

Office of General Counsel Annual Report FY2021

BACKGROUND

The Office of the General Counsel (OGC) provides an annual report to the President and the other Executive & Audit Committee members to assist with their governance and oversight responsibilities as outlined in the charter of the Oregon State University Executive & Audit Committee.

The 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 2020-21

Major areas of focus for the OGC in 2020-21 fell into several categories:

- *COVID-19 Response* – OGC remained fully immersed in advising on nearly every aspect of the university's response to the pandemic, as the university remained primarily remote throughout the entire academic year. Most of OSU's decisions in this area had a number of legal implications, and like all universities across the nation, OSU faces a very complex and uncertain legal landscape as a result of the pandemic. OSU leadership involved OGC in proactive ways to ensure that reasonable legal risk mitigation was included in decision-making. OGC also began to defend the first piece of litigation against the institution related to COVID-19.
- *Public Safety* – OGC supported the creation and implementation of OSU's new sworn law enforcement unit, which presented myriad legal questions.
- *Diversity/inclusion efforts* – OGC continued to work proactively to support OSU's goal of becoming an antiracist institution, without positioning the institution in a way that significantly compromises OSU's legal defenses against individual lawsuits. The office also advised OSU surrounding free speech rights that may sometimes appear to thwart diversity and inclusion goals. This complicated legal area often involves overlapping rights and presents risk in the legal and reputational arenas.
- *State and federal legislative or policy changes* – OGC advised on a number of federal and state legislative or policy changes this year. After responding to late term federal actions by the outgoing US President, OGC shifted focus to responding to the new President's policy and law changes in the areas of COVID-19, discrimination, immigration, travel, national security and federal grantee requirements. On the state side, OGC advised on OSU's response to legislative proposals regarding transfer, oversight of university decisions, a tribunal to hear university discrimination claims, student incidental fee decisions, university outside counsel oversight, COVID-19 liability immunity, firearms on university property, presumption of employment retaliation and name/image/likeness rights for student athletes.
- *Compliance issues* – Compliance issues continued to take significant focus because of the increased complexity and quantity of regulations in recent years, as well as heightened agency enforcement and public focus. 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 and involved outside agencies) and on implementing the very impactful new federal regulations. Other specific areas of compliance focus included fall 2020 wildfire smoke events, data security, OSU employees/students temporarily located in other states or countries due to COVID-19 or visa restrictions, undue foreign influence over federally-funded research activities, national security, export control, international Ecampus efforts, athletics, youth safety and pay equity.

- *Transactions supporting innovation, research and infrastructure* – OGC advised on a number of 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 and compliance matters for the complex PacWave wave energy project; analyzing opportunity, risks and potential terms for acquisition or management of the Elliott Forest; advising on the Samaritan lease arrangement for the new wellness center in the Reser Stadium renovation project; advising on issues surrounding complex acquisition of the off-campus GEM housing facility; resolving multiple water rights disputes with agricultural experiment stations; advising the newer Global Hemp Innovation Center; and working to resolve issues with Link Oregon, OSU's spin-out organization building a statewide internet network. OGC also supported OSU's efforts in expanding Ecampus internationally, in negotiating with PPL Electric Utilities for upgrading OSU's electrical grid, and in building partnerships with large employers who wish to send their employees to OSU for education benefits.
- *Student Mental Health* – In recent years, OSU has seen a significant increase in student mental health concerns, requiring focused OGC advising as threat/care management teams manage complex student issues. With most students being remote this year, OGC provided more targeted advising to support university offices' efforts to provide services online (bringing complexity around compliance and mitigating potential legal claims). Additionally, OGC assisted more university units in their efforts to provide supplemental and novel support, like the OSU Assist crisis response effort.
- *Employment Issues* – OGC supported implementation of the first faculty collective bargaining agreement (CBA), as well as SEIU and UAOSU grievances and the establishment of the new police union. Advice was targeted to numerous budget-related employment actions (pay cuts, furloughs, terminations or non-renewals, etc.), as well as many other pandemic-related employment issues. OGC advised through the overhaul of the professional faculty system, moving from annual contracts under academic faculty policies/processes to continuous employment policies with policies/processes better suited to professional faculty. OGC also advised regarding faculty grievances through the Faculty Senate grievance hearing process and the CBA process, as well as other employee matters.

- *Presidential Transition* – OGC advised the university through the negotiated resignation of former President King Alexander in the spring, as well as the university’s response to the events surrounding his resignation and the hiring of Interim President Becky Johnson.

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

LITIGATION, ADMINISTRATIVE CLAIMS AND COSTS

OGC manages all litigation defense for OSU and works closely with outside litigation counsel at every stage.

OGC works with leaders of all levels to address problems early and resolve concerns before they reach the litigation stage. Where settlement is more beneficial to OSU, efforts are made to resolve and remedy the claims as early as feasible.

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 last year, although the total number of cases is still at the low end of national peers, with 11 cases initiated. There is not a discernible trend or pattern to explain the increase this year, 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.

OGC also manages all civil rights and employment 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 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 a lower number of these claims this year, potentially due to the majority of students and employees working from home. Additionally, there is no discernible trend identified in the claims in recent years. Other than two of the claims (which were related to one unit and regarding issues that are in the process of being resolved), the claims involved unrelated issues, departments and individuals.

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, breach of contract, breach of trust, student discrimination and retaliation claims, a research sponsor dispute, 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 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. The most common is where the area of expertise sought 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, and OGC added a new attorney FTE this year as a result of this review.

Attachment 5 provides an overview of the types of matters sent to outside counsel. According to industry surveys, OGC uses outside counsel on similar types of matters as other peer universities.

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.

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 very similar in amount to last year's, although the mix shifted in a few areas. There were decreases in the following areas: intellectual property, research, transactions not related to real property development, immigration, employment, tax and litigation where OSU was a plaintiff. There were increases in costs related to real property development, compliance (including COVID-related and international Ecampus-related), bonds, and most substantially, defense litigation (both as a result of increased litigation and as a result of several breach of contract and public records cases not being covered by insurance).

Even with the increase in defense claims/litigation costs this year, it is encouraging that it remains the case that the majority of university-wide outside counsel costs are to support OSU's proactive endeavors.

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, helping leaders at all levels trouble-shoot particular issues presents opportunities to provide education on applicable laws and policies.

OGC also takes opportunities to provide more formal training. For example, this year's trainings included two sessions for OSU managers regarding legal issues at the all-day annual Managers' Legal Toolkit seminar and one session of the Leadership Academy for academic school heads. OGC also provided various trainings on topics to particular departments, including the Division of Student Affairs, Student Conduct Hearing Committee, the Office of Human Resources, 4-H leadership team, ASOSU, Extension Service Regional Administrators, multiple College leadership teams and others.

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, and an executive 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 2020-21³:

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, 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.

Employment issues – Advised on faculty grievances (through faculty senate and through the new UAOSU CBA), unfair labor practice claims, labor arbitrations, potential terminations-for-cause, reassignments, non-renewals, agency complaints, tort claims, personnel management issues, promotion/tenure appeals, employment law compliance, collective bargaining, benefits and athletics employment contract issues. Supported the Board Office in the Interim Presidential search process and contract.

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 state agencies, to issue bonds.

Compliance – In addition to Title IX compliance, advised on many different regulatory compliance areas, including, for example, COVID19, 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, 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. Also advised on intellectual property disputes.

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

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, the Office for Commercialization and Corporate Development on licensing). OGC is consulted when legal advice is needed or matters are particularly complicated, high value or high profile.

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, NCAA issues, drug and COVID19 testing, diversity and inclusion efforts, discrimination complaints, scholarships, gender equity in athletic opportunity and facilities, coach contracts, personnel matters, and national and state litigation and legislation regarding concussions and other injuries, antitrust, use of student athletes' name/image/likeness, and pay-to-play.

Risk management – Advised on Enterprise Risk Management initiative, as well as threat assessment, emergency response plan update, 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 new 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.

City of Corvallis – Worked with OSU and city leadership, as well as outside land use counsel, in preparation for the city's process for amending the OSU Zone in the land development code, as well as application of the interim development agreement to particular building projects and the resolution of other land use matters. Coordinated with city attorney on variety of concerns, including police matters, student conduct matters, international student concerns, and transportation and public safety program collaborations.

Legislation – Advised regarding variety of bills in the 2021 Oregon legislative session. Advised regarding variety of proposed federal bills.

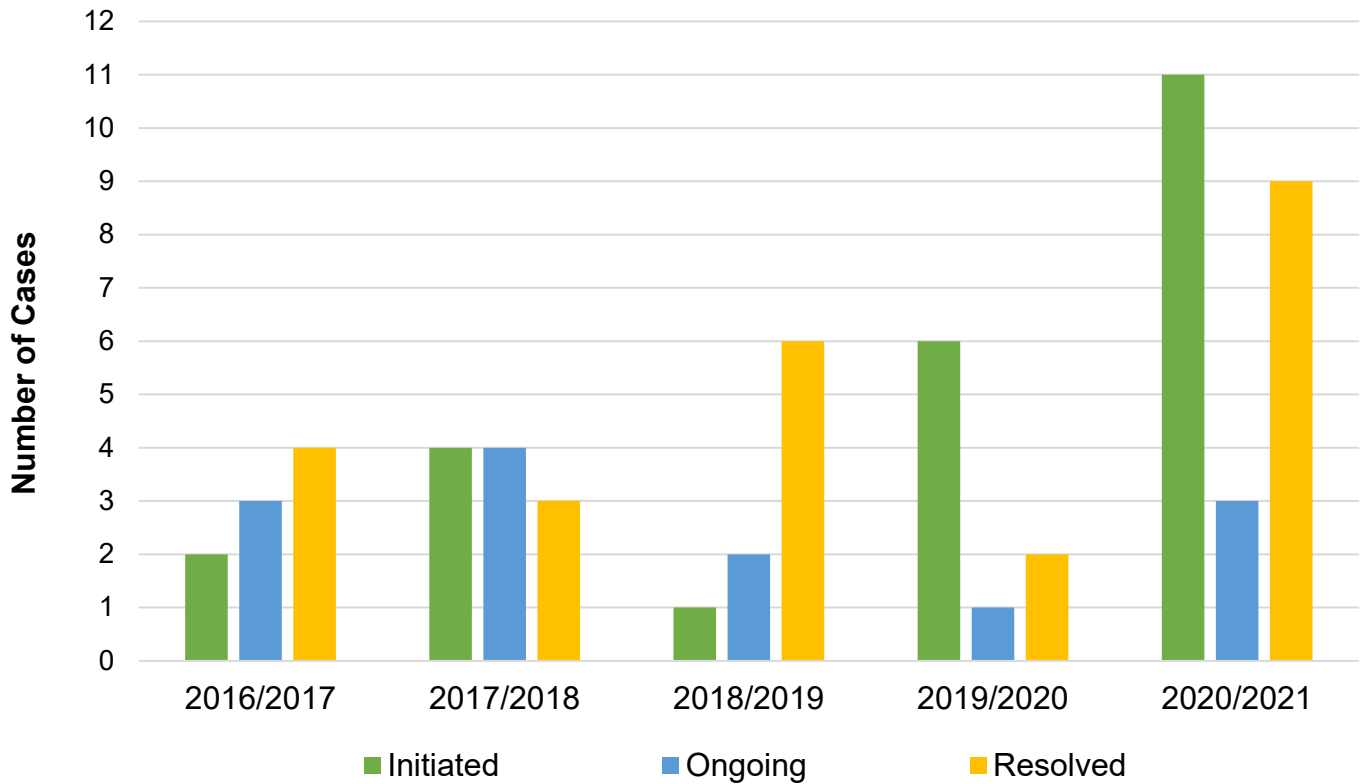
Foundation – Advised OSU employees and coordinated with OSU Foundation counsel on variety of contract, gift and ethics questions.

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

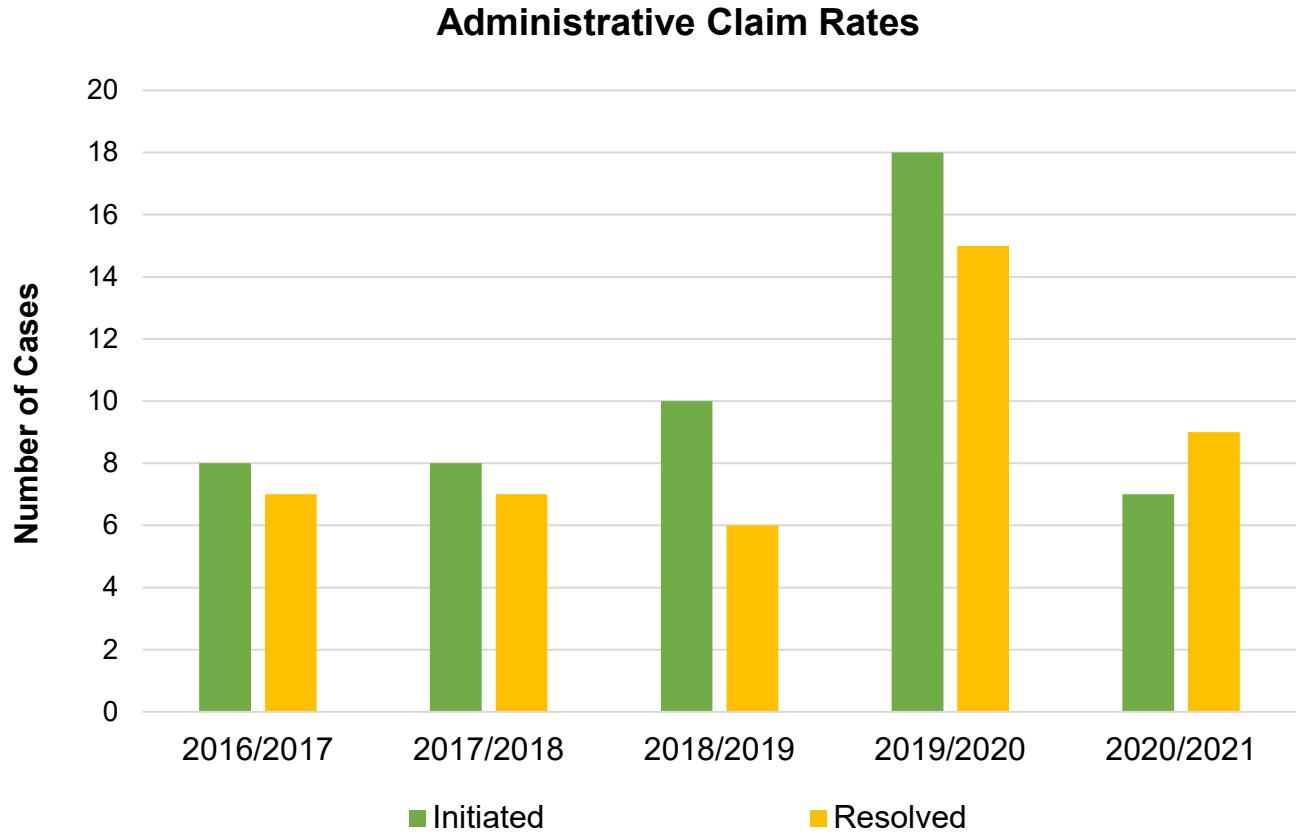
Bankruptcy/collections matters – Advised on student, client and corporate vendor bankruptcies and collections matters to the extent they impacted OSU.

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

Defense Litigation Rates



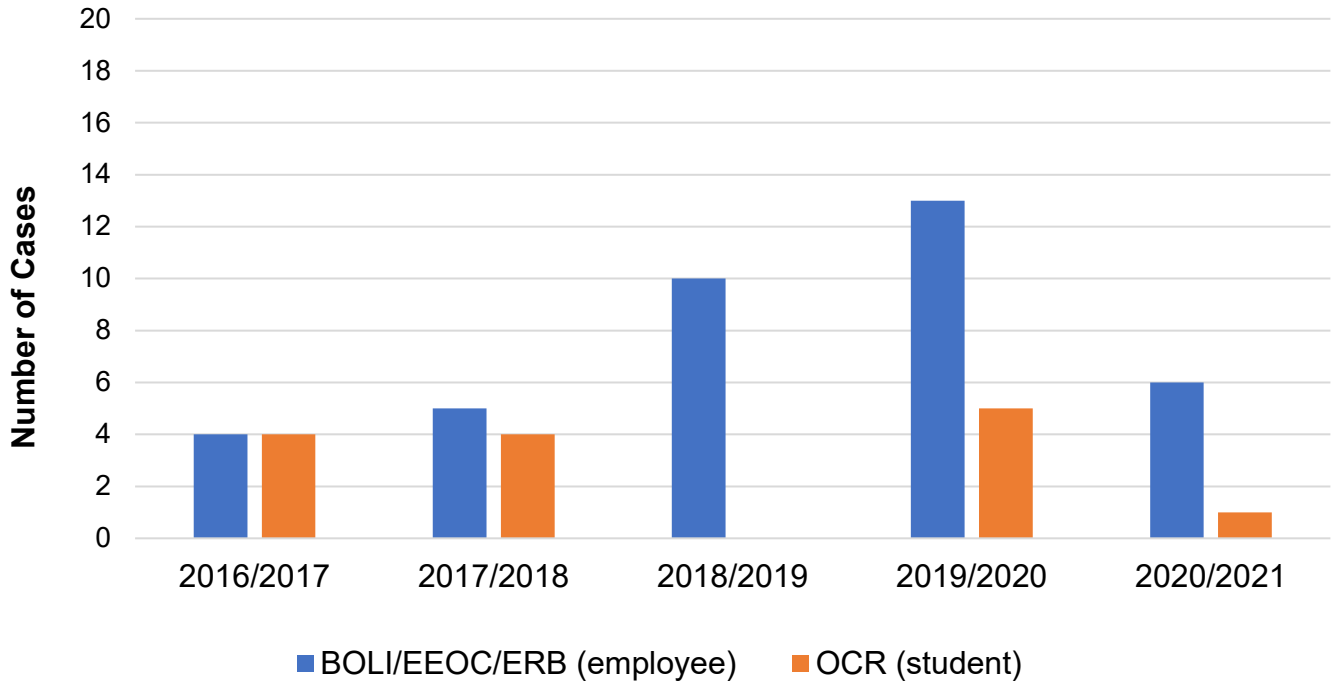
Administrative Claim Rates: Administrative claims (claims by students or employees to and investigated by outside agencies) made over the past five years. Claims are generally resolved within a one-year period, but may carry over from year to year.



"Resolved" indicates administrative closure for lack of evidence, findings with no litigation after expiration of statute of limitations period, court order, or settlement.

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

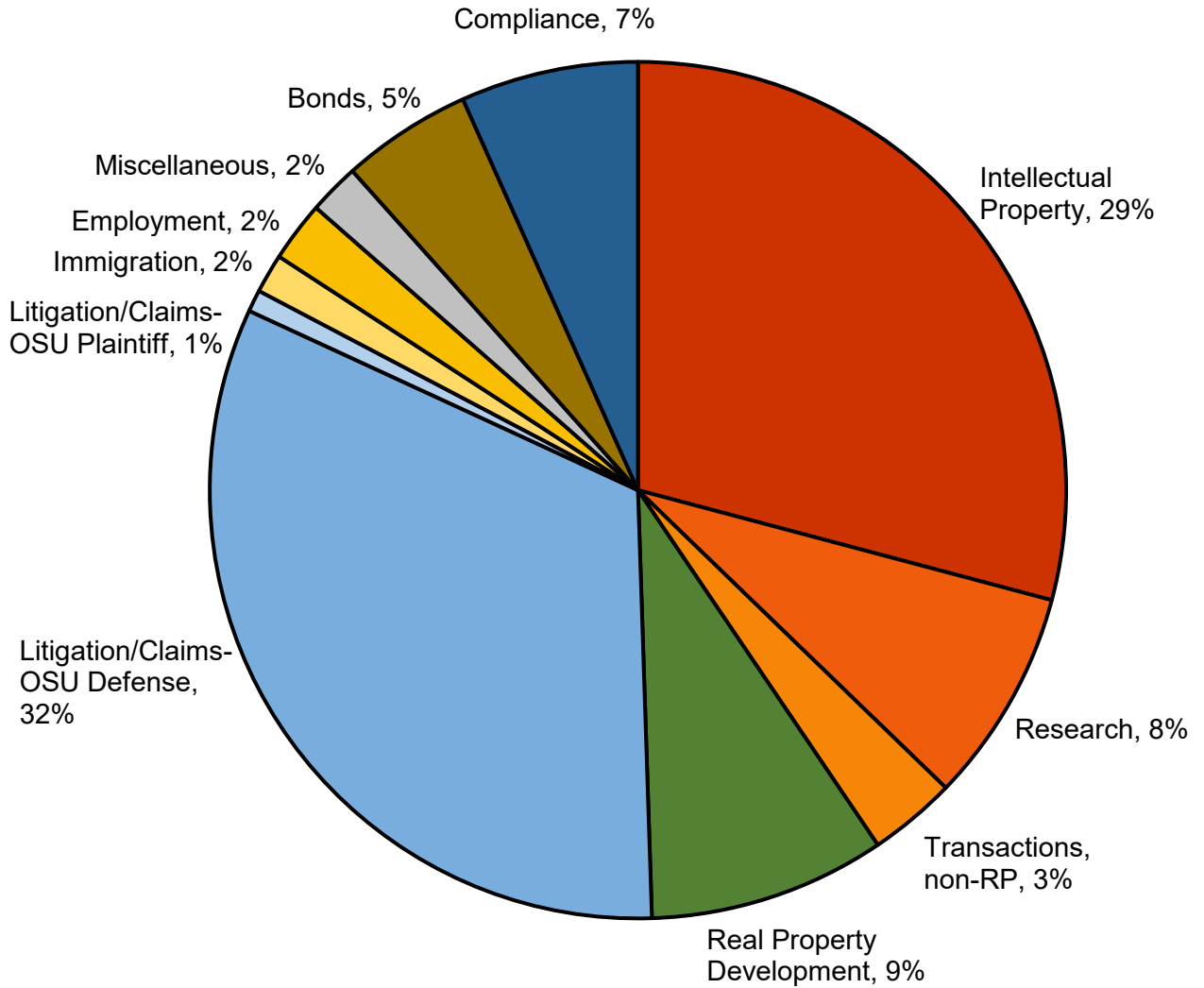
Administrative Claims by Type



University-wide outside counsel expenses broken out by type for FY2021.

Miscellaneous includes environmental, public finance, general advice, and other topics.

Total University-wide Outside Counsel Expenses by Type



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.

