

PREVENTATIVE LAW: AN OVERVIEW

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A. PREVENTIVE LAW: AN OVERVIEW

Why is **preventive law** a critical topic? A decade ago, few predicted that schools and colleges would become primary targets for lawsuits, administrative charges, and other claims asserted by such a wide array of claimants based upon so many different theories of liability. Today, teachers, faculty, administrators, and staff allege that they were improperly denied tenure, wrongfully terminated, victimized by discrimination, or sexually harassed. Students claim that they were damaged by misinformation about academic programs, failure to accommodate disabilities, and denial of federal and state rights. Claimants from outside of the institution are increasingly asserting claims arising out of a myriad of contracts, real estate transactions, disputes over research collaboration, and novel problems in cyberspace. An array of government agencies frequently conduct investigations of insti-

tutional compliance with statutory schemes covering financial aid, tax exemptions, antitrust, and immigration, to name just a few.

Most administrators and legal counsel devote the majority of their time and efforts to damage control in reaction to a specific claim, rather than to a concentrated effort to prevent future claims. With limited budgets, and swamped with seemingly unlimited problems, administrators understandably shrink at the thought of making claim prevention a priority. Too often preventive measures look like another good idea to explore in the proverbial “spare time.”

Unfortunately, the importance of preventive law typically is recognized only after a school or college is surprised by a financially ruinous verdict in a lawsuit alleging what were initially perceived as trivial facts or inconsequential ills. The cost of defending a single claim can easily reach \$100,000 in taking depositions and pretrial motions and at least as much if the case is tried to a jury. Even more costly are the countless hours of time from administrators, faculty, and staff. In addition to these defense costs, damages or settlement costs paid to a complainant can add millions of dollars to the financial toll. The cost of a preventive law program is truly a bargain when compared to these costs. Because a preventive law program can be implemented incrementally, the initial cost can be kept to a minimum and additional phases of the program can be implemented as funds and other institutional resources are available.

As two lawyers with over 50 years of combined experience representing schools and colleges, we know only too well the dramatic and long-standing damage that the lack of a preventive law perspective can cause. It pains us when intelligent, well-meaning, and committed administrators and staff members go the extra mile to help a student, employee, or faculty member – only to be greeted with a lawsuit or complaint as a result! The millions of dollars spent, the thousands of hours wasted, and the immeasurable stress school and college faculty/staff experience, because of failure to engage in preventive law, is all the more tragic to us because our experience shows that it is not merely an esoteric practice accessible to only a few sophisticated institutions. Rather, the proposition that drives both this book and our current legal practice is that, with appropriately directed and understandable guidance, non-lawyer administrators at any institution and in a variety of jobs can successfully and effectively incorporate preventive law as a core practice to the benefit of their institution.

Preventive law is both very necessary and doable; hence the natural question is, why is it so little practiced? In our experience, there are

five major barriers to institutions successfully and comprehensively embracing prevention

- First, there is a fundamental lack of awareness about the preventive law perspective. Even well-trained and intelligent administrators simply do not know about preventive law. Indeed, they do not even know that they do not know about it. Without this preventive law perspective, administrators “naturally” fail to spot problems-in-the-making or identify easy low- or no-cost safeguards to implement in areas under their control.
- Second, administrators lack legal information in an appropriate and manageable format. A multitude of reference books and other legal sources set out legal rules and cases – sometimes in excruciating detail. What is missing is a single accessible and up-to-date source that avoids unnecessary legalism and jargon and concentrates on the essence of what busy administrators need to know.
- Third, preventive law efforts are undercut because the available reference materials do not connect legal doctrines and developments to the real-life, concrete situations that administrators confront routinely in their day-to-day work.
- Fourth, we have found that there is much mystery and misunderstanding about the role of legal counsel (whether “inside” or “outside”) and the institution. Maximum legal claim prevention requires a concerted and harmonious effort between counsel and other school and college leaders. Far too often, the role of legal counsel is not spelled out, which leads to misconceptions and distrust that hamper the counsel/administrator relationship, so that counsel are not maximally utilized by administrators – and vice versa.
- Finally, we attribute some of the absence and insufficiency of preventive law efforts to the fact that administrators simply do not understand how preventive law is an integral component of their core job duties and mission. After all, if dedicated and increasingly harried administrators see preventive law as “someone else’s job” and a peripheral add-on that diverts from their critical functions, is it any wonder they give insufficient attention to it?

B. THIS PREVENTIVE LAW BOOK: DESIGN AND FOCUS

In writing this book, our main focus has been to provide a clear and useful discussion of preventive law that responds to these five deficiencies, so that school and college administrators will be able to take practical, concrete steps to prevent claims in the course of their regular professional activities. Other works on college and educational institution law provide comprehensive coverage of the major relevant legal topics. By contrast, the consistent focus of our book, as the title suggests, is first and foremost on preventive law. The legal discussion here emphasizes the clear, step-by-step unfolding of essential legal points, in context and in a user-friendly way.

Frequent use of realistic examples from our own experience and from the latest writings of practicing lawyers and administrators “in the trenches” provides critical situational reference points to bring home the relevance of legal topics; the examples also illustrate how preventive law can indeed be a natural part of administrators’ core duties and aspirations. Both in a separate chapter devoted to the role of legal counsel, and in ongoing consideration of the topics in the context of the book’s many other subjects, our book aims to demystify the critical relationship between the legal counsel and the institution and its administrators. We show how an effective counsel/administrator collaboration can become a major asset in an institution’s successful preventive law program.

This book is intended for use by a wide variety of school and college officials, and in a number of different ways. First, because claim prevention is everyone’s responsibility, this book *is intended to provide guidance at the school level for board members, superintendents, principals, and personnel administrators, and at the college level for board members, presidents, academic administrators, deans, faculty, personnel administrators, student affairs officers, and affirmative action officers. This book does not attempt or intend to transform these people into lawyers. Rather, the discussion assists them in identifying their vital role in the preventive law process. Second, this book discusses the applicable legal principles, statutes, regulations, and case law in the field of education law so that legal counsel and others whose responsibilities include legal issues will have a working knowledge of the law pertaining to schools and colleges. Third, this book provides the reader with the practical skills needed to obtain important information about a specific subject, resolve a specific claim, assess the risk of a particular activity, or take steps to manage a given risk. We hope that it will be a valuable guide for the legal counsel of schools and colleges, whether public or private, in developing a professional preventive law program.*

Of course, this book is not a substitute for legal advice. The guidelines presented here will help alert school and college administrators to the legal consequences of certain actions; the advice necessary to avoid a lawsuit or respond to a threatened lawsuit, however, should come from legal counsel.

C. CHAPTER REVIEW

We have divided this book into seventeen chapters. Following this introduction, Chapter 2 discusses the importance of a preventive law program in light of troubling trends in education-related claims. Further, the chapter addresses the legal audit, including who should conduct the audit, what topics the audit should cover, how much the audit will cost, and how to preserve audit report confidentiality. Finally, the chapter discusses risk management, the process by which the risks identified through the legal audit are assessed by legal counsel, evaluated by the institution, and managed through a risk management plan.

Chapter 3 addresses the major sources of law constraining schools and colleges, and some of the most fundamental principles and issues flowing from federal and state constitutions, statutes, regulations, and common law. To place the chapter's general points in the context of particularly relevant and useful examples, the chapter explores the state action doctrine, due process principles, and judicial attitudes that significantly influence the manner in which the major law sources are interpreted and applied.

Chapter 4 explains some of the basic legal concepts that are utilized in this book and that you may encounter in dealing with legal claims in an institutional setting. Some of the more common settings for the adjudication of such claims are also described.

Chapter 5 discusses general preventive measures central to devising a preventive law program. For example, the chapter provides guidance on drafting effective policies, procedures, and contracts. Further, Chapter 5 provides advice regarding document maintenance, grievance procedures, and training.

Chapters 6 through 14 highlight the statutory, regulatory, and case law that govern the obligations, responsibilities, and operation of schools and colleges. Focusing on the major aspects of institutional action that generate the most claims and controversy, these chapters are divided into governance (Chapter 6), administrators and staff (Chapter 7), faculty (Chapter 8), stu-

dents (Chapter 9), financial assistance (Chapter 10), research and communications (Chapter 11), campus facilities (Chapter 12), business issues (Chapter 13), and endowment and fund raising (Chapter 14). For each of these topics, the chapters review risks and provide specific strategies – including processes, procedures and other preventive measures – to eliminate, reduce, or acceptably manage the risks.

Chapter 15 provides guidelines for investigating wrongdoing on campus, including sexual harassment, student or faculty misconduct, and other circumstances requiring an impartial fact-finding process. The chapter outlines a step-by-step process for conducting investigations effectively and in a manner that does not trigger additional claims.

Chapter 16 describes the various avenues for obtaining legal services and factors that schools and colleges should consider in selecting legal counsel. The chapter then suggests ways to work effectively with legal counsel. This discussion will be valuable, whether the institution selects in-house counsel, outside counsel, or a combination of both.

Chapter 16 also proposes litigation and settlement strategies and discusses equally effective alternative dispute resolution mechanisms. The suggestions discussed in this chapter are key to developing uniform policies and disciplined procedures that will reduce the expenses of litigation, settlements, and judgments.

Chapter 17 addresses the complex topic of insurance. It discusses, in a step-by-step process, the selection of an insurance broker, the analysis of coverage and policy forms, and other factors relevant to the purchase of insurance. The chapter also highlights the difficult process of claims administration.

D. CONCLUSION

In sum, no school or college can fully attain its mission or goals or achieve institutional growth and development without a preventive law program as an essential component of its management. The stakes are tremendous. Each organization is financially and morally obligated to mitigate the frequency and severity of claims and to reduce both the financial and human impact of these claims on the institution and its constituents. With the assistance of this volume, we believe that you will be able to achieve those goals.