice-presidents for business affairs were aware of section 132-J (4) that allows for a disclaimer that should state, “The tuition number for future years is an estimate and not a guarantee of the actual amount the student may be charged.”

One vice-president for business affairs at a private college stated that s/he was very concerned about this list of high tuition colleges and stated that if there would be a future punitive aspect of the list that large numbers of private colleges may agree to a specific net tuition number. If the number of colleges exceeded 5% then no one would be in the highest 5%. There might be a legal challenge to such a collective agreement as being “in restraint of trade” regarding anti-trust. However, there may be an exception to anti-trust when there are outside pressures forcing price limits. Also the tuition agreement may be considered a “voluntary price ceiling” by the higher education industry rather than “price fixing”. If there is the change in policy of *The Higher Educational Opportunity Act of 2008* (Supra) to a list which will be used to penalize institutions of higher education, it will certainly be challenged in a future court.

Twenty-eighth, leaders should limit contract authority for middle level management. Five of the 30 leaders interviewed indicated that contract disputes are an
area of concern at their campuses. Contracts with outside vendors, textbook companies, athletic conferences, construction companies, outside auditors, law firms, food service providers, research partners, other institutions, each employee, labor unions, administrators, and advertisers occur as part of the operation of every institution. One state college vice-president for business and finance found that too many persons were signing contracts obligating the college. The vice-president limited contract authority of faculty department chairs and staff supervisors to a few hundred dollars. All contracts over a certain size or for a certain duration of time had to receive written authorization from the vice-president for business and finance. According to the vice-president, “the number of contracts diminished, the number of contract disputes diminished, and the size of the disputes diminished.”

When contracts are added to construction, nine of the 30 leaders mention the concern. Construction includes problems with contracts, benefits, safety, quality, and utility. A vice-president for student services at a community college mentioned that one million dollars was spent on re-roofing his/her entire campus and the work was not done correctly. The roofs leaked in the first year. The entire construction project had to be re-roofed. The vice-president said, “We attempted a law suit, to return the money spent, against the roofing company but they went bankrupt. We will never go with the lowest bidder again. We will stay with companies that have done large projects in our area. The risk of a bad construction decision or bad construction contract is too great.”

Conclusion

The leaders had a strong sense of keeping decisions and records transparent. There was a strong sense that all persons working in a college environment should feel
comfortable about leadership handling of all aspects of administration. Leaders are more
than just managers. Management provides consistency, order, and stability while
leadership provides insight that produces successful adaptation. Managers do what is
financially best while leaders do what is truly best.
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