

Office of the General Counsel Annual Report FY2023

BACKGROUND

The General Counsel provides an annual report to the president and the other Executive, Audit and Governance Committee members to assist with their governance and oversight responsibilities as outlined in the charter of the Oregon State University Executive, Audit and Governance Committee.

The Office of the General Counsel (OGC) serves as a key resource to Oregon State University, providing legal advice on all manner of issues facing the complex and large organization. The OGC statement of philosophy and staffing details are provided in Attachment 1.

MAJOR AREAS OF FOCUS FOR FY23

Major areas of focus for the OGC in 2022-23 fell into several categories:

- *Athletics* – The volume and complexity of OGC advising in this area increased substantially last year, as the landscape of college athletics is in significant transition and under challenge in multiple agencies and courts nationally. Areas of advising included Name/Image/Likeness (NIL) (generally, as well as group licensing and donor collective issues), *Alston* benefits, Pac-12 conference realignment issues, national efforts to find athletes to be employees for purposes of collective bargaining and wage/hour law, NCAA rules surrounding pay-for-play and inducement, antitrust, coach contracts, student athlete conduct issues, sports gambling and health/safety protocols.
- *Free speech and academic freedom* – OGC increased focus in this area, given political polarization and controversial court decisions nationally. Advice was given on particular claims or issues where free speech or academic freedom were implicated, as well as on systematic efforts including the revision and updating of the university's time, place and manner free speech policy and the creation of a new academic freedom policy.
- *Diversity and inclusion efforts* – OGC continued to work proactively to support OSU's goal of becoming an antiracist and inclusive institution, without positioning the institution in a way that significantly compromises OSU's legal defenses against individual lawsuits. OGC also provided advice on the Supreme Court's Harvard/UNC affirmative action cases and religious rights cases.
- *State and federal legislative or policy changes* – This year saw less focus needed in responding to changing federal legislative or policy changes, as compared to some recent years. OGC supported government relations colleagues and others during the 2023 Oregon legislative session, interpreting bills and impact to OSU, engaging with others to strategize OSU's response and periodically testifying or negotiating in Salem. Bills that received targeted focus included those on university governance, sexual misconduct, athletics fan behavior, abortion, contractor requirements, and public meetings law. OGC also advised on options and implications of the Oregon Senate walk-out this year.
- *Presidential transition* – OGC focused on supporting President Murthy's successful transition and first year of service at the university.

October 19-20, 2023 Board of Trustees Meetings

- Transactions supporting innovation, research and infrastructure* – OGC advised on a number of larger transactions and related issues that supported OSU’s research, innovation and infrastructure. Many examples from last year continued this year, given the complexity, size and duration of the projects. OGC continued advising on the large Regional Class Research Vessels (RCRV) project, including resolution of numerous operational and contract issues; advising on contractual, risk management, operational, construction, licensing and compliance matters for the complex PacWave wave energy project; analyzing opportunity, risks and potential terms for management of the Elliott Forest and beginning negotiations on terms of a potential management agreement with the state of Oregon; advising on the Samaritan lease arrangement for the new wellness center in the Reser Stadium renovation project, including concluding negotiations and execution of the lease; negotiating with PPL Electric Utilities for upgrading OSU’s electrical grid; advising on the resolution of water rights disputes and the acquisition of new water rights; advising the Global Hemp Innovation Center on the rapidly evolving legal landscape for hemp and marijuana research; advising on large employer partnerships to provide employers with OSU educational benefits; supporting OSU’s efforts in expanding Ecampus internationally; advising and negotiating new member framework agreements for Link Oregon, OSU’s spin-out organization that is building a statewide internet network; and advising on ongoing capital improvement projects including the PRAX arts and education complex, Reser Stadium renovation and the Washington Way improvement project. OGC also advised on contract, procurement and permitting issues in preparation for the construction phase of the Jen-Hsun and Lori Huang Collaborative Innovation Complex; procurement, environmental, construction and permitting issues related to the Cascades Innovation District; and the potential sale of the South Farm property for purposes of development intended to increase affordable housing inventory.
- Compliance issues* – Compliance issues continued to take focus because of the increased complexity and quantity of regulations in recent years, as well as heightened agency enforcement and public focus nationally. Because compliance is difficult to tackle in large, decentralized universities with diverse compliance topic areas, OGC’s partnerships with the Office of Audit, Risk and Compliance and key compliance partners is critical. Title IX remained a top compliance area of risk for OSU this year and continued to require a substantial amount of focus, including OGC advising on individual cases (especially as reporting and responding parties engaged lawyers). Other specific areas of compliance focus included cybersecurity, national security, workplace safety, ADA digital accessibility and international activities.
- Public Safety* – OGC continued to focus advising for OSU’s newer sworn law enforcement unit as it continued to grow its programs and services and to engage with OSU response and support offices and the larger OSU community.
- Student and Employee Disability Accommodations* – As with many universities across the country, OSU is experiencing an increase in employee and student disability concerns and accommodation needs. Accordingly, OGC focused more advising in this area this year.

See Attachment 2 for an overview of key subject areas in addition to the high focus areas listed here.

LITIGATION AND ADMINISTRATIVE CLAIMS

OGC works with leaders of all levels to address problems early and resolve concerns before they reach the litigation stage. But, where lawsuits are filed in court against OSU, OGC manages the defense and works closely with outside litigation counsel.

A snapshot of defense litigation rates over the past five years is provided in Attachment 3.¹ OSU has traditionally had extremely low litigation rates compared to similarly situated national peers, but those rates have been expected to rise as OSU has grown in size, complexity and profile. As can be seen in Attachment 3, OSU's defense litigation rate increased substantially in FY21, although the total number of cases was still at the low end of national peers. In that year, there was not a discernible trend or pattern to explain the increase, other than OSU experiencing litigation in areas in which it had not seen litigation previously i.e. sponsored research, COVID-19, fair credit reporting act, public records, and potential research forest acquisition. Moving to FY22, OSU's litigation rate substantially decreased, with just one employee and one student case filed in court. As we discussed last year, it was not expected (even based on OSU history) for the litigation rate to be as low as it was in FY22. For FY23, the rate increased slightly from last year, but remains consistent with the range of OSU's lower litigation rate over the last decade.

OGC also manages all civil rights and administrative claims to and investigated by outside agencies. These include complaints filed by employees or students in agencies such as the federal Department of Education's Office for Civil Rights (OCR), the federal Equal Employment Opportunity Commission (EEOC), and the state Bureau of Labor & Industries (BOLI). Attachment 4 includes a snapshot of the numbers and types of these administrative claims over the past five years. OSU experienced an increase of these claims this year, but the rate remains in the range of the last five years. Additionally, there is no discernible trend identified in the claims.

Management of other types of pre-litigation property or personal injury claims is coordinated 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

¹ The defense litigation over this five-year period involved employment disputes, injuries, medical malpractice, breach of contract, breach of trust, student discrimination and retaliation claims, a research sponsor dispute, a claim of fraud related to a Department of Energy Wave Energy prize contest, a claim of violation of the Fair Credit Reporting Act, and defense of a public records decision.

² The Office of Risk Management also manages OSU's insurance program. All of the former OUS institutions, with the exception of the 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).

WORKING WITH OUTSIDE COUNSEL

OGC engages the assistance of outside counsel in several types of situations. Even when outside counsel is engaged, OGC lawyers work closely with that counsel on strategy, communication and implementation, as well as on ensuring that the advice is tailored to and consistent with OSU's context, values and goals.

The most common situation where outside counsel is engaged is where the area of expertise is highly specialized and where it is inefficient or infeasible to build that specialized expertise in-house. Additionally, although several OGC attorneys have backgrounds as litigators, litigation matters take more time, resources and attorneys than is feasible to handle in-house at the current OGC size. The office also engages outside counsel for matters in which it is advisable or required to have an independent review or opinion. Finally, there are times that outside counsel is engaged because the work and needed timelines surpass the capacity of the office; however, efforts are made to minimize this approach given the higher cost of outside counsel. Staffing numbers of in-house counsel versus outside counsel are monitored to ensure provision of the most cost-effective legal services.

It is encouraging that it remains the case that the majority of university-wide outside counsel costs are to support OSU's proactive endeavors, rather than traditional defense-related costs (see Attachment 5).

Attachment 6 provides a five-year snapshot of OSU-wide outside counsel costs. Outside counsel work ebbs and flows with the needs of new initiatives and issues. This year's total costs were slightly higher than last year's and the mix shifted in a few areas. The increase was primarily due to defending the COVID19 remote education tuition and fees class action litigation (not covered by insurance), as well as doubling immigration-related fees from significantly increased international employee hiring and the increasing processing time and complexity now involved with permanent residency cases for employees as they are promoted. There was also an increase in transactions-related advising generally as OGC experienced short-staffing in that area this year (due to one attorney's retirement coinciding with another attorney's unexpected family medical leave period). A significant decrease was also seen in the compliance area, as the new export control officer was hired and less outsourcing was needed in that area, less outside advising was needed in international online education compliance and less outside advising was needed in HIPAA issues with student health services enterprises.

PREVENTATIVE LAW – OUTREACH AND TRAINING

OGC attorneys engage in the practice of preventative law every day, serving as key members of OSU teams in proactive planning and pre-decision phases. This advance advising often avoids or mitigates legal action later. Additionally, serving as thought partners with leaders of all levels as they address particular issues presents opportunities to provide education on applicable laws and policies. OGC also takes opportunities to provide more formal training in a variety of arenas.

OGC Statement of Philosophy

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

In working with OGC, OSU employees can count on impeccable ethics and integrity, as well as 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 provide the university 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.

OGC Staff

The office includes seven (7) attorneys (including the General Counsel), two (2) paralegals, an executive assistant and an administrative assistant. While the office is staffed leanly compared to national benchmarks, OGC provides high quality legal services in an efficient way. The university has a collaborative culture of bringing OGC in early in planning and problem-solving and the attorneys strive to practice preventative law in all arenas. OGC's success in providing efficient legal services is dependent on both of these conditions — leaders of all levels utilizing OGC in this proactive manner and a focus on preventative law. OGC also connects often with colleagues within the state and nationwide to stay ahead of the curve on best practices for efficient and cost-effective services.

DYNAMIC ADVISING ACROSS DIVERSE SUBJECT AREAS

OGC provided advice in the following key areas in 2022-23³:

Student issues – Advised on issues related to student conduct, student wellness, student government, academic appeals, academic programs, Greek life and other student organizations, free speech, firearm rights, undocumented students, admissions policy, and scholarships/financial aid.

Civil rights investigations/issues – Advised on discrimination, retaliation, sexual assault and bullying investigations, as well as disability accommodations and facilities accessibility reviews. Advised leaders across the university on civil rights and constitutional law issues. Advising extension on religious rights allegations raised in 4H.

Employment issues – Advised on faculty grievances (through the new UAOSU CBA), staff grievances (through SEIU and CGE CBAs), labor arbitrations, potential terminations-for-cause, reassignments, agency complaints, tort claims, personnel management issues, employment law compliance, collective bargaining, benefits and athletics employment contract issues.

Contracts, industry partnerships, association collaborations, real property development – 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. Advised on land use and water rights issues involved in the development or use of OSU real property.

Compliance – In addition to Title IX compliance, advised on many different regulatory compliance areas, including, for example, Clery Act timely warning/crime reporting, export control, Title VI and VII, IT security compliance, environmental health/safety regulations, HIPAA/FERPA, NCAA rules, financial aid regulations, Native American Grave Repatriation Act (NAGPRA), controlled substances and human/animal subject research regulations.

Research issues – Advised on large research projects, hemp and marijuana research questions, research compliance, research misconduct actions, technology transfer issues, and liability/risk issues regarding research vessels and field work.

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

Athletics issues – Coordinated with the Pac-12 GC and other Pac-12 institutional GCs on matters of common interest, as well as continued to provide support to OSU's Department of Intercollegiate Athletics regarding increasingly complex and high-profile issues. Advised on matters regarding student athlete conduct, concerns regarding student athlete criminal or student conduct history, drug testing, diversity and inclusion efforts, discrimination

³ OGC works with many offices at the university who have primary responsibility in these areas (e.g., the Office of Human Resources and Office of Faculty Affairs for employment issues, the Office of Equal Opportunity and Access on discrimination issues, the Office of Student Conduct and Community Standards on student conduct issues, Procurement and Contract Services on transactions, OSU Advantage Intellectual Property & Licensing team on licensing). OGC is consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

complaints, scholarships, gender equity in athletic opportunity and facilities, coach contracts, personnel matters, concussions and other injuries, antitrust, use of student athletes' name/image/likeness, pay-to-play and conference re-alignment and grant of media rights.

Risk management – Advised on Enterprise Risk Management initiative, as well as threat assessment, emergency response plan update, hazardous waste and environmental health and safety issues, Veterinary Hospital client claims, personal injuries on university property, university property damage, infectious disease issues, travel policy, large or particularly risky events, and other matters.

International issues – Advised on issues related to international research endeavors, export control and heightened federal national security concerns on research/education collaborations, student study abroad and athletic/music/academic team international travel, employee travel, immigration and travel ban issues, overseas employee compliance, international transactions and federal regulations regarding foreign gift reporting. Also advised OSU regarding INTO relationship, as well as international compliance issues regarding extending Ecampus to students residing in other countries.

Policies – Advised on variety of proposed university policies or policy revisions, especially partnering with the Office of Audit, Risk and Compliance and the director of policy and standards on university's long-term policy modernization effort. Advised Faculty Senate and ASOSU on their policy efforts as critical shared governance partners.

Legislation – Advised regarding variety of bills in the 2022 Oregon legislative session. Advised regarding variety of proposed federal bills.

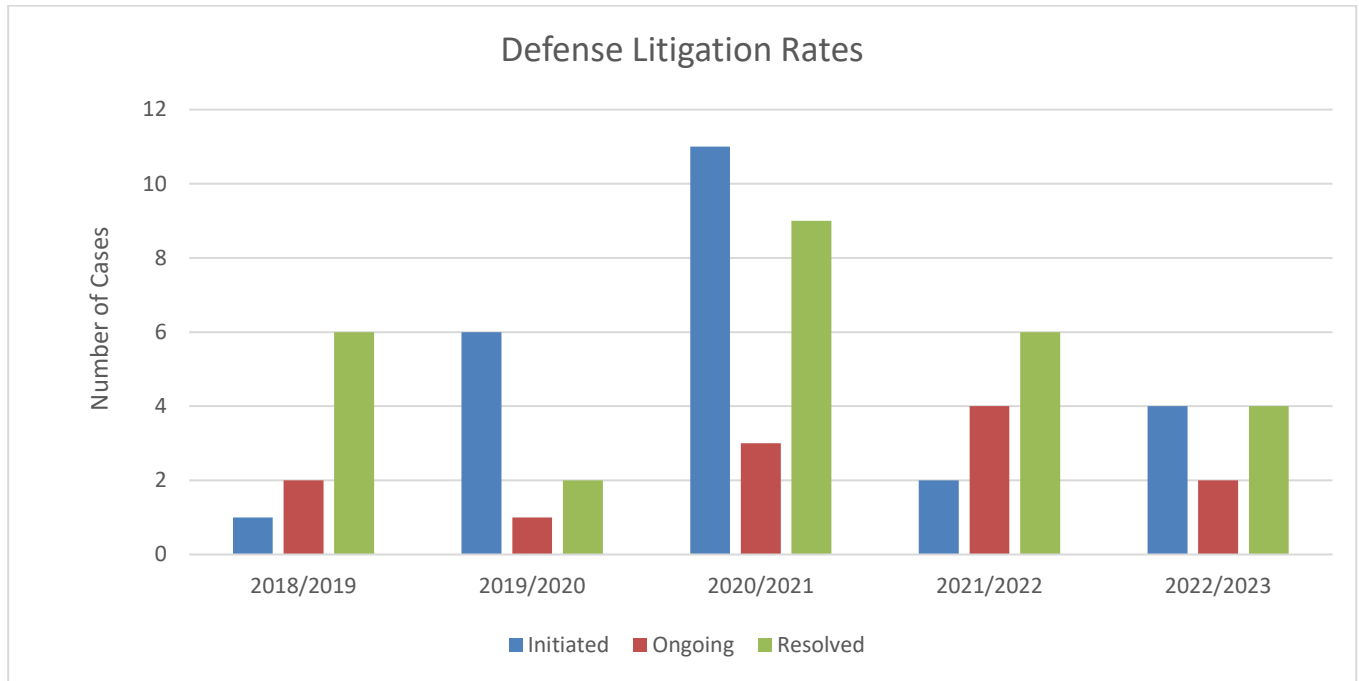
Public records – Advised regarding complex and high profile public records requests, disputes and considerations.

Foundation – Advised OSU employees and coordinated with OSU Foundation counsel on variety of contract, gift and ethics questions.

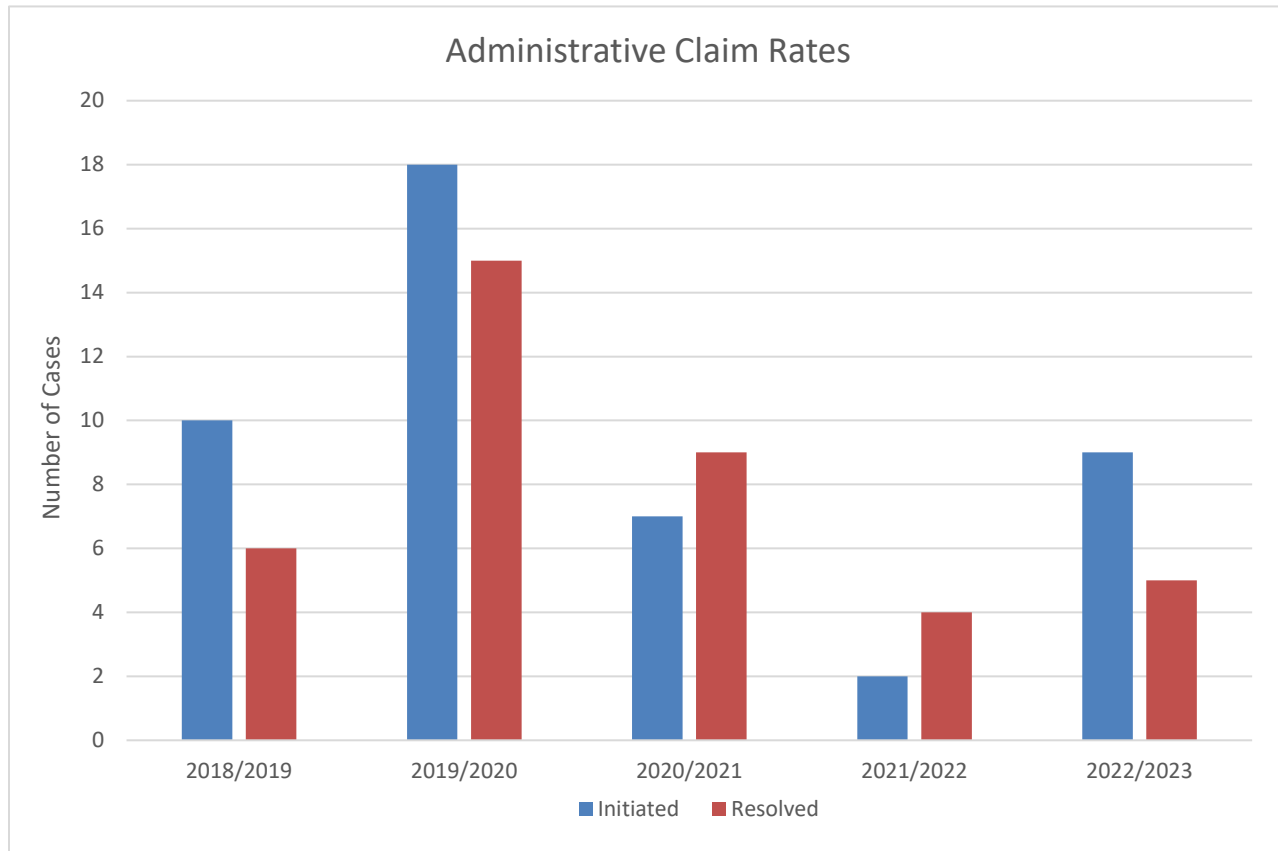
Ethics/audits – Advised on government ethics issues and internal/external audits.

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

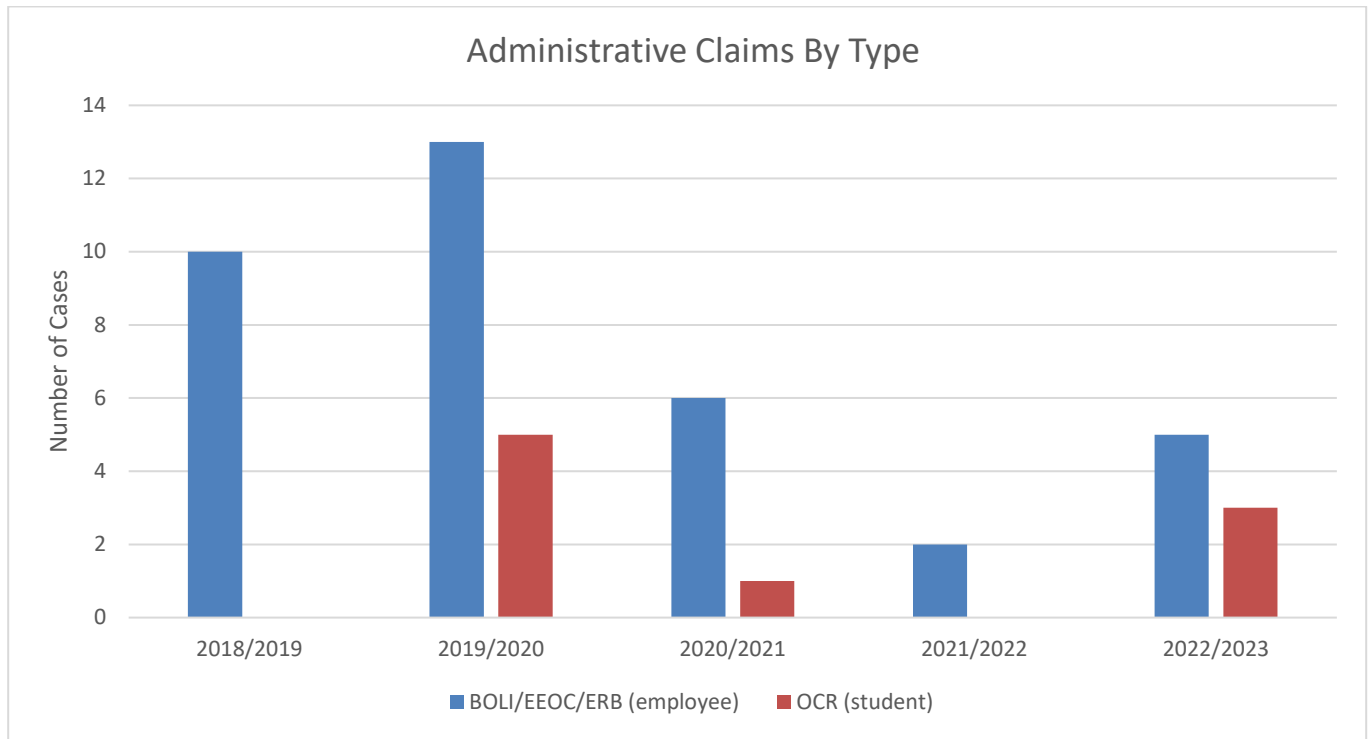
Defense Litigation Rates: Five-year snapshot showing number of court cases filed against OSU and resolved each year, as well as those carried over from previous years.



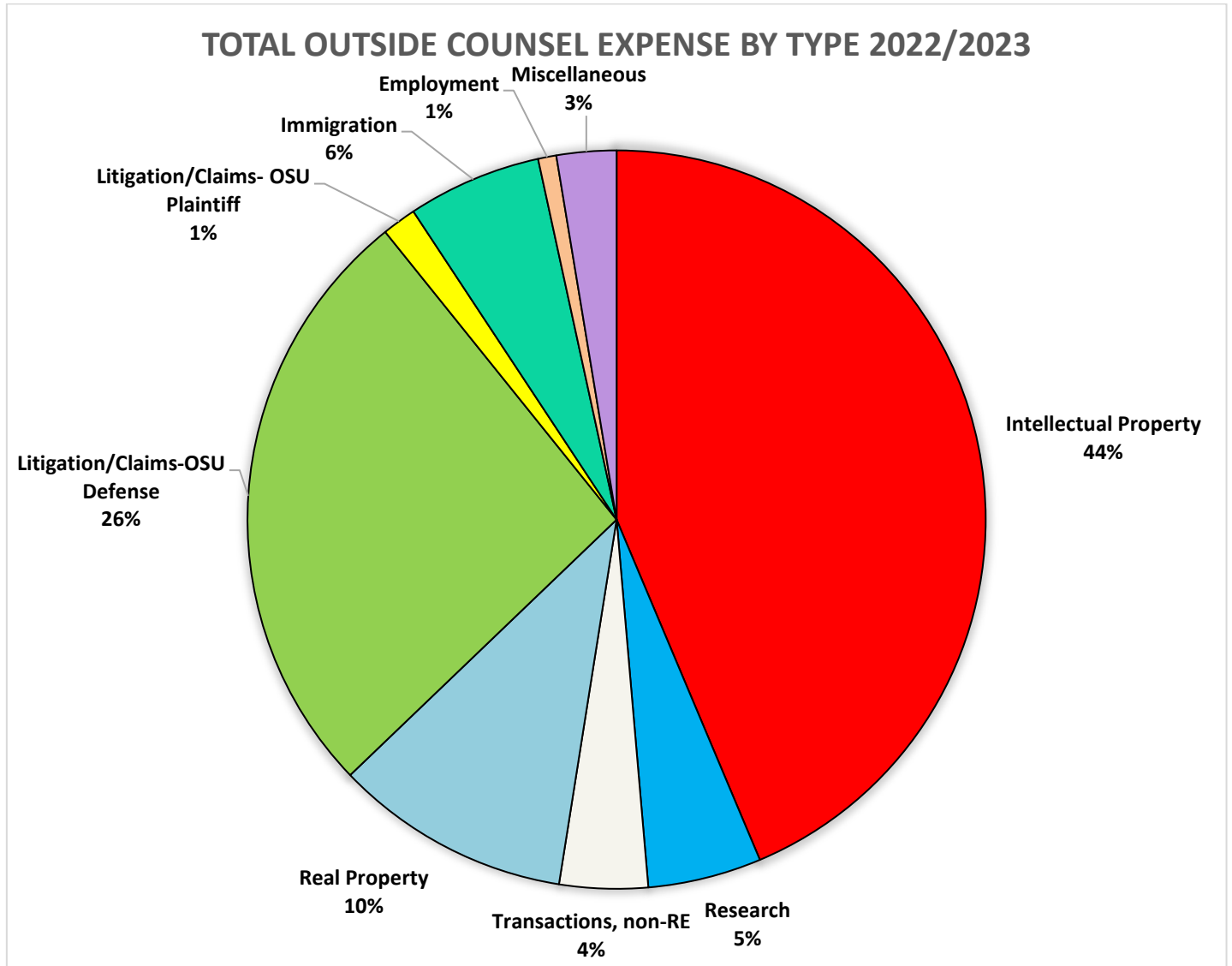
Administrative Claim Rates: Administrative claims (claims by students or employees to and investigated by outside agencies) made over the past five years. Claims are generally resolved within a one-year period, but may carry over from year to year.



Administrative Claims by Type: Administrative claims broken out by those from students versus employees, over the past five years.



University-wide outside counsel expenses broken out by type. Miscellaneous includes compliance, tax, general advice, public records support during vacancy of public records officer and other topics.



University-wide outside counsel expenses annually over the past five years. These amounts include all outside counsel costs paid by the university, regardless of the unit ultimately paying the costs.

