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Pressing Legal Issues: 10 Views of the Next 5 Years

Terrorism threats. Race-conscious admissions. Intellectual-property rights. Conflicts of interest. Those are just a few of the issues with legal ramifications that are proliferating at colleges and universities. The law has permeated almost every aspect of higher education.

What will be the most pressing issues that higher-education institutions will confront in the next five years? The Chronicle asked 10 legal experts for their views.

Christine Helwick, general counsel for the California State University System:

Individual privacy versus public accountability. Recently enacted legal restrictions on the release of health and financial information, as well as already existing rules that safeguard employment and student records, reflect an intense public desire to protect individual privacy. At the same time, colleges will confront competing demands for institutional accountability, greater transparency, and national security -- some of which come at the expense of personal freedoms, including the protection of personal privacy. That conflict creates a societal dilemma that will continue to play out in a variety of different forums.

Governance. It will take several years before colleges can effectively respond to Sarbanes-Oxley issues -- the role of trustees in institutional governance, the institutionalization of new ethical standards, the granting of greater independence to auditors, the establishment of new procedures for whistle-blowers, and so on. Meanwhile, much experimentation, some false starts, and undoubtedly a few new episodes of embarrassment may lead to new proposals to regulate other areas of campus governance.

Technology. The law develops with much deliberation, and its processes are not particularly well suited for the rapid pace at which technology progresses. The widespread use of computers in higher education has created a whole host of legal issues that are only partially resolved -- intellectual-property protections, access to digital imaging, the downloading of music and pornography, liability for host networks, security against hacking, and many others.

The graying of the work force. Colleges will continue to experience increased legal activity related to the status of baby boomers as they age, including the management of more-diverse disabilities, claims of age discrimination, faculty competence, more-complex workers' compensation issues, and the development of new retirement incentives.

Maintaining academic standards. Colleges are currently held accountable to many constituencies: students, parents, alumni, government regulators, unions, taxpayers, voters, special-interest groups.

Situations that present a clash between the institution's academic standards and the often narrow demands of particular groups -- situations that arise over disability accommodations or the development of admissions criteria, for example -- require time-consuming, individualized attention. The law is often confusing, conflicting, unpredictable, and specific to each situation.

Martin Michaelson, a partner in the Washington, D.C., law firm of Hogan & Hartson:

The workplace. Employment law -- including age, disability, sex, race, and other forms of discrimination; wrongful termination; pension law; and claims under other laws -- already accounts for at least half of most institutions' legal exposures. The law for several decades has tended to be ever more attuned to worker rights, and, with massive national increases projected in the populations of faculty and staff members, new trouble in this area is likely.

Inclusion of minority students. Minority-group members, increasingly prevalent, will account for half of the nation by the middle of this century. The U.S. Supreme Court decisions in the University of Michigan cases set out a broad doctrinal framework for affirmative action in higher education, yet many hard legal challenges remain.

Academic freedom. Neither the distressingly sparse law of academic freedom nor institutional academic-freedom policy has begun to respond in earnest to the evolving demographics of a professoriate in which record numbers of faculty members are neither tenured nor on a tenure track. Academic freedom for nontenured faculty members is a question not of whether but of what and when.

Government investigations. The trend, pronounced in the past decade, of more government oversight and investigations of colleges will continue. Expert lawyering tends to be instrumental in achieving satisfactory outcomes in such matters. Tactical skill, strategic judgment, and mastery of arcane law will be required.

Terrorism. Terrorism risks will generate legal issues in areas like immigration, access to dangerous biological and other laboratory materials, campus-police activities, disclosure of computer databases, institutional reporting to government, and the privacy rights of students and faculty members.

Computer law and distance education. As teaching, research, and administration involve more people physically distant from each other, including in different countries, the law will continue to catch up with marketplace needs in such areas as intellectual-property rights, resolution of transjurisdiction disputes in cyberspace, conventions for making contracts, and tension between institutional and faculty prerogatives in the virtual campus. Expect, too, more federal intrusion into distance-education quality assurance.

Beverly E. Ledbetter, vice president and general counsel at Brown University:

Athletics. Despite the National Collegiate Athletic Association's efforts, the liability in this area just keeps growing. With angst about the "arms race," worries over athletes' safety, concerns about excessive compensation, complaints of bias, and criminal charges of misconduct, can all the king's horses and all the king's men (and women) put Humpty Dumpty together again?

Age. Higher-education institutions over the last decade have emerged as employers of choice offering competitive pay, good benefits, and up-to-date workplaces. While competing for the talents of young employees, they have continued to enjoy the fruit of the labors of those who are older. As colleges work to provide more and better opportunities to a younger and increasing highly educated workforce, will they be able to sustain a legally principled exodus for those beyond midcareer? Or

are class-action age-bias suits peering over the horizon? Are we prepared for an "older workers" union?

Benefits. Now that colleges have improved their salaries and benefits, will they find a way to equalize them? The likelihood that federal or state laws will deal with the issue of equal access to benefits is greater than ever. The focus on special perquisites for corporate executives may have unexpected consequences in academe by requiring public disclosure, if not restriction, of benefits provided to individuals or special classes of individuals. Because both the benefits and the groups to which they are extended cannot increase, benefits will decrease.

Conflicts of interest. Whether or not there is a Sarbanes-Oxley for nonprofit institutions, it is a foregone conclusion that there will be a public demand for safeguards against conflicts of interest at higher-education institutions. That initiative may very well come from Congress. If it does, look for the agencies dispensing the dough to cough up more than guidelines. This time around, they will specify the actual form of conflict of interest. Principal investigators, senior officers, and administrators will have to comply before the money is dispersed.

Diversity. The Supreme Court's rulings in the Michigan cases began a new era. They were the first of many cases that will not only seek to define how we create diversity but will also successfully challenge colleges that do not align their practices with their policies. It is an issue we will wrestle with in earnest for the next decade. The platitudes and rhetoric of the past year will turn to serious business for colleges and their lawyers. Diversity is very much worth saving but to do so demands focus, objectivity, and structure. There is not as much time as many people might think.

Business enterprises and taxes. As our institutions have grown intellectually, we have become more complex in both our structure and operations. The distinction between the academic world and the corporate sector is dissolving. As regulators try to sort out which hat we are wearing, tax consequences will surely follow. Will "hybrid" or "dual status" colleges become common?

Michael A. Olivas, professor of law at the University of Houston:

Consumer and educational malpractice. Such issues from the business world are leaching slowly into higher-education law, especially as colleges take on auxiliary enterprises and neglect their core business of teaching. The first federal case overturning a grade occurred in 1997, and more litigation is on its way.

Accommodating learning disabilities. Elementary and secondary schools are already accommodating many students with learning disabilities. Overly ambitious parents will increasingly demand similar treatment from colleges as a way to give their kids an edge.

Bankruptcy issues. They are the trailing indicator of how bad the job market is for B.A.'s. Many students seek to wipe their financial slates clean, and sometime courts let them do it, although Congress has tried to restrict it. The bankruptcy laws do not allow students to discharge their student loans in bankruptcy proceedings except in limited situations. Still, the stigma of bankruptcy is gone -- much like the jobs.

Privacy, identity theft, and computer security. Everyone knows how to use the computer, and students and faculty members are rewarded for being very good at it -- hence, colleges will increasingly have to cope with bandwidth theft, illegal downloading, hacking, cyberstalking, and the hundreds of other related issues that affect academic research.

The Patriot Act. The more highfalutin' and patriotic-sounding the legislation, the more I fear the devil in the details -- and the Patriot Act is my Exhibit A. Who knew that terrorists would include

undocumented college students, flight schools, and the like? Colleges and universities should keep both an immigration and a criminal lawyer on speed-dial.

Admissions post-Grutter. Although the Supreme Court probably will not take another case in this area for many years, state-wide referenda are likely to continue and probably will prevail in some more states.

Julie D. Goodwin, general counsel at Morgan State University:

Budget constraints. During the past few years, colleges -- especially public institutions -- have experienced substantial budget cuts. When resources shrink, the struggles over the distribution of those resources increase. Therefore, we expect that employment-related disputes and discrimination claims, among others, will grow substantially.

Enrollment management. Also related to the budget challenges, rising tuition rates are affecting all students and are sure to have the greatest impact on low- to moderate-income students. That trend will exacerbate existing concerns regarding access, need-based scholarships, and diversity.

Alternative income streams. As resources shrink, colleges will be looking for alternative sources of revenue, such as income derived from the marketing of university-owned intellectual property. For example, many institutions are either looking to enhance existing or developing new trademark-licensing programs, recognizing the value of receiving royalties for the use of their lucrative marks. Institutions are also interested in exploring the opportunities and income associated with rapidly and effectively moving campus innovations and inventions to the marketplace. Institutions are seeking to secure intellectual-property protection on university inventions and to make those inventions available through licensing to the private sector. Biomedical research, for example, often yields the development of devices that, if brought to market, can benefit the public health. Similarly, software created at higher-education institutions can be marketed once the intellectual-property rights are secured.

Collective bargaining. It is likely that union-organizing campaigns and other labor efforts will increase as more groups seek to make sure they get their share of the limited resources that will be available.

Peter D. Kushibab, general counsel of the Maricopa County Community College District:

Student records. The confidentiality that has protected much of the information that American higher-education institutions maintain about their students has suffered a multilateral assault in recent years. Through amendments to the Family Educational Rights and Privacy Act, the Patriot Act purports to make education records more accessible to federal law-enforcement investigators. Other changes in Ferpa render certain types of student-discipline records more susceptible to disclosure. State freedom-of-information acts increasingly work to compel registrars and other officers to release information about students -- the disclosure of which was once discretionary. Information-technology security officers labor constantly but often unsuccessfully to create new firewall protocols against unlawful access to student information. All those factors will make it more difficult for college officials to maintain the integrity of student data.

Race-conscious decisions. The Supreme Court decision in *Grutter v. Bollinger* represents a long-awaited victory for proponents of affirmative action in admissions. The decision, however, has re-energized the already lively discussion of race-conscious decisions in other realms of academe, notably scholarships and faculty hiring. American courts, especially federal appellate tribunals, have thus far been reluctant to sanction consideration of race or ethnicity in matters other than college admissions. Many institutions will be forced to litigate those issues as the courts define the limits of

Grutter.

Creating a risk-conscious environment. Shrinking support from state legislatures has forced higher-education leaders to be more creative in their efforts to raise revenue and compete for students. New ideas, however, often entail new risks. Faced with rising litigation costs and escalating premiums for liability and property insurance, colleges will be forced to weigh carefully the risks of their novel programs. To make decision makers more sensitive to such risks, many institutions have adopted risk-management models that take a holistic approach -- one that assesses and works to control risks that transcend the boundaries of various divisions and departments.

Georgia Yuan, general counsel at Smith College:

The meaning of discrimination. In the 50 years since *Brown v. Board of Education*, plaintiffs have been using lawsuits to shape the definition of civil rights in education, especially in relation to racial diversity and equality. Each case has brought policy guidance and a sharper definition of whether we are illegally discriminating in the delivery of educational services. Recruitment programs intended to enhance student and faculty diversity, as well as scholarships and financial aid, are areas in which we can expect continued judicial scrutiny. Testing the recognition of gay, lesbian, transgender, and bisexual persons as a protected class covered by discrimination laws will also be the subject of legal action.

Privacy rights. Colleges store and maintain student, alumni, patient, and employee information, as well as research data and images. The Internet, shared electronic databases, laptops on every desk, and e-mail have brought speed and access to those information-retention functions, increasing the likelihood that the privacy of that information will be encroached upon. More-precise definitions of privacy will come from the courts, and to the extent that those definitions fail to protect privacy, legislatures and regulators will be pressed into action.

Accountability. Trustees and external auditors, influenced by the post-Enron corporate climate, will hold colleges to new standards of accountability. New regulations designed to measure institutions' success at managing financial and educational matters will probably result. Public institutions will be required to persuade legislatures and the public that they are producing graduates who are well prepared for the job markets of the 21st century.

David Williams II, vice chancellor for student life and university affairs, general counsel, secretary, and professor of law at Vanderbilt University:

For-profit ventures. As colleges search for new revenue streams, they will become more entrepreneurial. That will require legal analysis and attention to both contractual and transactional issues in areas like real estate, zoning, tax, and intellectual property. Colleges will have to deal with issues concerning unrelated business income, tax-exempt status, and the legal aspects of taking ideas, inventions, and products to the public market.

The post-September 11 effect. The creation of the Department of Homeland Security and the enactment of the Patriot Act will require colleges to increase security measures and deal with more regulations on immigration, foreign travel, and the handling of dangerous chemicals. The government has already issued a number of new requirements concerning visas that restrict foreign citizens from participating in certain types of research. In addition, although colleges will have greater opportunities to engage in research related to homeland security, those opportunities will be accompanied by tighter guidelines and stricter legal regulations.

Governance Even though the recently enacted Sarbanes-Oxley legislation does not apply to

colleges, many of us have been trying to incorporate some of its recommendations into our daily operations, and Congress will probably develop something akin to that legislation for colleges and other nonprofit organizations in the near future. This area of governance includes not only the relationship between senior administrators and trustees, but also compliance issues, like those concerning athletics, and individual and institutional conflicts of interest. Governance issues surrounding the relationships between a university and its various foundations and other affiliates will also require attention from legal counsel.

Technology. File sharing and its interaction with privacy issues, the use of computers and the Internet involving student research -- those are just a few of the growing legal issues involving technology that colleges will face. We are presently lagging behind the curve of new technology innovations and with each one comes new legal concerns.

Beth A. Harris, vice president and general counsel at the University of Chicago:

Access and economic diversity. With the cost of college tuition rising faster than inflation, and with growing recognition that students attending prestigious colleges are increasingly from wealthier families, colleges are beginning to be seen as less able than in the past to provide opportunities to all. That trend, coupled with continuing threats to affirmative action, may well shift the focus of efforts to enhance diversity away from underrepresented minorities and toward economic diversity. Attacks against admission preferences for legacy students are also likely to increase.

Race-conscious programs. The Supreme Court decisions last summer in the Michigan affirmative-action cases have not closed the door on the legal issues related to expanding diversity on campuses. Race-exclusive and race-conscious scholarship and financial-aid programs, minority-faculty hiring initiatives, pipeline programs, and student services aimed at members of minority groups will continue to raise legal questions.

National security. Because of September 11, government regulation of trade with enemy countries will increasingly affect research and publishing efforts at higher-education institutions. Federal support of research on biological agents will also grow, yet with that support will come more regulation and oversight. In addition, access to the United States by foreign students, faculty members, and research assistants will continue to be problematic for colleges.

Institutional integrity. The recent corporate-governance scandals and the advent of Sarbanes-Oxley have heightened concerns about institutional integrity. There is likely to be increasing pressure on colleges to examine their own governance and the independence of their trustees. Institutional and individual conflicts of interest that appear to compromise the integrity of research will also receive greater attention.

Kathleen Curry Santora, chief executive officer of the National Association of College and University Attorneys:

Issues that campus lawyers themselves will confront include:

Resources. Almost 70 percent of respondents to a Nacua survey anticipated that their office or institution would experience budget cuts this year. Most predicted that the loss of resources would create growing pressure to do more with less and would restrict their participation in educational meetings that keep them abreast of changes in the law and the profession.

Information. Lawyers need immediate access to information and expertise more than ever, yet they are faced with information overload. To deal with concerns surrounding both resources and information, Nacua, like other higher-education associations, must strive to provide more

comprehensive and easily accessible information -- balancing online desktop delivery with programs that encourage personal interactions among lawyers.

Preventive law. The practice of preventive law is the most effective way to conduct legal affairs, as it keeps legal problems from occurring in the first place. It reduces the likelihood of adversarial relationships and allows an institution to manage legal issues systematically, without shifting to crisis mode every time a complaint is lodged or a lawsuit is filed. Institutions must educate people on their campuses about the legal implications of their actions, identify areas of significant risk, and establish internal mechanisms to forestall legal action. They must also encourage and provide the resources for campus leaders to cooperate with one another in legal planning on a regular basis, leading toward a civil and collegial campus culture that welcomes the resolution of disputes.

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