

Office of Counsel Review Committee Report

August 2018

The Ad-Hoc Office of General Counsel Review Committee (OGCRC) unanimously decided reported issues below were significant, and agreed that further investigations should be conducted. Reported issues indicate seriously negative impact on students’ learning, teaching and research activities of faculty, reputation of the university and faculty, and Wright State University faculty led professional organizations.

To gain some perspectives, OGCRC interviewed the general counsel for information specific to Wright State University, and contacted all general counsel’s office of public universities in Ohio for general information.

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1. Issues reported to the committee

A. Symposium & Professional Organizations

Engineering

“Questions asked 2 weeks in advance, never received responses

- i. sharing of participant data (names and affiliations) with other participants
- ii. liability questions regarding our venue for the reception (the Engineers Club downtown)”

“A faculty member organized a symposium. Approximately 150 researchers from around the world attended the conference. The faculty member asked for clarification on what information could be made publically available to conference participant and also about liabilities issues related to using an off-campus facility. Th faculty member never received a response to their request.”

Psychology

A faculty organized the International Symposium on Aviation Psychology that WSU has hosted on campus since 2009.

“Because of budget issues and dwindling human resources, I had to, in a hurry, secure an outside vendor to develop and manage the Symposium webpage that used to be managed at WSU. We are already a couple of months behind the curve. I have recently gotten a contract from a Vendor for \$2000 that will be paid from an Agency account (i.e., external funds). I have just been told that it may take up to 8 weeks for it to be processed. This will ruin the Symposium as we are already behind in putting forth Announcements and Call for Proposals. Standing up the webpage is an essential first step for the Symposium to move forward. It is an extremely distressing situation.”

B. Honoraria & Contract

Earth & Environmental Sciences

“In 2015, we began discussing participating in cruises on Lake Erie with Environment Canada (the equivalent of our EPA). D and A were eventually able to go on three cruises (proposed in My Ohio Sea Grant), but in my recollection we missed sending someone on the first cruise we were invited to participate in because we couldn’t get the paperwork processed in time. At the time, the Ohio Attorney General’s office was running our legal office, and they took more than three months of back and forth to review and approve of the contract with Environment Canada. They were very concerned with ensuring our exclusive rights to any ‘discoveries or inventions’ we might make, despite our explanations that we were unlikely to invent anything and that any discoveries would be of a natural scientific nature and would be published as co-authored work with Env. Canada scientists.”

“A faculty member had an opportunity to participate in special training to help the department pursue NSA certification. NSA had arranged for participating faculty to receive \$5,000 stipend

for participating. The faculty was required to sign a document stating they would participate in the training provided through an online program from a community college in another state. GC would not approve signing the agreement because the agreement referred to legal requirements in the other state. The faculty member signed up for the training as an individual without receiving the stipend.”

C. Laptop Use

“There was a dispute between a faculty member and a student regarding ownership of some research that was stored on a university laptop. The GC was consulted in September 2017 and the GC determined a solution to the problem. The faculty member/student are still waiting (June 2018) for the GC to implement the solution.”

“It has now been 278 days since September 13, 2017, when you were referred to this issue. In fact, it was April 28, the commencement day, after the ceremony was over at Nutter's, when you told me in person that the laptop will certainly be returned ‘this time’ in the coming week. That was the 3rd or the 4th promise of returning the laptop within a week. For brevity, I am only including part of the record below. Well, it has been > 50 days since that day!” (As of May 31, 2018)

D. Software & Other Purchase

Chemistry

“My issues with the general counsel’s office stem from the amount of time that they take in scrutinizing the wording of the litigation clause in every sales or licensing contract. The need for this has been explained as there being a state law restricting any litigation between the university and a vendor to a court within the state of Ohio. The resulting negotiation should involve a phone call or an email and be resolved relatively quickly, however that does not ever seem to be the case.

Further in most cases the university's portion of any vendors business is so small, that the vendor can simply respond "take it or leave it", if they so desired. It might be handy to have a brief statement describing this requirement that could be appended to requests for quotes for the purchase of items that need to go through the purchasing office.

A further impediment to purchasing is the purchasing department's inability to believe that we understand things like sole source and capital equipment. A case in point is occurring right now. We have an instrument that we need to have repaired by the manufacturer. A PO was requested covering the repair and the part most likely needing to be replaced. The cost of the part, a CCD camera, was over \$10k. The first bounce back from purchasing asked whether the part should be tagged since the cost was at the level of capital equipment. Our response that this was a replacement part and not something new. This was followed by a second bounce back asking if this was sole source. In many cases there are many sources for a replacement part, however an exception to this is scientific instrumentation.

An issue that connects both of these issues is the linear process of purchasing in WrightBuy.

If the processes of scrutinizing the legal aspects, verifying the budget, and raising any questions about the purchase could occur in parallel rather than in series, and a bit of trust that the requesting unit knows what they are doing, purchases would occur in a more timely fashion.”

Engineering

“We are being asked to get more items vetted by the GC office but it appears that the GC's office does not have the manpower to process the volume of requests being generated in a timely manner. There is a lot of material (e.g. standard contract for good and service) being sent to the GC. In many cases, the GC is requesting changes in the contract language related to liability and where legal action can be initiated (i.e. in Ohio). Many of these contracts are for off-the-shelf products that we are buying in limited number or for short-term use. The vendors are not interested in customizing contracts for small orders and this leads to delay and in some cases an inability to use state-of-the-art equipment/software in our courses.”

Science & Math

GC office reviewed and negotiated terms and conditions for off-the-shelf hardware, software, and supplies slow down the process for 3-4 months.

“Example: Purchase of software for DNA analysis (CLC Genomics), reagents (e.g. DNA synthesized in vitro from common vendors such as ThermoFisher) as well as DNA sequencing services (e.g. Univ. of Illinois research facility).”

E. Publication & Grant Delay

“Delaying the publication of manuscript by reviewing the terms of publication charges (which has been standard in academic publications for decades).”

“A faculty member submitted two grant proposals with similar titles to different funding agencies. The faculty member was summoned in person by OGC and was forced to defend against accusations of research misconduct.”

F. Public Safety

“For a few months a faculty member and department chair tried to get the OGC to issue a cease and desist order against a volunteer "gone rogue." [Lots of details omitted but there is a fear of physical violence] The issue remains unresolved by OGC but instead the police department is working with the department to deal with issues as they arise.”

G. Student Workers & Post Doc Decisions

“The 28 hour per week student work limit to comply with the ACA. Despite IRS guidance to the contrary (employees that work > 28 hours on average need to be covered), the hard 28 hour limit in WSU policy is forcing departments to close their offices for parts of the business week to comply.”

“This was indeed the case for a postdoc who was in a lab. Postdoc from Japan left the lab more than a year earlier than planned, regardless of having a Japanese fellowship to work in my lab for

an extra year. He told me multiple times that his decision was influenced by the frustration of having to wait for months to be able to obtain the reagents to do the research.”

2. Interview with General Counsel

A. General Counsel Larry Chan (as he stated)

- Secretary for Board of Trustees
- Legal representation of the University
- Volume of litigation for WSU is not real high – compared to other universities
- Staff: 2 GC’s (lawyers) – was 3 but 1 lawyer left and has not been replaced (in process now for 3rd lawyer) and 2 paralegals
- State Attorney recommends 4 attorneys
- Tech transfer pushed on GC office when those two experts left the office that handled this previously. No tech contract expertise in the GC office right now.
- Uses a triage process. He termed “in chronological order.” But may not be able to get to simpler requests in a timely manner. Target is a 2 week turn around.
- At his previous institution, contract review was one of Chan’s main responsibilities
- Now (at WSU) contracts are getting more review than in the past.
- Faculty can help by timely submissions with as much lead time as possible
- When he first came, Chan’s intent was to create training for faculty

B. Interview

Time: June 12, 2018 at 2:30 p.m.

Participants: OGC Review Committee (Tom Rooney, Chris Cline, Brian Rigling, Mike Bernstein, & Yoko Miura), and General Counsel Larry Chan

Committee: There are faculty concerns with the OGC and we are trying to determine how faculty might help. What is your view of the job of the OGC?

General Counsel: Our office touches every aspect of the university, from trustee to custodian. We provide legal representation for the university. Examples include: coordinating H1B fraud investigation, Plant Moran issues, OIG Report on Ron Wine, etc. There are over 12 current cases pending (Ron Wine, Fendley, Naraynan, Medical malpractices through Boonshoft, student sexual assault/Title IX, Dept. of Education investigation, disability discrimination, civil rights cases, injury claims, a bumping rights termination case. There is tech transfer, patents, negotiations with Premier Health, Collective Bargaining, compliance and regulatory issues, workers comp cases, athletics-related work (coaching contracts, NCAA violations, student athlete misconduct, Title IX), public records requests, etc. We also use outside counsel in contract review. Any contract that creates liability for WSU. We do Clinical Trials Alliance agreements too.

Committee: Do you use outside counsel?

General Counsel: Anytime we go to court, the AG office represents WSU.

Committee: Do you have adequate staffing?

General Counsel: I was told the optimal OGC would have 4 attorneys. We had 3, now 2. And 2 paralegals, one administrative assistant.

Committee: Do you farm work out?

General Counsel: Only court cases. (TR observes this is not correct, they farmed out collective bargaining last year).

Committee: Are you being asked to do too much?

General Counsel: An OGC is uniquely qualified to handle these tasks. All work that comes through our office needs legal review.

Committee: Should we have an in house trial attorney?

General Counsel: No. Trial/strategy can be done in house. We currently have the right mix of people. We just need 4 attorneys. When RSP lost 2 lawyers in tech transfer, it increased workload.

Committee: Sounds complicated. Are there any easy issues?

General Counsel: Even simple things can take time. We try to get to mission critical stuff as quickly as possible. We use first in-first out and triage.

Committee: Off-the-shelf terms and conditions (software). We have been doing it for years, and now it is a problem. Have there been changes?

General Counsel: No changes, we are just following contract guidelines for the state of Ohio. Contracts used to go through OGC without review. Other universities not doing this are doing it wrong.

There are some things we cannot do in contracts as a state institution. We can't indemnify. We can't auto-renew contracts. Governing law must be Ohio. We cannot do arbitration. Most software contracts violate all of these, so they need to be renegotiated.

Small software companies often do not agree to the changes we need. We issue an objection letter when signing a deal if they will not change them. Sometimes a company will pull out of the deal.

Committee: Do paralegals do any review for you, after which you follow on?

General Counsel: Yes

Committee: Are there things faculty can do?

General Counsel: We need a long lead time, a month or so in most cases. I was hoping to do a training for faculty, but have been unable to due to time limitations.

Committee: Is WSU's case load unusual for its size?

General Counsel: Volume of litigation is not heavy for its size. Toledo and Akron have more litigation than we do. BGSU was lighter. When there is nursing/engineering/medical school, there will be more litigation.

Committee: Is WSU benefitting from IP?

General Counsel: I am not a finance guy, but our IP is about 10X greater than BGSU. AT WSU, IP does yield some revenue, but not much.

Committee: Will you hire a replacement for Mia?

General Counsel: We have an offer letter out.

3. From Other University's General Counsel's Office

The committee contacted all general counsel's office of public universities in Ohio for general information, and obtained 2 responses.

A. Ohio State University, Office of Legal Affairs, Deputy General Counsel

Question: Do you review and negotiate terms and conditions for off-the-shelf hardware, software, and supplies?

Response: OSU's Office of Legal Affairs doesn't directly review routine purchasing contracts (e.g. for routine goods or services). Our purchasing department negotiates and executes these contracts (using guidelines provided by our office, as there are some contractual issues particular to public institutions that purchasing offices need to be mindful of).

Question: Are you aware of any law changes since 2016 that impacted faculty activities?

On the second question, I think you'll be best served consulting with Wright State's legal office. We don't maintain a list of legal developments categorized in a way that makes for an easy way to answer your question completely. But certainly, among other developments in the past two years, changes to the immigration/international employment environment are being closely followed for their potential impact on the ability to attract and maintain international talent. Also, as I imagine your University is already aware, the Department of Health and Human Services is introducing changes to the federal policy for the protection of human subjects in scientific and medical research and we're following that closely.

B. University of Cincinnati, Chief Risk Officer

Question: Do you review and negotiate terms and conditions for off-the-shelf hardware, software, and supplies?

Response: The review of contracts is done through general counsel. Risk Management may be asked to advise on insurance and other related terms and conditions.

Question: Are you aware of any law changes since 2016 that impacted faculty activities?

Response: Many law changes since 2016 have affected both faculty and staff employees, either directly or indirectly.

4. Recommendations

The committee finds that the current day-to-day operations of the OGC are having a significant effect on the ability of Wright State to deliver on its core mission. Therefore, the Faculty Senate should consider further action to identify solutions.

It is clear from the details included in this report and the interview with General Counsel Chan that several problems exist in the office that can be addressed as follows:

1. Timely review of requests for legal opinions or advice:
 - a. Currently GC is processing requests in the order received. This process is not working. There needs to be a process established that immediately reviews each request and determines:
 - 1) If a response is required. If not, an immediate reply to the person requesting the advice of GC or review of GC.
 - 2) A determination of the date a response is required to meet both legal time limits and time limits set forth in the request.
 - 3) Assignment to prepare the response with a reporting date to GC for approval if not being completed by GC.
 - 4) A date for GC to report to the requesting party.
 - 5) A tickler system to assure that the time guidelines are followed.¹
2. Staffing:
 - a. Based on a review of the duties of the office, including those that are GC's responsibility which in other universities would not be required the office is understaffed.
 - b. Recognizing that the university is in serious financial difficulty, in order to avoid potential law suits for failing to give timely advice, missing deadlines, losing grants, properly managing the legal affairs for the university, etc. (all of which have happened in the past as discussed with GC), the staff needs to be expanded to meet the needs of not only the faculty but the central administration.

Yoko Miura (CEHS EC, Chair)
 Michael Bernstein (J.D., RSCOB)
 Chris Cline, (Ex-Superintendent, CEHS)
 Tom Rooney (COSM past EC)
 Brian Rigling (CECS EC – until July 2018)

¹ Attorneys in a law practice in Ohio are required to maintain a tickler system to avoid missing dates that are required to protect their client's cases. Failure to comply with this requirement in Ohio can cause an attorney to lose his license to practice law. GC should be no different. GC is the attorney for the University. Numerous systems are available for minimal expense to set up these systems.