

Challenges in the Changing and Litigious Environment of Higher Educationⁱ

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Fitting the Pieces Together

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“The organization lacks effective checks and balances, does not have an independent safety program and has not demonstrated the characteristics of a learning organization...Changing the organization’s culture will be the real challenge.”

~ Columbia Accident Investigation Board – August 2003

Recent trends related to tort claims in higher education coupled with increased state and federal legislation have prompted institutions across the country to examine their role in enhancing safe learning and living environments for their students, faculty, staff, alumni and guests. This process of reflective evaluation has resulted in a need for administrators to re-examine how they define the student/university relationship outside the classroom. Based on the outcomes of this evaluative process, Student Affairs professionals are actively engaging in the creation of broad-based risk management initiatives to raise the awareness of and enhance the ability to effectively manage the multiple complexities inherent in today’s society.

Over the past 6 years, the author has had the opportunity to serve as the point person for the design and implementation of such a program within two distinctly different Student Affairs programs. One institution’s focus was on the management of risks associated with events and activities coordinated by registered student organizations, while the other has focused on the implementation of proactive risk management into the operations and services of The Division of Student Affairs. Throughout the course of developing the programs, one

underlying theme has consistently comes to light, the importance of focusing efforts not only on creating systems and protocols, but on the changing of the institution's culture. In this session we will discuss strategies for developing a fully integrated risk management model aimed at changing institutional culture.

The author has found that the influence an organization's culture has on the mitigation, or in some cases, facilitation of risk is profound. The 2000 Bonfire Commission Report generated by an independent team of investigators following the collapse of the Texas A&M Bonfire in November of 1999 concluded that: "Cultural bias on the part of the university administration and staff resulted in several missed opportunities in reactive risk management of Bonfire, resulting in failure to identify that the Bonfire structure had grown too large to be constructed using past practices." ⁱⁱ Specifically the Commission identified the following characteristics of the organization attributed to the tragedy;

- Cultural bias in decision-making resulted in organizational tunnel vision.
- There was no Independent Internal Oversight used as a method of critical evaluation for Bonfire organizational oversight.
- TAMU administration functioned reasonably well in a mode of reactive risk management. However, they failed in the area of proactive risk management.
- Evidence was conclusive that the TAMU administration was not always successful in correcting unsafe and unproductive Bonfire behaviors in the reactive role of risk management.
- Bottom line – the TAMU organizational culture is such that no one at TAMU questions what independent observers would.

Similar cultural influences were identified in the report generated in 2003 by the Columbia Accident Investigation Board. In a 248-page report that took seven months to generate, the Board said the shuttle was not "inherently unsafe" but issued a series of twenty-nine recommendations for safe return to flight. Of the twenty-nine, six focused on organizational

change, identifying NASA's blind spot as believing it had a strong safety culture.ⁱⁱⁱ Both independent review teams cautioned the organizations that changing their cultures to reduce incidents of loss would be the greatest challenge.

A review of traditional organizational theory supports the challenge that changing culture is a major obstacle when attempting to implement new initiatives or ideologies. While both Texas A&M and NASA were attempting to identify strategies to respond to critical incidents, the author's experience when developing a proactive risk management plan devoid a precipitating incident indicates that the challenge of leading an organization to change merits attention. Traditional organizational characteristics such as the propensity to only learn in crisis, to be infused in their own values, and the fact that they will do anything to survive present barriers to success, particularly when prior philosophies of by-gone legal eras advised against proactive engagement with students and campus life.^{iv} Additionally, large organizations tend to replicate performance, resulting in self-perpetuating practices that do not lend themselves to regular review.^v

Acknowledgement of traditional organizational characteristics, in conjunction with the influence an institution's culture can have over safety protocols, calls for institutions to develop proactive risk management strategies that do more than create paper trails or complex administrative systems. The end goal must be creating systems that change institutional values and philosophies to match the desire for mitigating risk. Specific to the advancement of student learning, institutions should seek to implement programs and processes to assist students, faculty, and staff in learning to identify the potential and perceived risks involved in the events they coordinate, or participate in, as well as to develop strategies for the use of value-based judgment skills to eliminate, limit or accept those risks. Three key strategic

efforts have proven to advance efforts to design such a program; establishing proactive risk management as an organizational priority, identification of a guiding philosophy, and development of key staff, faculty and administrators as risk managers.

Establishing Risk Management as an Organizational Priority

Bill Hoye shares with us that “the best defense to the proliferation of tort claims is a good offense, in the form of reducing the risk of injury and harm to students, faculty, staff and guests. **To that end, college and university administrators and their counsel should invest greater thought, time, energy and resources in preventative law,** risk assessment, training, orientation and educational programs for faculty and staff.”^{vi} While many campuses are actively involved in the development of risk management resources within specific areas such as student clubs, study abroad programs, laboratory operations, etc., those institutions that work to advance efforts on a broader institutional level that pulls together independent efforts will experience greater success. Establishing campus safety as an institutional priority necessitates the development of partnerships among university administrators, counsel, Environmental Health and Safety professionals, campus safety officers, student leaders, staff responsible for the coordination of services to students, and faculty. Through these partnerships, a campus community can begin to influence change. Identification of risk management as an institutional priority can take many forms; the drafting of a strategic objective to enhance risk management efforts, the development of risk management specialist positions within individual units either as full-time staff or by adding responsibilities to current duties, or the allocation of fiscal resources to proactive efforts. One model of institutional commitment can be found at Texas A&M University. Under the leadership of

President Robert Gates, the institution has developed a university-wide commitment to proactive risk management. Through the Office of the President it has been clearly communicated that executive management supports, advocates and expects a university-wide commitment to risk management. Recognizing that many departments and units across the campus had models, processes, and procedures in place to manage risk and compliance for specific areas of responsibility, a new initiative was developed in 2004 with the establishment of the University Risk and Compliance Office. This new unit was established specifically to coordinate university-wide efforts related to risk management and to facilitate the sharing of information and build on various units strengths and initiatives as they relate to risk management efforts.^{vii} What makes this model ideal is the fact that independent departments and units are allowed to pursue risk management strategies that fit within the framework of the services they offer. For example, Residential Life, Academic Affairs, and Student Activities all have individual risk managers that coordinate programs geared towards specific areas of operation. In addition to the establishment of an institutional office to coordinate efforts, universities may choose to establish staff and volunteer expectations that clearly identify risk management as a top priority. Examples of this can be found in the development of the Risk Management Team at Arizona State University through which risk management is added to job duties/responsibilities of individual members (appendix 1) or in the Advisor Agreement Letter designed to clearly communicate expectations to faculty and staff serving as advisors to registered student organizations (Appendix 2). Some institutions have established required risk management training for student organizations while others have set expectations for the addition of risk management officers for high-risk student clubs (Appendix 3). All of the above-mentioned efforts, or any combination of them, will serve to

advance institutional efforts to integrate proactive risk management into the campus culture.

A Guiding Philosophy ^{viii}

A critical element when integrating a proactive model of risk management into an institution's culture is the identification of a unifying theoretical framework that is aligned with the institution's core values and mission. This foundational philosophy should serve to guide all efforts towards the advancement of pro-active risk management while providing opportunity for focus on the empowerment of both students and staff to continue the design, development, and facilitation of programs, events, and initiatives grounded in the pursuit of student as well as staff development and excellence. To this end the philosophical framework should guide not only traditional risk management efforts, but overall student development efforts. Any imperatives developed for the campus should be rooted firmly in such a philosophy and have the support of stakeholders' campus and community wide. Both Texas A&M and ASU, as well several other institutions across the country, have identified the facilitator philosophy adapted from the facilitator model offered in *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Life?* as their unifying philosophy.^{ix} The authors of this book promote the concept of a facilitator university that seeks to operate within an environment in which administrators seek to **partner** with students and **share responsibility** for management of campus life rather than allocating it unilaterally or not at all. As related to risk management work, the facilitator model encourages members of the university community to collaborate on the promotion of a positive university –student relationship. The philosophy calls for the development of a system that allows students, staff, and faculty to operate within an educational environment that helps individuals make intelligent, fair and reasonable choices within the boundaries

established by state, federal or local laws, institutional rules/policies and the educational mission of the university.

Adoption of the facilitator philosophy allows for a clear identification of the role of **both administrator and student** in the advancement of a pro-active environment, thus enhancing the probability that a deeper impact will be made. The administrative role in the partnership requires that we abandon the thinking of legal eras of the past and accept the newly defined responsibility voiced by the courts in recent tort liability cases involving colleges and universities. Institutional leadership must clearly communicate expectations for commitment to actively engaging in risk identification and mitigation strategies to staff and students and respond appropriately to decisions and/or incidents that are not aligned with expectations while intentionally designing proactive processes to empower staff to create a safe and productive environment. Leadership must continue to utilize General Counsel to frame strategies for meeting the challenges of administrative responsibility, being careful to allow the law to guide efforts rather than direct actions. The student's role in the partnership requires that each accept responsibility as both individuals and members of a community. They too must recognize that the environment of Higher Education has changed and that as adults they have the responsibility to actively engage in efforts to proactively respond to that environment. Students are responsible for the safe and effective management of their events and like administrators they must respond when their peers choose to act counter to the intended culture of good decision-making and campus safety. The balance of rights with this responsibility calls upon our students to embrace the proactive processes that serve as the foundation for their development as partners with the institution.

In addition to identifying a guiding philosophy, we must also redefine the concept of

risk management. Through the course of the past five years via interactions with hundreds of staff, faculty and students from the across the country, the author has found that the number one barrier to engagement in proactive risk management is manner in which we as educators have often defined risk management. Rules, policies, and a litany of “thou shalt nots” have historically been the topics covered in risk management programs. A reconceptualized approach to risk management necessitates a definition that takes the campus community beyond policies and compliance, while these are important components, a successful proactive system will adopt a definition that incorporate the **process** of identifying the potential and perceived risks involved in campus activities and operations. It will also include **monitoring** organization activities and **provide opportunity** for campus community members to **taking corrective actions** and proactive steps to minimize accidental injury and/or loss. The types of risks we are seeking to identify and mitigate should also be defined. Again, our traditional approaches to dialogues about risk lead campus community members to only think of physical risks. This perception of risks only being those things that cause injury, death, or damage can result in poor buy in from individual who do not readily see the inherent physical risks in the events, operations, or services. If I do not think my event will cause injury then I will not think I need to be bothered with risk management. To broaden the campus communities understanding of risk and enhance individual buy-in for university efforts to mitigate risk, consider the following:

- **Physical** risks can include things such as food poisoning, injuries that may result from physical activities, injuries that may result from travel related accidents
- **Reputation** risks are those things that may result in negative publicity for your organization, staff, members, the institution, and/or the venue where you are holding event.
- **Emotional** risks are those things that can cause a participant at your event or seeking

your services to feel alienated or that negatively impact the feelings of a member or members of the campus community

- **Financial** risks are those things that negatively impact the fiscal stability of your organization and/or other organizations financially supporting your event and/or services
- **Facilities** risks are those things which may cause property damage, prevent your event from being held (bad weather, not enough space for the number of participants, lack of equipment or materials needed for the event)

When an institution recognizes that they may have created an understanding of risk management that is far from appealing to most students, faculty and staff, and take actions to change that understanding they will create an environment that facilitates broader institutional support for efforts.

Developing Risk Managers

The risk management professional is a manager that knows and advocates for the risk management process and can effectively communicate and lead the process within the organization to ensure continuing risk evaluation and mitigation.^x The development of risk management skills in all students, staff and faculty should be the objective. While the probability that not all campus community members will become proficient risk managers is high, efforts should be made to provide training and development opportunities for those that have an interest in learning or whose job duties necessitate it. The Arizona State University Student Affairs Risk Management initiative was established to oversee and coordinate the integration of proactive risk management practices into the services and operations of the Division of Student Affairs. To this end, the program has focused on the continued professional development of division staff, faculty advisors to student clubs, academic

partners, and most recently senior level administrators within the division. While the Assistant Director assumes greater responsibility for the oversight of risk management efforts all staff is expected to actively engage in the advancement of the program. Certain staff has been identified as liaisons to the risk management program and serves as unit representatives on the Risk Management Team. These individuals are exposed to a higher level of training and regularly meet to discuss key concepts of proactive risk management. Their role within their individual units and/or departments is to act as the “specialist”, taking lessons learned back to their colleagues and assisting with research, resource design and student outreach efforts. (See appendix 1)

Staff development can be achieved through classroom style training programs, sharing current literature on risk management related topics, or participation in external programs and conferences that feature risk management education. In an effort to assure that members of the campus community are afforded training opportunities that will enhance their risk assessment and mitigation skills, the Risk Management Team at ASU has developed a set of core competencies for risk managers. Persons serving as institutional risk managers, insurance providers, faculty that teach risk management courses, and current literature were consulted to develop the list of core competencies. Although this list is not all-inclusive, it serves a solid foundation for the development of risk managers. (Appendix 4) Members of the campus community or outside consultants that have some measured level of expertise in an identified area facilitate staff development.

Conclusion

The re-conceptualization of the university/student relationship with an emphasis on the reduction of risk and injury was precipitated at Texas A&M by a crisis resulting in loss of

not only lives, but a long-standing tradition of the University. At Arizona State University, the process was initiated because of lessons learned from TAMU and an innate awareness on behalf of executive administration of the importance of pro-actively engaging in risk management practices. Both efforts have attained some level of measured success and both have struggled to overcome the challenges of shifting organizational culture. Both have worked against services becoming little more than a paper process or another hoop for students to jump through as they seek to engage in campus life. Both are striving to change institutional culture.

Perhaps complete change will never be realized, the natural characteristics of complex organizations, the ever-changing composition of the campus community, and competing strategic priorities will necessitate intentional and continual efforts. Keeping proactive risk management on the executive administration's radar, a firm commitment to a guiding philosophy that supports proactive risk management, and enduring staff and student development opportunities must remain at the forefront of efforts... **Changing the organization's culture will be the real challenge**

ⁱ Adapted from paper presented for 2006 Stetson Conference

ⁱⁱ Bonfire Commission Report, Texas A&M University Spring 2000

ⁱⁱⁱ Extracts form the Columbia Accident Investigation Board www.caib.us/news/report/default

^{iv} See R. Bickel & P. Lake, *The Rights and Responsibilities of the Modern University; Who Assumes the Risk of Colleges Life*, 1999

^v David Parrott, Associate VP of Student Affairs, Texas A&M University, staff development program 2001

^{vi} William Hoye, *Understanding the Analytical Approaches of Courts in Negligence Cases*, Stetson 2006

^{vii} For detailed information on the recently established University Risk and Compliance Office see <http://urc.tamu.edu/default.aspx>

^{viii} Portions of this section adapted from a previous work by author titled; *Tort Liability Update and Student Tort Claims: An Update of Recent Tort Liability Cases and a Continuing Discussion of Strategic Initiatives in Risk Management*, Stetson 2005

^{ix} Bickel and Lake

^x Louisot, Jean-Paul *What Makes and Effective Risk Manager?* Risk Management Magazine Fall 2005