

## **What We've Learned About Preempting Crises at Universities**

Sam Gandhi, Wendy Lazerson, and Karen Popp  
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### **Sam Gandhi:**

It's not just Varsity Blues. Universities are facing different kinds of crises than they ever imagined before, from COVID and Title IX to sports scandals and cyber breaches. As these institutions find themselves in legal and political crosshairs, their legal counsel are called on to mitigate and even preempt potential disaster. How do they plan and execute these strategies, and what makes universities unique compared to other institutions? We'll find out in today's podcast.

### **Karen Popp:**

You have the professors, the students, the staff, the parents, the alums, the fans. And with social media and the way things go viral, you know, at any moment something can just explode.

### **Wendy Lazerson:**

While discrimination and diversity has always been an issue, it has taken on new meaning with the Black Lives Matter movement. With the COVID era the issue of safety is very, very much on the mind of universities.

### **Sam Gandhi:**

When you talk to universities and boards of trustees and administrators, what are the things that they worry about?

### **Karen Popp:**

The unknown.

### **Sam Gandhi:**

From the international law firm Sidley Austin this is the Sidley Podcast, where we tackle cutting-edge issues in the law and put them in perspective for business people today. I'm Sam Gandhi.

Hello and welcome to this edition of the Sidley Podcast, episode number 23. Today, we speak with two thought leaders on the new legal realities facing universities, Wendy Lazerson and Karen Popp. Wendy is co-chair of

Sidley's Labor and Employment practice and a partner in the firm's San Francisco and Palo Alto offices. She also serves on the firm's COVID-19 Task Force and represents employers in their workplace disputes, including jury trials and arbitration. She also advises employers on workplace issues and conducts workplace investigations.

Karen Popp is the global co-leader of the firm's White Collar: Government Litigation and Investigations group and a partner in the firm's Washington, D.C. office. She focuses her practice on high-stakes matters with legal, political, and public relations components. These include global internal investigations, defense against the Department of Justice and SEC Enforcement investigations, Congressional investigations, OIG and State Attorney General actions, corporate compliance, and litigation. Karen was recently named by *The National Law Journal* as a Crisis Leadership Trailblazer, an honor given to a small select group of leading lawyers who have had a significant impact on clients through times of crisis, and demonstrated a track record of successfully steering clients through complicated and challenging high-profile matters.

Wendy and Karen, great to have you on the podcast.

**Wendy Lazerson:**

Thank you for having me. Great to be here.

**Karen Popp:**

It's great to be here. Thank you.

**Sam Gandhi:**

Wendy, I'm going to start with you. Universities are different animals than corporations and other kinds of institutions. How unique are the crises that afflict universities? I mean, the crises don't seem very unique, but it's the universities that are unique themselves.

**Wendy Lazerson:**

Sam, you're right universities are microcosms of society, but there are complications. Some of the complications are based on the constituencies, ranging from youth, parents, alumni, employees, and then others are based on certain legal requirements that corporations usually wouldn't face, so these complications can reflect themselves in a variety of ways. For

example, with the COVID crisis that we face we have a duty to provide a safe workplace under OSHA requirements, but then we've got a student population that's residing in the school, concerned parents, and sometimes irate parents who are demanding refunds and lawsuits because they're paying full tuition for a remote experience.

We've got Title IX, which requires that universities that get federal funding have equality in education and that includes scholarships, athletic scholarships, and financial aid. So, we've seen some recent lawsuits by athletes alleging a failure to have equal opportunity there for women. And then we have alumni with their competing interest about, perhaps, wanting a winning sports team. We have sexual harassment with the Title IX implications. But we have privacy issues that arise a little differently in the university or school setting because of federal laws and state laws that regulate who can have access to records and who can see certain information.

**Sam Gandhi:**

And Karen, what is it about universities and colleges that make them more susceptible to these unique types of crises?

**Karen Popp:**

It really is a combination of factors. It's almost like, you know, a perfect storm that we don't really see in any other place. A university is like its own little world. You have the professors, the students, the staff, the parents, the alums, the fans, and the surrounding community. If it's a state school you've got government that regulates and gives it its budget. And then you've got the general public with high expectations of higher learning. And the fact that you've got young, immature students who are eager to engage in adult-like behaviors. They've got their residential life, either on or near campus, without the type of adult supervision that their parents may have given them at home. They may be away from home for the very first time.

And then you couple that with parents' high expectations and demands on the university that their kids be kept safe, but that they're allowed to grow up and mature, but at the same time get an excellent academic education. And in a university setting you've got a lot of autonomy and freedom. You've got freedom of thinking, freedom of voice, exploration, you're expected to go out and try things. You've also got professors who are

tenured in an academic freedom setting and that may generate a feeling of being sort of Teflon or perhaps even above the rules. There's enormous pressure on the university in this sort of setting, and it's a huge business, the university is a huge business. It's impacted by a successful sports teams' seasons, academic reputation, but at the same time being a fun environment to be in while being safe.

All of these factors really increase the number of activities where mischief can happen, but it certainly is the type of mischief, type of actions, that will land you on the front pages of the newspaper, will get the community in an uproar, and even Congress can weigh in on it. Certainly, your local legislature can, your parents can, and you can have demonstrations on campus. And with social media and the way things go viral, you know, at any moment something, what might seem to be small when it's in its own little world on a university campus, can just explode and run rampant like a fire. While at the same time, there is pressure on the university to run a successful business.

**Sam Gandhi:**

How much does Title IX drive a lot of the litigation relating to universities? And we've seen a lot of it focused on sports sexual harassment, but in fact Title IX is really not about sports, and the word sexual harassment actually doesn't even show up in that Title. But how much of Title IX is really driving a lot of litigation and adversarial proceedings at schools?

**Wendy Lazerson:**

I think that Title IX drives quite a bit because the mechanisms provided for Title IX, which are currently in something of a state of flux, impact how disputes are resolved and who can have a say. And how a dispute and the resolution of that dispute may impact somebody, a student, for the rest of their lives; when you have a young student who, for example, may have had an incident. So, I think Title IX plays a very important role not only in the legal requirements and the rights that it provides for, but also due to the fact that it provides a mechanism and a process for resolving these disputes.

**Karen Popp:**

And Title IX has a vast application. I mean, for example, hazing if it has any sort of sexual connotation to it, which a lot of hazing does. Parties where

people, you know, hook up with each other and then the next day have second thoughts. And it's also a type of activity, type of law that will land on the front pages. But you know, we've seen on university campuses a wide range of other scandals. We've got fraud, alleged fraud that can happen at the academic level, alleged fraud that can happen at the sports level. Athletes, in order to play, have to be able to stay in school, so we've seen academic scandals. And we've got a lot of cyber issues that can happen on a college campus. And to the cyber point, you've got enormous data that's got to be protected.

We've also had school shootings. We've got alcohol and drug abuse. Because the legal age is now 21, when I was in college it was 18, but it is 21. You've got enormous pressure on the fraternities and the sororities, and other organizations, other events happening where alcohol might be served. And then students get injured and get killed. You have a shooting on campus, you have anything that impacts the safety of students, rape or whatever it is, it is a crisis for that university. You know, I served on a board of trustees of a major university, chaired it, chaired its foundation. I'm in other different roles in two separate universities in that way. I was a student body president when I was in college. The first female in the whole UNC system to have done that. And back then, Congress was after the UNC system for not integrating faster.

There was a lawsuit by the HEW and as a student body president I went to Washington for that. So, you can come at a university from all different angles, but guess what's happened in the last 18 months? COVID. And COVID has created an enormous amount of pressure on universities and those constituencies, and the community around them related to COVID compliance. So, universities have to have — and I know we're going to get this, you know, question Sam — but they have to have a lot of planning, procedures, processes in place to prevent, detect, and react when things happen.

**Sam Gandhi:**

So, let's go to that, Wendy. In general terms, what are the first items university leaders need to consider when, say, a crisis, or a situation like that, appears like the ones we've been talking about?

**Wendy Lazerson:**

Well, Sam, I think the first thing they have to do is be ready long before the crisis occurs. So, even before the crisis arises, universities have to have a team in place that's going to be the crisis team, so we're not fumbling around at the time we're facing a crisis to figure out who are the experts that can address it. They should have their PR team also lined up and in place, because there's going to be a competing interest between transparency and privacy, and all the implications there. They have to think about all of the legal implications, what laws apply, what are the potential risks, the legal liabilities based on all the various constituencies. And then, of course, there's the reputational issues that go along with making the decision about how we're going to approach any given crisis.

**Sam Gandhi:**

So, Karen, in terms of preempting those events, how does the board of trustees or the administration identify potential problems ahead of time? What are the issues that could potentially warrant an investigation?

**Karen Popp:**

So, one of the things you've got to do is to constantly be assessing the risks in your institution. You've got to be proactive, you can't just be reactive. One idea is to monitor social media. Look at the student newspaper. Have that on your monitoring process. What are groups doing on campus? What are students upset about? Listen to the different constituencies. Have a hotline. Have ways for people to report concerns or alleged wrongdoing. Encourage people to speak up. Have a procedure to assess the issues as soon as you do get some sort of "speak up" allegation and investigate it as needed. You've got to have the right folks in place to look into those issues, so you want to make sure you've trained the inside people to investigate properly. You hire outside folks when needed.

You also need to have a culture of compliance, so that your various constituencies understand that this is what we're about. This is our environment, people have to do the right thing, people have to say something when they see something. They have to help to alert the university when things happen, so the university can deal with it. You want to have clear rules so that people understand what is the right thing, train on it, keep that updated risk profile that you're constantly assessing. Plan, plan, plan, plan. A crisis can hit a university from many angles, so you want to have scenario planning. It'll help you get good at identifying things that

might go viral. Because keep in mind, we all know that these handheld devices coupled with social media can make almost anything go viral and become a real branding issue for a university.

So, have your experts on a bat phone and ready to call them, so that you can react quickly, methodically, and effectively. Time is truly of the essence when you've got something brewing. Which is, frankly, why I personally at the practice that I have, which is a crisis management practice, I always keep my phone next to me at night. Because literally minutes can happen when you detect something. You have got to react quickly, and you have to know what you're doing.

**Sam Gandhi:**

You're listening to the Sidley Podcast and we've been speaking with Sidley partners, Wendy Lazerson and Karen Popp, about the types of crises universities face, and the ways they can best mitigate them or even preempt them. So, a few weeks ago a university reached a settlement with the female athletes who sued alleging violations of the federal Title IX gender equity law, and as part of that settlement the university agreed to add an additional women's sport. So, Karen, this is just one of just a ton of cases that continue to be in the news. And so, if I'm one of the stakeholders of a university, what are the first things that need to be done when an issue like this emerges? And when I say a stakeholder, I'm really talking about the board of trustees, administration, people who are really operating the university and responsible for these things.

**Karen Popp:**

One of the first things you've got to do is to recognize the potential impact on the university. Crisis is one that involves significant reputational damage, not to mention loss of money; so you've got to react accordingly. You need to centralize coordination in dealing with the crisis. You have to have the right people at the table. You have to have a leader of those people. You know, a university will have lots of people involved, so you need to have one team dealing with it and make sure they are a combination of public relations, legal, and the appropriate internal constituencies. You definitely want to involve the board of trustees, if it's big enough. You want to hire outside expertise, if it warrants it.

Having outsiders with the expertise — and possibly independent — can really help with the image of how the university is handling the situation if it goes public, a university not being perceived as circling the wagons. But don't get ahead of yourself. Don't get ahead of the facts and this is one of the things that so many institutions and organizations, and frankly companies, feel like they have to do when there's a lot of press pressure to make a comment. You want to make sure that if you speak that you are not going to say something that later is proven to be untrue. So, you want to make sure that when you are speaking publicly that you know for certain that those are in fact the facts. And that can take time to understand the facts.

If it's a significant issue, you're going to want to conduct your own investigation. Hopefully, you can do it without it becoming public, but if it does you still will have to do that in parallel with handling the crisis. You want to involve your board of trustees, perhaps even have them oversee it. And then when it is time to go public, or if it is already public, and you're having to deal with it, you've got to have clear and effective communications. You've got to make sure, as I said, not only is it accurate, but it's also consistent with everything that you have said before. You've got to make sure you're not violating any rules, any policies, any laws in releasing the facts that you're releasing.

And then, of course, you've got to be worried about the waiver, the privilege. If, in fact, you're gathering facts of a privileged review because there could be litigation. And then, of course, you do need to have a communications plan with your various constituencies. You may have to have a spokesperson go to some of these groups on campus and beyond to explain what happened. And then, of course, you're going to be wanting to remediate as you're dealing with these things and then understanding what that remediation is so that you can also speak publicly about it at the right time.

**Sam Gandhi:**

I'm going to talk to you both about one thing, which is what's unique about universities, is you're dealing with the students who, yes, we treat them as adults, because they're generally over 18. But at the end of the day, they're really students, and you're not really going to be able to control students like you would maybe, potentially, have leverage over an employee or a



vendor or somebody that you're in a contractual relationship with. Maybe each of you can kind of comment on how universities approach that student stakeholder in the midst of a crisis and things to do and not do.

**Karen Popp:**

So, Sam, you're absolutely right. A student holds a very unique position on campus, because the student is the consumer, and normally in a corporate setting your consumer is at arm's length, that's the one you're advertising to trying to recruit. And so, the student is on campus consuming your product, having already paid for it, but they also have to abide by rules to be there, and they have to abide by rules to get there. And so, when there is an issue, you know, it's a combination of utilizing your policies and procedures in place to deal with the student, while at the same time understanding that student could up and leave any moment. And frankly, you may be asking them to leave.

**Wendy Lazerson:**

Yeah, I would agree with Karen and add that while the student is a consumer, you've also got the complication that often the parent is the one paying for this consumption. So, you get into very...

**Sam Gandhi:**

Oh, take my word for it I've got lots of experience with that.

**Wendy Lazerson:**

Okay. So, we probably all do as parents too, let alone as lawyers.

**Sam Gandhi:**

Yeah.

**Wendy Lazerson:**

So, it's very interesting when you have to deal with a parent group that doesn't realize how few rights they may have while they're footing the bill because of the privacy laws and the rights of students to their privacy. So, that's a whole overlay that you wouldn't face out in the commercial setting. And I think also, you know, as we touched upon Title IX, that's something that doesn't exist in the commercial setting either. So, when I talked earlier about the processes, the framework that Title IX provides; there has been a very big debate between the rights, for example, with the sexual

harassment component of Title IX, the rights of the accuser versus the rights of the accused and what should the processes be. Should this be, well, it's a university we should have an informal setting and an investigator, or should it be like an adversarial hearing with cross-examination? So, this whole debate also reflects the politics of our day and who is in the Department of Education.

**Karen Popp:**

And also, Wendy, to that point, I would add that you know a lot of campuses, a lot of universities, have a judicial system that is run by the students, run by peers, and that you would come before your peers on allegations of wrongdoing. And at what point does the board of trustees, the senior leadership, get involved? And how do you have to comply with those policies in place that are run by student peers?

**Sam Gandhi:**

One follow-up on that, Karen. Where does the judicial system that the university sets up start and where does law enforcement and civil judicial proceedings really begin? And how do universities navigate that dichotomy?

**Karen Popp:**

So, every university is going to be different. And certainly you've got public universities and private universities, and that is one big difference. Obviously, a public university is on public land even though it's university land. But generally speaking, most campuses, most universities, have their own police departments that have jurisdiction on campus. But if there is a serious incident on campus, obviously, you will bring in law enforcement. And then we know a lot of conduct happens off of campus.

So, my experience is universities have very good relationships with the local police and God forbid you have something significant that you have to call in the federal government — and that can happen. I would encourage any university that hasn't done this, and I'm sure most have, to make sure you've got great relations with your local and federal authorities. So that if something does happen on campus, you can bring them in quickly, and if something happens off campus they can contact you quickly.

**Sam Gandhi:**

Wendy, I'm going to bring you back to the legal and the policy that applies in these cases. What comes into play in a crisis involving an educational setting that may not be in a commercial setting? What are the laws that we're talking about besides Title IX?

**Wendy Lazerson:**

Well, you have the FERPA, the Family Educational Rights and Privacy Act, and that governs who has access to information. Parents may be shocked to find out that when a student turns 18 they may not have access to their child's records. So, if you take an adversarial proceeding and perhaps some allegations made against a student, how involved a parent can be and the parent's right to know may be affected. And just the way these disputes get resolved and what people's rights are to due process are also impacted by some of these laws that apply to the universities.

If people can understand what these frameworks are so that they have expectations and they understand their responsibilities. This could help prevent crises from getting out of control and being magnified. So, for example, if you have a situation where an incident occurs and then you have a faculty member who doesn't understand, for example, the Family Educational Rights and Privacy Act. And that faculty member has access to information, and they inadvertently start talking about something that might be considered a private student record, that can be a crisis on top of the crisis. So, training and education on these unique considerations that the university faces is very, very helpful, I think, in preventing problems.

**Sam Gandhi:**

Karen, when you talk to universities and boards of trustees and administrators, what are the things that they worry about?

**Karen Popp:**

The unknown. Not knowing what they don't know. Concerns that something is happening and they haven't found out about it, and it may go viral, it may hit social media before they even know about it or otherwise, you know, it's too late. What are the resources that you need to have in order to be able to prevent, detect, and react quickly? How to have a structure in place that you get the most bang for your buck? Because many universities don't have the resources and the revenue to have the A plus structure to

prevent, detect, and react. And so, how can you get the best for the money that you can spend on this?

And universities, especially universities that are multinational, that have programs outside of the U.S., they have to think of laws like the Foreign Corrupt Practices Act, and how things can happen abroad. They can also land on the front pages in this country. But not knowing what the various constituencies are doing, and how that can bring liability and exposure to the university is something that administrators, boards, are dealing with. And making sure they have the right people in place to help deal with it.

**Sam Gandhi:**

Wendy, I'm going to pose that to you as well. What are you seeing in your experience, the newest issues that universities are grappling with?

**Wendy Lazerson:**

So, Sam, these may not be new issues, but they take on various forms with the times. So, for example, while discrimination and diversity has always been an issue, it has taken on new meaning in the recent year or two with the Black Lives Matter movement. Also, Varsity Blues raised questions about equal access to education. And that has a diversity component to it as far as underrepresented communities who may not have a rich parent capable of making a bribe.

And then, I think, with the COVID era upon us here, the issue of safety is very, very much on the mind of universities. And the safety issues go from COVID, to guns, to drinking, to Greek life. Greek life is a very hot topic and whether it should even exist. So, I think, universities are grappling with all of these issues as they become relevant to what's going on in the society around us.

**Karen Popp:**

And I would also add sports. We now see that sports are a place where you can have, you know, crises where there is a heightened expectation of having more rules in place, more compliance in place. We've seen different types of scandals involving sporting teams, and I think that there's a real, now, sense on many college campuses from the board and senior leadership level that you normally would not have. But to make sure that there are more controls in place to prevent wrongdoing, to prevent

misconduct. And if it happens, to find out about it and react very quickly to it to stop it.

**Sam Gandhi:**

We've been speaking with Sidley thought leaders Wendy Lazerson and Karen Popp about the unique legal and policy landscape for universities that experience a crisis. Wendy and Karen, this has been a great look at how universities best respond to ever-evolving crises including those that are unknown. Thanks for sharing your insights on the podcast.

**Wendy Lazerson:**

Sam, thanks so much. Great to be here.

**Karen Popp:**

Yeah, Sam, thanks so much. Great being here today.

**Sam Gandhi:**

You've been listening to the Sidley Podcast. I'm Sam Gandhi. Our executive producer is John Metaxas, and our managing editor is Karen Tucker. Listen to more episodes at [sidley.com/sidleypodcast](https://www.sidley.com/sidleypodcast) and subscribe on Apple podcasts or wherever you get your podcasts.

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