

General Counsel Annual Report

I. OGC Statement of Philosophy

The Office of General Counsel (OGC) serves as a key resource to Oregon State University, as we provide legal advice on all manner of issues facing this large, complex organization.

In providing legal advice, we add value by crafting creative and pragmatic solutions, fostering critical analysis, and facilitating resolution towards common goals across a spectrum of agendas and viewpoints. Our attorneys bring a high level of knowledge, judgment and common sense to every issue on which we advise, and our advice is contextualized and specific to OSU's needs. To be effective advocates and advisors, we take a genuine interest in and ensure understanding of OSU's history, culture, current activities, challenges and goals.

We are guided by a strong commitment to impeccable ethics and integrity as well as demonstrating respect, collaboration and inclusivity. Building and maintaining relationships across OSU is paramount to our ability to provide excellent service. OGC is just one part of a large and multi-faceted team at OSU, and our attorneys respect the expertise, judgment and business decisions of OSU leaders. It is imperative that we be viewed as partners, advisors, and problem-solvers.

Although OGC is a fast-paced and often high-pressure environment that calls for a level of professional autonomy in each employee, our attorneys, paralegals and assistants work together to strive to provide the campus with seamless service and to support and guide each other collaboratively. The principle of teamwork that is integral to the relationships with constituents outside the office is evidenced in our working relationships within OGC.

II. OGC Staff

The office includes six attorneys, two paralegals, and an executive assistant. Each employee came to OSU with varying levels and types of public and private legal experience, but all are well-steeped in public higher education law and dedicated to the University's mission.

While the office is staffed leanly compared to many peer institutions, we provide high quality legal services in an efficient way. The University has a collaborative culture of bringing us in early in planning and problem-solving, and the attorneys strive to practice preventive law in all arenas. Our success in providing efficient legal services is dependent on both of these conditions—leaders of all levels utilizing OGC in this proactive manner and our focus on preventive law. We also connect often with our colleagues within the state and nationwide to stay ahead of the curve on best practices for efficient and cost-effective services.

III. Summary of Trends & Major Areas of Focus for FY2015-16

The National Association of College & University Attorneys (NACUA) conducted a nationwide survey of university general counsels (GCs) in February 2016 to determine key trends in concerns. The top five concerns reported by the GCs were: (1) compliance, (2) sexual misconduct, (3) diversity/inclusion, (4) governance, and (5) budget/resources. Our concerns and focus over the last fiscal year followed similar trends but also included some OSU-specific priorities, as described in more detail in the following:

Compliance issues – Compliance issues have taken significant focus for us in recent years as a result of the growing list of regulations with which OSU must comply, the increased complexity of the regulations and the heightened agency enforcement and public focus. Compliance is difficult to tackle on large, decentralized campuses with diverse compliance topic areas. We partner with the new Office of Institutional Compliance and the Office of Audit Services in implementing the University Compliance Program (as presented to the Board of Trustees on October 15, 2015, and the Executive & Audit Committee on September 12, 2016). Title IX/Sexual Misconduct and Lab Safety were the two top compliance areas of risk for OSU, and we worked heavily in these areas last year. Work included advising on many individual cases, as well as on revision of policies/procedures and reorganization of offices/structures in these compliance areas.

Diversity/Inclusion & Free Speech – The student speak-out in the fall refocused all of OSU on important diversity/inclusion efforts, and we advised on both affirmative action/discrimination legal issues as well as free speech concerns. These are complicated legal areas that involve significant risk in the legal and public relations arenas, and we have spent substantial time with many units as OSU proactively works to further goals in these areas.

Governance changes – We continued to focus on supporting OSU's new governance structure. In addition to advising the Board of Trustees on ethics, compliance, public records/meetings, process, litigation and other legal areas, we continued to work to increase collaboration between the other Oregon public universities' GCs on issues of common interest. We also continued the long-term work of interpreting the new legal landscape on OSU's powers and duties.

Bend and Newport campuses – We spent substantial time and effort in supporting the continued successful development of the Bend and Newport campuses. In Bend, we advised on contracts, construction, bonds, land use, ethics, personnel matters, risk management/safety, student organizations/liability, student conduct issues, and compliance. In Newport, we advised on the location of the new MSI building, land acquisition for the residence hall, ship operations, compliance, agency partnership arrangements, and personnel matters. (Although Bend and Newport have taken a targeted focus recently from our office, we also continued to advise extension offices, experiment stations and other OSU locations across the state.)

Leadership transitions – Last year saw a substantial amount of leadership transition at varying levels of the institution. This often required our advising on employment law, internal processes/policies, and in some cases, grievances, internal audits, conflict management and/or settlement agreements. We also act as support for units in flux that need assistance in identifying gaps/trouble-shooting, as well as for new or interim leaders who would like help in becoming acquainted with OSU processes, people, policies, etc. Through our advice, we promote consistency and stability in OSU decision-making and actions throughout leadership transitions.

In addition to the above high focus areas, we also provided advice in myriad other key subject areas. Please see Appendix 1 for an overview of these other key areas.

IV. Success in Defending Litigation/Claims and Reducing Costs

OGC manages all litigation defense for OSU and works closely with outside litigation counsel at every stage. OSU has very low litigation rates compared to similarly situated national peers. A 2013 NACUA Survey of hundreds of institutions nationwide revealed that comparator institutions had an average of 18-33 active litigation matters at any one time, whereas OSU has averaged

approximately 4-6 open litigation matters at any one time. (See *Appendix 2 for litigation numbers over past three years.*¹) OGC works with leaders of all levels to address problems early and resolve concerns before they reach the litigation stage. And, where settlement is more beneficial to OSU, we work to resolve and remedy the claims as early as feasible.

For those matters that we continue to actively litigate, we have uncommon success. In fact, OSU has prevailed in every single such litigation matter in the last two years. And OSU's victories have recently been in pre-trial stages, before significant attorneys' fees have been expended.

OGC also manages all civil rights and employment administrative claims. These include complaints filed by employees or students in outside agencies such as the federal Office for Civil Rights (OCR), the federal Equal Employment Opportunity Commission (EEOC), and the state Bureau of Labor & Industries (BOLI). We typically handle these in-house, and again, have high success. OSU has prevailed on every single one of these claims in the last three years. (See *Appendix 2 for administrative claim numbers over past three years.*)

Other types of pre-litigation property or personal injury claims are managed by OSU's third-party administrator, Berkley Risk Management, along with OSU's Office of Risk Management. OGC advises the Office of Risk Management as needed on those claims.²

V. Working with Outside Counsel

OGC engages the assistance of outside counsel in several kinds of situations. The most common is where the area of expertise sought is highly specialized and where it is inefficient/infeasible to build that specialized expertise in-house. Additionally, although several of our attorneys have a background as litigators, litigation matters take more time, resources and attorneys than is feasible to handle in-house at the current OGC size. We also engage outside counsel in matters in which it is advisable or required to have an independent review or opinion. Finally, there are times that we engage outside counsel because the work and needed timelines surpass the capacity of our office. This last category is one that we consistently work to minimize. In fact, after a two-year review of this category of outside counsel expense, we determined that it would be more cost-effective to hire another in-house attorney, and she started in July 2016.

Appendix 3 provides an overview of the types of matters that we send to outside counsel. According to the 2013 NACUA survey, we are using outside counsel on similar types of matters as our peer universities. (Note that some of these expenses are paid from the OGC budget and are more closely managed by OGC, and some are paid by individual department, projects or grants and managed more closely by subject matter experts in those departments. Litigation

¹ Note that most of the litigation over this three-year period involved employment disputes, although a couple involved injuries and student discrimination claims, one involved free speech, one was a student-athlete class action against all NCAA member schools and one brought claims regarding an OSU employee's participation as an expert in a criminal trial.

² The Office of Risk Management also manages OSU's insurance program. All of the former OUS institutions, with the exception of University of Oregon, participate in the Public Universities Risk Management and Insurance Trust (PURMIT), which is a self-insurance program allowed by statute. PURMIT is a separate legal entity from OSU, with separate legal counsel. OSU's Chief Risk Officer, however, sits on the PURMIT Board of Trustees, and OSU has a number of OSU-specific insurance policies (e.g., maritime policies).

expenses are paid by our self-insurance pool, but we closely manage those matters and expenses.)

Even when outside counsel is engaged, we work closely with that counsel on strategy, communication and implementation, as well as ensuring that the advice is tailored to and consistent with OSU's context, values and goals.

Appendix 4 provides an overview of OSU-wide outside counsel expenses over the last three years, as well as the portion of those expenses that are paid and closely managed by OGC. This appendix also highlights litigation fees over the last three years, which are paid by our risk pool but closely managed by OGC. We have implemented a variety of cost containment measures³ in working with outside counsel. Some of these measures explain the steady decline in outside counsel costs in recent years, but other factors also played a significant role. For example, the intense work in the governance transition from the State Board of Higher Education to the OSU Board of Trustees necessitated much higher outside counsel expenses in 2014, and those expenditures have been tapering off dramatically. Other outside counsel work will ebb and flow with the needs of new initiatives, such as the outside counsel work in the development of the Cascades and Newport campuses. Early wins in litigation have meant lower litigation fees (and no damage awards), but predicting future litigation rates and fees can be difficult.

VI. Managing University Public Records and Subpoena Process

We manage the public records process for OSU, and our senior paralegal is the University's public records officer. OSU strives for transparency as a strongly held value, and we work to produce responsive records to public records requestors quickly and cost-effectively. There are times, however, where we withhold records, consistent with the Oregon Public Records Law, to protect OSU or other individuals or to ensure compliance with privacy and other laws. As a governmental entity, OSU is also entitled to recoup the costs of complying with public records requests, but we take seriously our commitment to provide records to requestors in the most cost-effective way possible. While requestors sometimes appeal OSU's decisions to withhold records, those appeals are rare, and in recent years, OSU has won all of those appeals.

This year, we responded to 202 public records requests (many of which were high volume and/or high profile). (*See Appendix 5 for a chart of OSU's public records requests over the last three years.*)

We also manage the process of responding to subpoenas in which testimony or documents are sought for third-party litigation. We responded to approximately 30 subpoenas (some very large) this year, and we prepared and advised a number of OSU employees whose work-related testimony was sought in various third-party trials or depositions.

VII. Practicing Preventive Law – Outreach and Training

Our attorneys engage in preventive law every day, as we serve as key members of OSU teams in proactive planning and pre-decision phases. Our advising ahead of time often avoids legal

³ Examples of these measures include negotiating discount rates, implementing a strict budgeting process at the outset of a case and monitored regularly, providing for clear statements of work, requiring no more than one attorney billing on particular calls/meetings, requiring the use of lower-cost associate attorneys where feasible, etc.

action later. Additionally, as we help leaders of all levels trouble-shoot particular issues, we are providing training on applicable laws and policies.

We also take many opportunities to provide formalized training. For example, we provided training to OSU managers regarding legal issues at the all-day annual Managers' Legal Toolkit seminar, as well as other various trainings on myriad topics to particular departments, including the Student Affairs leadership team, Diversity & Cultural Engagement leadership team, Extension Service Regional administrators, Finance & Administration leadership team, Procurement & Contracts Services, Registrar's Office, Sponsored Programs and others.

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Appendix 1

Dynamic Advising across Diverse Subject Areas

In addition to the high focus areas of advice highlighted above, we also provided advice in the following key areas in 2015-16⁴:

Student issues – Advised on issues related to student conduct, student wellness, student government, academic appeals, academic program issues, and scholarships.

Civil rights investigations/issues – Advised on discrimination, sexual assault and bullying investigations, as well as disability accommodations and facilities accessibility reviews. Advised leaders across campus on civil rights and constitutional law issues. Advising in this area has increased dramatically over the last year, likely due to increased sexual assault/harassment reporting, increased awareness of the bullying policy and increased concerns regarding diversity/inclusivity and student speech on-campus. The federal Department of Education's new guidance on transgender issues has also increased advising specific to this important area of inclusiveness.

Employment issues – Advised on faculty grievances, terminations-for-cause, reassignments, non-renewals, agency complaints, tort claims, evaluations/personnel management, employment law compliance, collective bargaining, and athletics employment contract issues.

Contracts, industry partnerships, association collaborations – Advised on variety of procurements and contracts including high value or complicated construction and goods/services agreements and transactions, as well as industry collaborations, sponsored research agreements and consortium/association agreements.

Bond due diligence – Worked with outside bond counsel, as well as counsel for other universities and state agencies, to issue both state-backed and University revenue bonds.

Legislation and ballot measures – Advised on a variety of bills in the 2016 short session, as well as OSU response to several ballot measures with potential impact on OSU.

Research issues – Advised on permissible OSU role in marijuana and industrial hemp research/industry, other controversial research matters, academic freedom, personnel matters, drones/new FAA regulations, research misconduct actions, technology transfer issues and grant compliance matters.

Athletics issues – Coordinated with other Pac-12 GCs on matters of common interest as well as continued to provide greater support to Athletics regarding increasingly complex issues. Advised on matters regarding student-athlete conduct, NCAA issues, drug testing, public-private partnership opportunities, diversity/inclusion efforts, discrimination complaints, scholarships, Title IX equality of athletic opportunity and personnel matters.

Intellectual property issues – Advised on patent, copyright and trademark issues regarding commercialization and ownership of technology, research and course curricula. Also advised on patent and copyright disputes.

⁴ Note that we work with many offices on-campus who have primary responsibility in these areas – for example, we work with Human Resources and Academic Affairs on employment issues, Equal Opportunity & Access on discrimination issues, the Office of Student Conduct & Community Affairs on student conduct issues, Procurement and Contract Services on transactions and so on. We are consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

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Risk management – Advised on new University Risk Management initiative as well as threat assessment, OSU Veterinary Hospital client claims, personal injuries on-campus, overseas travel, infectious disease, large or particularly risky events, and other matters.

International issues – This year saw a marked increase in advising on international issues, likely as a result of strategic OSU focus on internationalization in several areas. Advised on issues related to international research endeavors, export control, student study abroad and athletic/music/academic team international travel, employee travel, immigration, compliance with foreign country laws on our overseas employees/programs, and transactions matters (including a new OSU program with Sampoerna University in Indonesia to encourage and facilitate Sampoerna students earning OSU undergraduate business degrees).

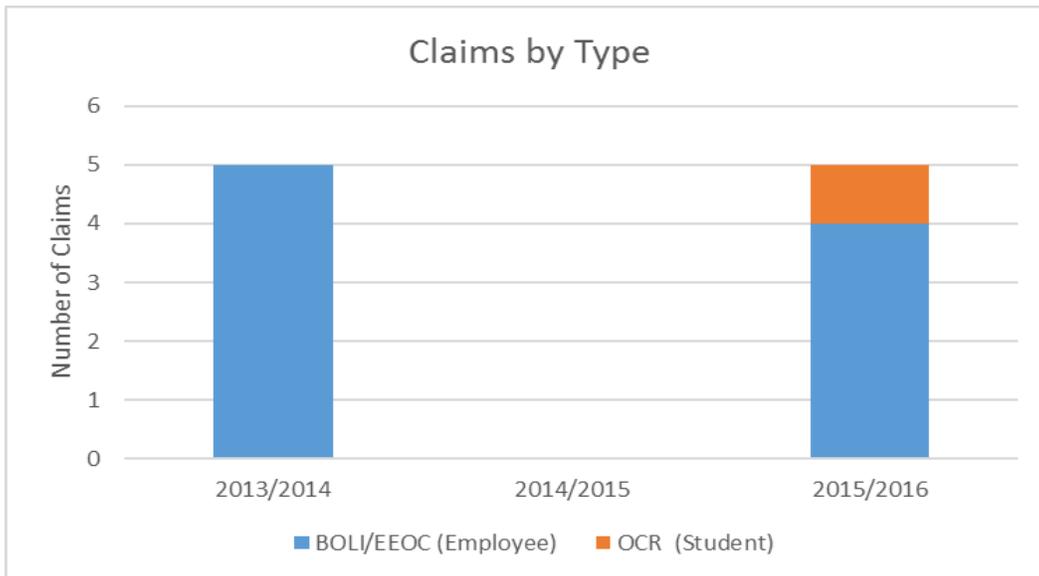
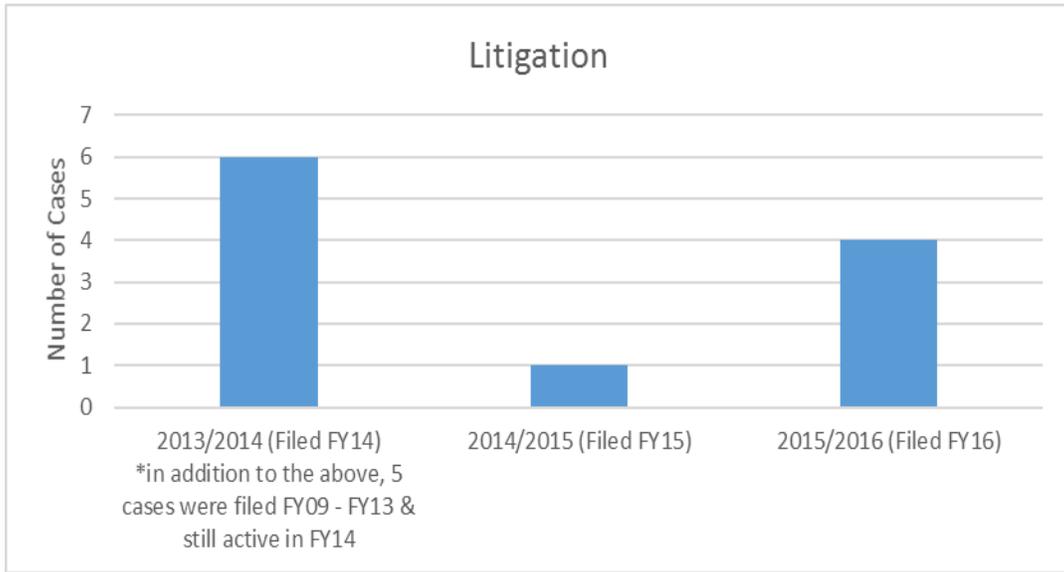
City of Corvallis – Worked with OSU and city leadership, as well as outside land use counsel and parking/transportation consultants, throughout the city's comprehensive plan amendment process and application of the interim development agreement to particular projects. Coordinated with city attorney and district attorney on variety of concerns, including student conduct matters, international student concerns, and transportation and safety program partnerships.

Foundation – Advised on variety of gift and ethics questions as well as revisions to the Memorandum of Understanding and the creation of the new Beaver Caucus.

Ethics/audits – Advised on government ethics issues and internal/external audits.

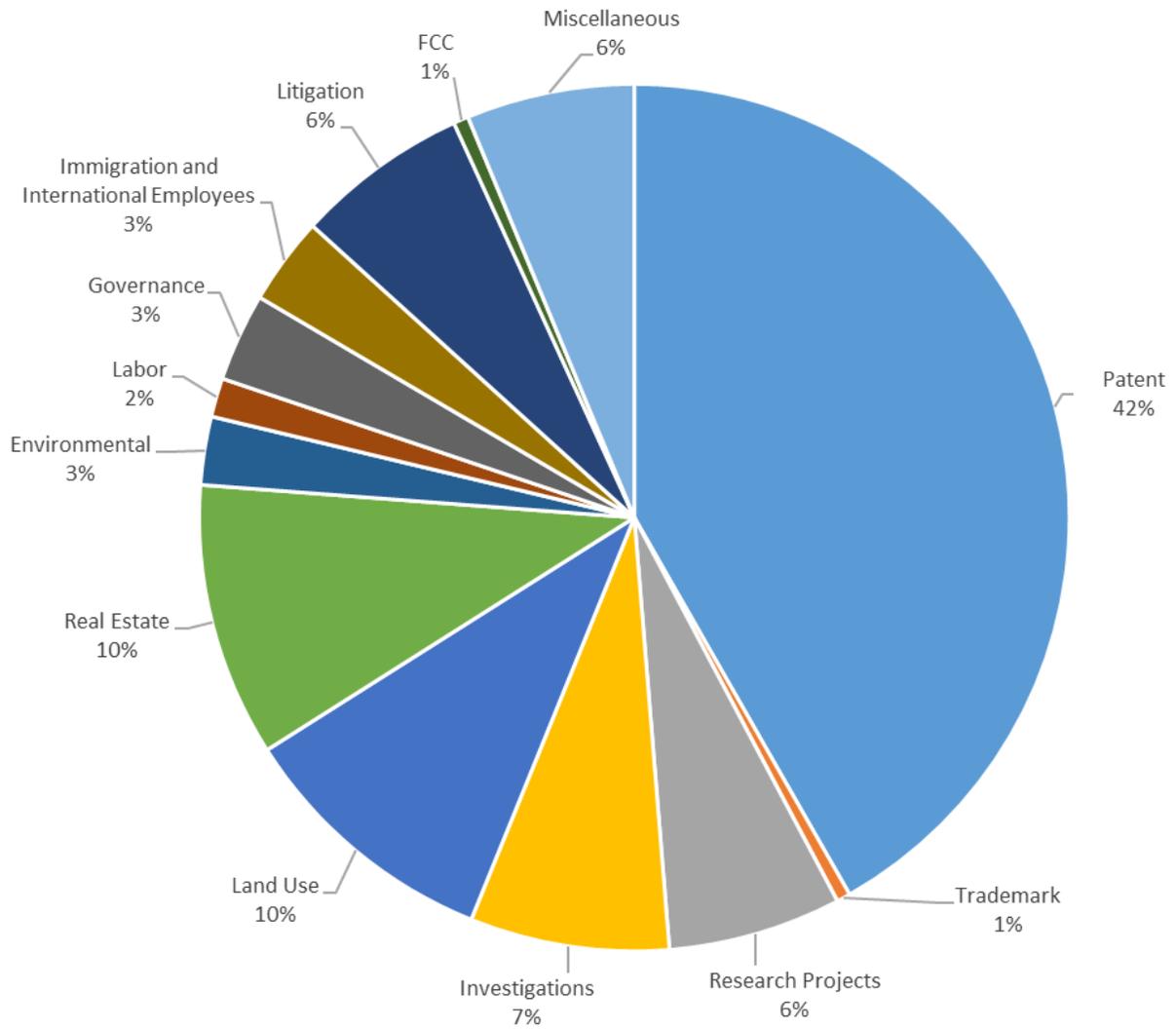
Bankruptcy/collections matters – Advised on student, client and corporate vendor bankruptcies and collections matters to the extent they impacted OSU.

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Appendix 2

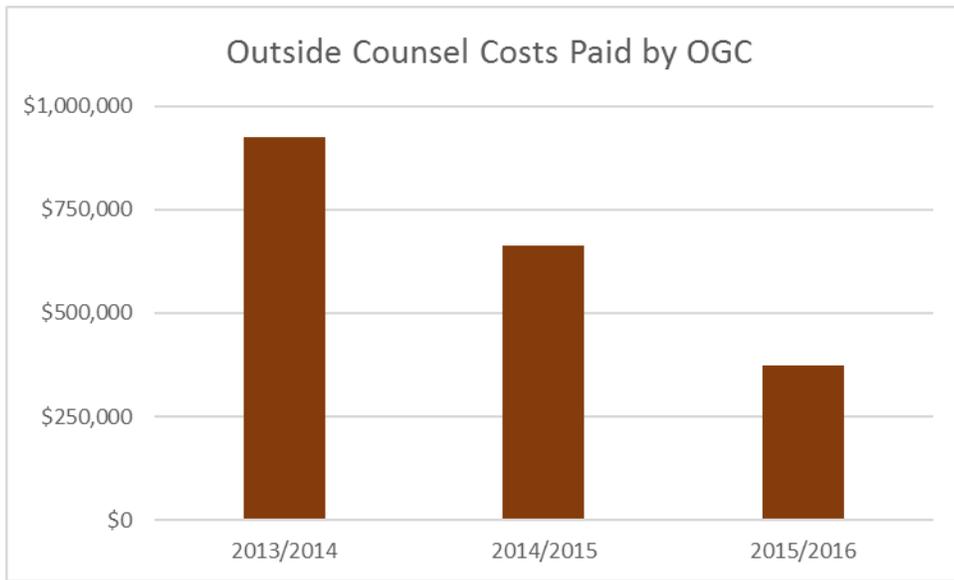
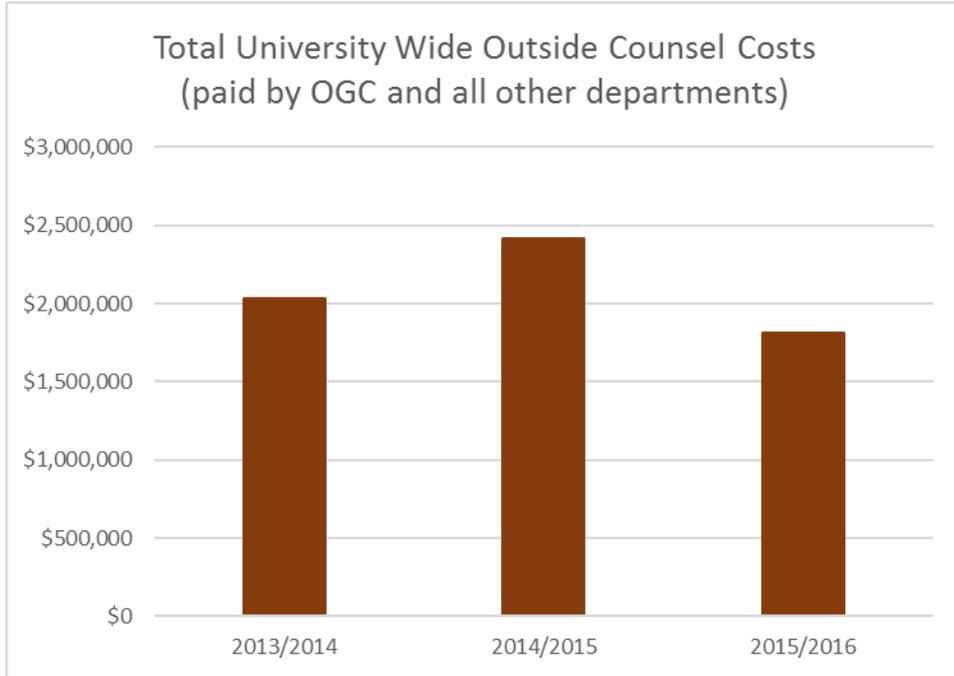


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Appendix 3

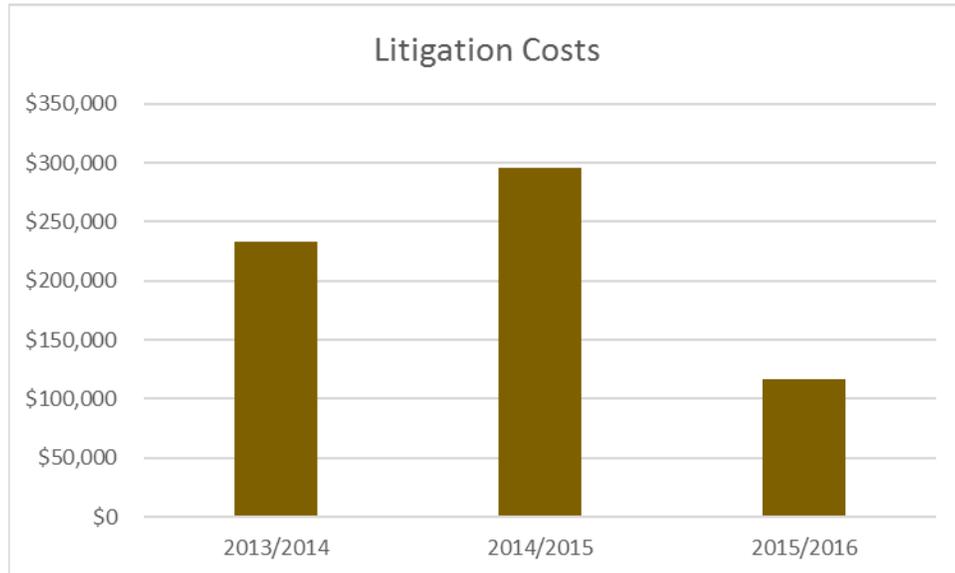
Total Outside Counsel Expenses by Type 2015/2016



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Appendix 4



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Appendix 4 (continued)



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Appendix 5

