

Risk Management and Higher Education: *Implications for Leadership*

Peter Lake

Professor of Law, Charles A. Dana Chair, Director of the
Center for Excellence in Higher Education Law and Policy
Stetson University College of Law

Leading Risk Management Efforts

Modernizing Risk Management

Centralized Policy Compliance

- Chief Compliance Officer v. General Counsel
- Lawyer – Legal Advice, Counseling – Not a Principal or Business Agent or Administrator (Don't turn your GC into a super administrator!)
- Lawyer – Confidential
- Chief Compliance Officer – Administrator, Agent of University, No Attorney-Client Privilege (Don't turn your CCO into a college attorney!)

Functions of GC

v.

Functions of CCO

- J.D, Experienced
- Counsels/Advises on Law <-> Collaborates with Clients on Policy Development <-> Offers Input on Non-legal Implications of Legal Advice <-> Helps Client See What Is a Legal Issue and What Is Not

- J.D. Possible, Not Necessary
- Manages Projects/ Investigations (Internal/External)

Functions of GC

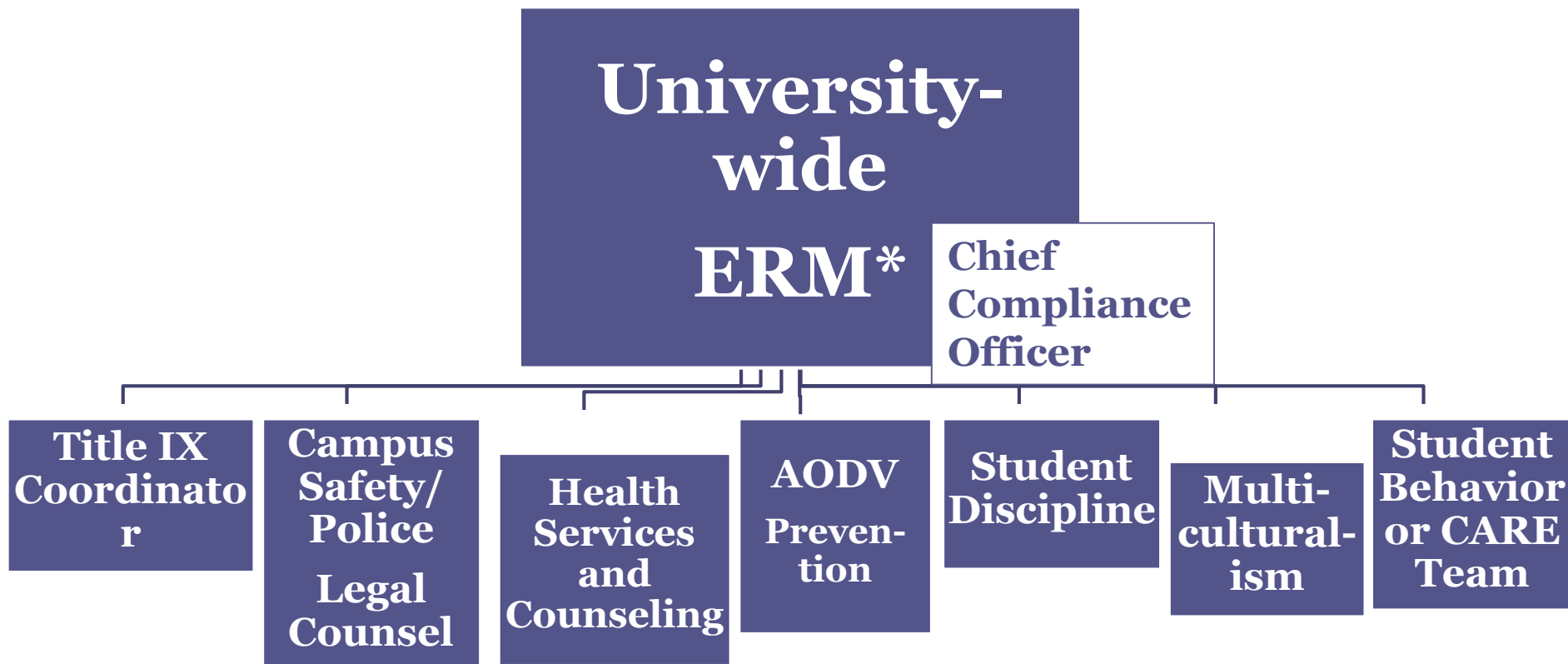
v.

Functions of CCO

- Anticipates Trends/ Developments in Law – CLE
- Prepares Legal Documents: Reviews Documents with legal Implications from a Legal Perspective
- Letter of the Law? Evidence of Compliance

- Training, Oversees Compliance Staff – Monitors Compliance Efforts – Identifies Promising Practices, Consultants, CE
- Monitors Compliance Culture, Identifies Compliance Challenges
- Spirit of the Law? Internalization of Compliance

A Well-Ordered Campus Might Look Like This...



*Other ERM functions, such as financial and research risk management, are not included in this diagram.

Leadership Area #1: Core Mission Delivery

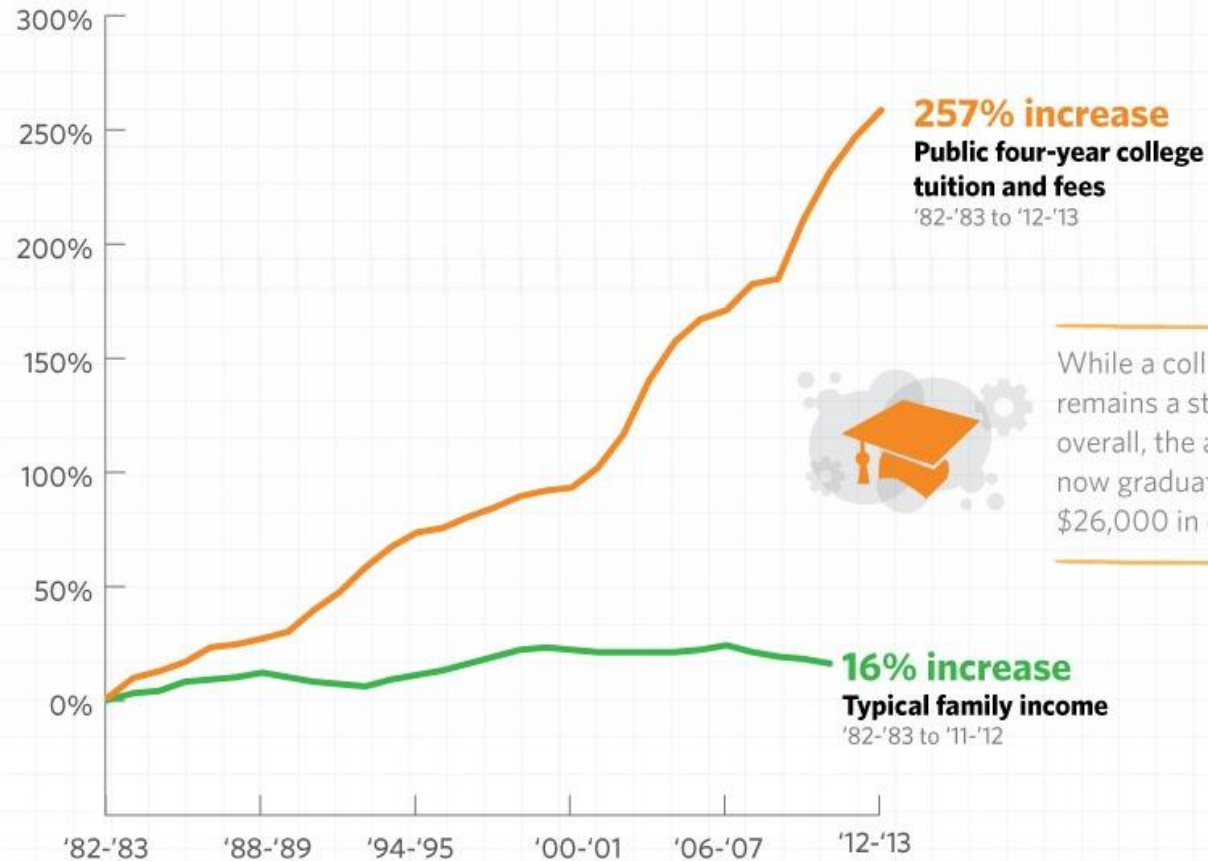
Core Mission - The Backdrop

- Lumina Foundation
 - Bologna Process
 - Degree Qualification Profiles (DQPs)/Scaffolding
- Gates Foundation
- Banks/Lenders
- Accrediting Bodies
- Economy, the Rise of Student Loan Debt, Soaring Costs
- Rise of MOOCs
- Gainful Employment
- What Is Learned/Measured Outcomes?
 - Richard Arum, *Academically Adrift: Limited Learning on College Campuses* (University of Chicago Press 2011)

The cost of college is growing out of reach

Average tuition and fees at a public four-year college have increased more than 250% over the past three decades, while incomes for typical families grew by only 16%.

Percent change
Adjusted for inflation



While a college education remains a strong investment overall, the average borrower now graduates with over \$26,000 in debt.

Source: U.S. Bureau of Labor Statistics and The College Board

From the White House and Pres. Obama

- Since 2009, Obama has tackled student lending, gainful employment in the for-profit sector, called for innovation and lowering costs of higher ed, etc.
- State of the Union Address in February 2013
- College Scorecard Released Day After Address
- Pres. Obama Speeches from Campuses in 2013
 - Knox College in July: Vows to “Shake Up” Higher Education
 - Univ. Central Missouri in July: Praised UCM’s Innovation Campus
 - Two-day Bus Tour in August (Visited Univ. at Buffalo, Binghamton University, Lackawanna College) Where He Laid Out 3-Step Approach

A BETTER BARGAIN FOR THE MIDDLE CLASS

PRESIDENT
OBAMA'S
PLAN FOR
MAKING COLLEGE MORE AFFORDABLE



PAY COLLEGES AND STUDENTS FOR PERFORMANCE

- Develop a new college ratings system for comparing value among schools and tie aid to it
- Challenge states to fund public colleges based on performance
- Hold students and colleges receiving student aid responsible for making progress toward a degree

Empower students to compare measures like average tuition, loan debt, and graduation rates

Nearly \$150 billion in federal financial aid is allocated to colleges yearly based on the number of students who enroll, not the number who earn degrees

PROMOTE INNOVATION THAT CUTS COSTS AND IMPROVES QUALITY

- Challenge colleges to offer students a greater range of affordable, high-quality options than they do now
- Challenge colleges to use technology to redesign courses and provide student services
- Encourage schools to award credits based on learning, not seat time, and promote dual enrollment

HELP STUDENTS MANAGE LOAN DEBT

- Allow all student loan borrowers to cap payments at 10% of their monthly income
- Make sure struggling borrowers know they have options to help repay their debt

Only 2.5 million of 37 million federal student loan borrowers are benefitting from repayment plans tied to their income level

WH.GOV/A-BETTER-BARGAIN

3-Step Approach

The White House,
President Obama's Plan for Making College More Affordable

(August 22, 2013)
<http://www.whitehouse.gov/share/make-college-affordable>

College Scorecards

- Produced by the Dept. of Ed's College Affordability and Transparency Center
- Currently Includes:
 - Cost
 - Graduation Rate
 - Loan Default Rate
 - Median Amount Borrowed to Attend
- In the Future, Scorecards Will Include:
 - Types of Jobs Graduates Get
 - Income
 - Other?

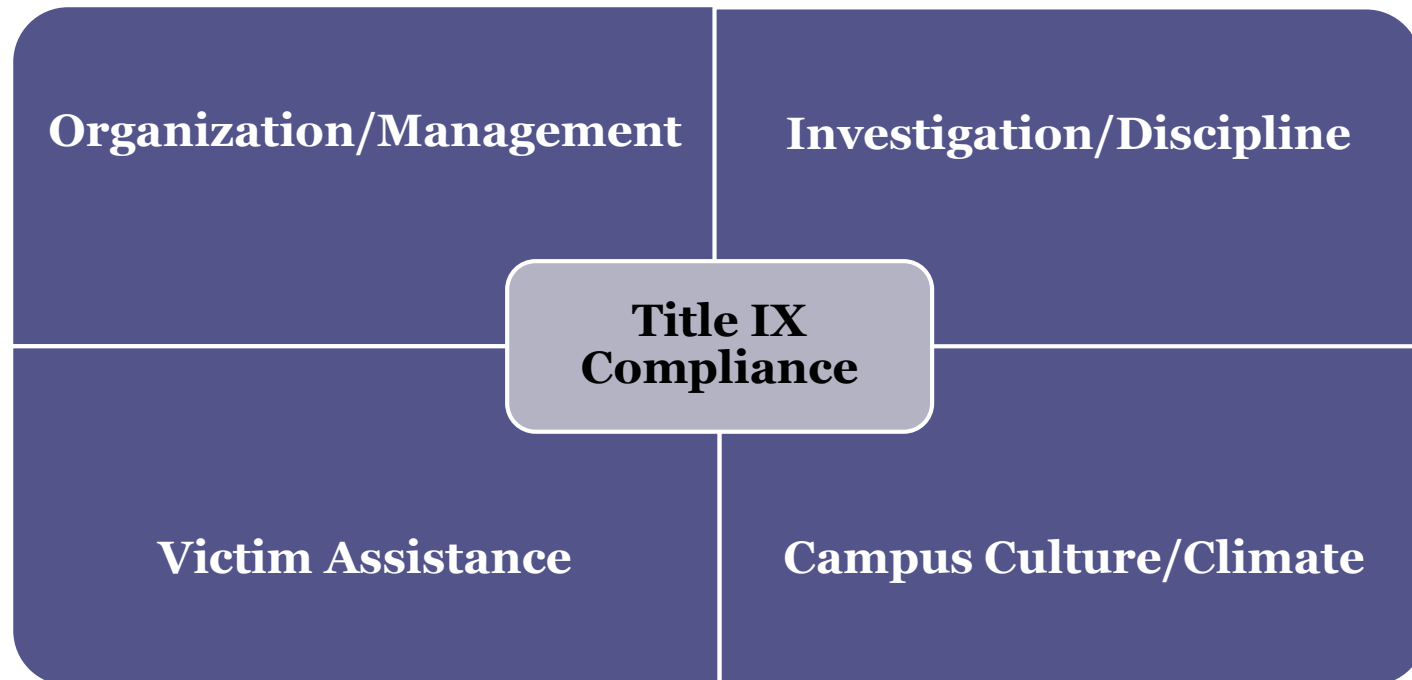
Leadership Area #2: Multiculturalism

Multiculturalism

- *Fisher/Schuette*
- Enrollment Management
 - Application → Admission → Retention → Persistence → Attainment → THRIVING
- Demographics//GenZ
- Law – Discrimination as a barrier to educational opportunity
 - Violence is discrimination
 - First Amendment Rights

Leadership Area #3: Title IX

Lake's Four Corners of Title IX Regulatory Compliance

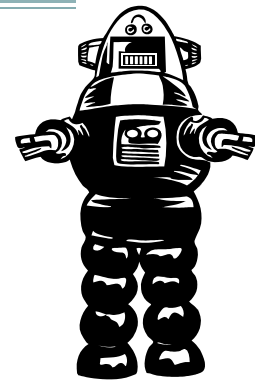


Title IX-What can we learn from recent investigations and guidance?

- Yale
- Xavier
- Univ. of Montana
- SUNY
- Future investigations: UNC Chapel Hill and use of honor codes/retaliation
- Contrast with civil liability standards for negligence (*Freeman v. Busch*) and civil liability for Title IX under *Gebser/Davis*
- *Not Alone*, a report from the White House Task Force to protect Students From Sexual Assault
- *FAQ's on Title IX and Sexual Violence* from DOE Office for Civil Rights

Rosetta Stone Lesson for Leaders

**“Beep-beep, #6^O!@, Buzz”
The Regulators (Robot Speak)**



The Robots - Interacting with Federal Regulators of Higher Ed

- The Two Big Robots and Their Cultures
 - Dept. of Education → K-12 mostly
 - Dept. of Justice → Crime, not Higher Ed
- Mandates to Collaborate
- Who Programs the Robots?
 - Congress
 - White House
- * Who Reins in the Robot?
 - * Congress
 - * White House
 - * Courts?
- * Who “Influences” the Robot?
 - * All of the above
 - * Interest Groups
 - * Newspapers (Chronicle)

How Does the Robot Operate and Communicate?

- APA
 - Rule-Making
 - Negotiated Rule-Making
- APA- Adjudication
- “Guidance” – “Dear Colleague”
- Resolution “Agreements”/Letters of “Findings” [Not Guidance]
- Informal Communications
 - Website → Blog; Press Releases; Speeches; Media Advisories
 - Non-Website (Dialogue) → Representatives to Meetings; Regional offices

The Regulatory Horizon - What Might the Robot Say/Do Next?

- Increased SDFSCA Enforcement – Biennial Reviews?
- Mandated Care Teams?
- Tying Regulatory Compliance to Financial Aid
- President Obama's Affordability Agenda, Scorecards, Core Mission Delivery
- Title IX, SaVE, Clery, VAWA Developments
 - *FAQs on Title IX and Sexual Violence* released in April 2014
 - Watch for UNC Chapel Hill Resolution
 - New White House Task Force to Protect Students from Sexual Assault (*Not Alone* report)
 - Negotiated Rule-Making

Leadership and Compliance U.

Don't Let Compliance Efforts Undermine Your Core Educational Mission!

Facilitator U.

v.

Compliance U.

Student as “Visitor”

v.

Student as “Consumer”

Educational Process

v.

“Due Process”/College “Courts”

Focus: Educational
Mission

v.

Focus: Technical
Compliance/Due Diligence

Skill Sets of SSAOs/
M.Ed., Ph.D.

v.

Legalists/J.D.

Shared Responsibility

v.

Oppositional

Academic Freedom/
Administrative Autonomy

v.

External Policy Direction

Lawyer as Collaborative
Resource

v.

Lawyer as CCO (NO!)

Fight Against Compliance U.

- Focus on the Spirit of the Law
- Be Proactive
- Find Educational Solutions
- Embrace ERM
- Fewer Legalisms
- Need for Fair, Balanced Accountability for Safety Based on Science
- Evolution of Student Affairs Into an Academic Profession
- Interdisciplinary Approaches
- Learning Science
- ***Compliance is a goal, a process, not an end state!***
- ***You are not in compliance! Do you really want a gold medal? – Yale, Montana, etc.***