

Office of General Counsel Annual Report FY2020

BACKGROUND

The Office of 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 2019-20

Major areas of focus for the OGC in 2019-20 fell into several categories:

- *COVID19 Response* – OGC began advising on international student issues related to the coronavirus in early Winter term, and by March, the office was fully immersed in advising on nearly every aspect of the university's response to the pandemic. 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.
- *Faculty Bargaining* – A significant focus this year included supporting OSU in its bargaining of the first faculty collective bargaining agreement. The agreement was executed, and it supports the goals of furthering healthy shared governance, promoting faculty success and positioning OSU well in terms of financial, legal or policy concerns addressed in the agreement. OGC also advised on a number of other issues or questions surrounding the support and management of faculty in a newly unionized environment.
- *Public Safety* – As a result of the termination of the Oregon State Police contract, OSU was provided with the opportunity to re-envision its public safety services, including the creation of a new armed law enforcement unit. OGC has devoted substantial focus to supporting this effort, given the myriad legal issues surrounding the establishment of a campus police department.
- *Free speech and diversity/inclusion efforts* – OGC continued to work proactively to support OSU's goals of providing an inclusive, diverse and safe environment, as well as supporting and protecting free speech rights. This is a complicated legal area that often involves overlapping rights and presents risk in the legal and public relations arenas.
- *State and federal legislative or policy changes* – OGC advised on a number of federal and state legislative or policy changes this year. On the federal side, OGC advised on OSU's response to federal efforts regarding immigration, Deferred Action for Childhood Arrivals (DACA), travel restrictions, Title IX regulations, foreign influence, free speech and new legislation related to COVID19. On the state side, OGC advised on OSU's response to legislative proposals regarding name/image/likeness rights of student

athletes, sports gambling, capital funding, transfer issues, police accountability, racial justice issues and COVID19.

- *Compliance issues* – Compliance issues continued to take significant focus as a result of the increased complexity and quantity of regulations in recent years, as well as heightened agency enforcement and public focus. Compliance is difficult to tackle in large, decentralized universities with diverse compliance topic areas, and the Office of Audit, Risk and Compliance (OARC) takes the lead in OSU's institutional compliance coordination and support. OGC serves as a partner to OARC in this effort. In particular, OGC advised on a number of Title IX areas including on individual cases (especially as reporting and responding parties engaged lawyers and involved outside agencies) and on implementing new federal regulations which significantly impacted this area of compliance. Other compliance areas in which OGC focused substantial advice included COVID19 compliance, foreign influence, youth safety, IT security, and Oregon's new Equal Pay Act.
- *Transactions supporting innovation, research and infrastructure* – OGC advised on a number of transactions and related issues that supported the increase of 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, federal license, risk management and compliance matters for the complex PacWave wave energy project; resolving issues related to the construction of the new Forest Science Complex; analyzing opportunity, risks and potential terms for acquisition of the Elliott Forest; supporting efforts to maximize insurance recovery related to the Burt Hall fire; resolution of multiple water rights issues for agricultural experiment stations; advising the new Global Hemp Innovation Center and advising to resolve issues with Link Oregon, OSU's new statewide network project. OGC also supported OSU's new efforts in expanding Ecampus internationally, evaluating public-private partnership opportunities related to the expansion/renovation of Reser Stadium, supporting OSU in negotiations with PPL Electric Utilities for upgrading OSU's electrical grid, adjusting OSU's relationship with College Housing Northwest regarding the management and maintenance of the GEM housing facility and exploring opportunities for partnerships with large employers who wish to send their employees to OSU for education benefits.
- *Student Mental Health* – Like other universities across the country, OSU continued to see increases in student mental health concerns, which required more OGC advising as crisis/threat/care management teams worked through complex student issues.

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. OSU has extremely low litigation rates compared to similarly situated national peers. A 2013 NACUA (National Association of College and University Attorneys) 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. This trend of low litigation continues to hold steady but could increase given national trends, especially increased litigation expected due to the COVID-19 pandemic.

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 litigation rates over the past six years is provided in Attachment 3.¹

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 Office for Civil Rights (OCR), the federal Equal Employment Opportunity Commission (EEOC), and the state Bureau of Labor & Industries (BOLI). There continues to be high success in this area, and OSU has prevailed on all but one of these claims in the last six years. Attachment 3 includes a snapshot of the numbers and types of these administrative claims over the past six years. OSU is experiencing a significant increase in the rate of claims in recent years, but the pure numbers of claims are still low for an institution of this size. 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 have been resolved), the claims involved unrelated issues, departments and individuals.

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

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. Efforts are made to monitor the staffing numbers of in-house counsel versus outside counsel to ensure provision of the most cost-effective legal services.

¹ The litigation over this six-year period involved employment disputes, injuries, breach of contract claims and student discrimination claims, as well as one equipment dispute and one 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).

Attachment 4 provides an overview of the types of matters that are 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 5 provides a six-year snapshot of OSU-wide outside counsel costs. Outside counsel work ebbs and flows with the needs of new initiatives and issues, and this year saw an increase in outside counsel costs as compared to last year. The primary drivers for this year's increase were OSU's response to COVID19 and increases related to the PacWave research project, land use, litigation and transactions work. Notably, OSU's costs related to immigration were down by 50% this year, likely attributable to the hiring of an immigration specialist (with a JD) in the Office of International Services, federal agencies experiencing significant delays in processing visas and COVID19 slowing immigration generally. Additionally, OSU's costs regarding compliance reviews were substantially lower this year, as several large scale reviews in high priority areas were completed.

It is encouraging to see that the majority of these university-wide outside counsel costs are to support OSU's proactive endeavors, with less going to traditional legal defense.

PREVENTATIVE LAW – OUTREACH AND TRAINING

OGC attorneys engage in preventive 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 many 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, one session of the Leadership Academy for academic school heads, and one session at Training Days for all interested employees. OGC also provided various trainings on myriad topics to particular departments, including the division of Student Affairs, Student Conduct Hearing Committee, the Office of Human Resources, 4-H leadership team, College of Business teaching faculty, the Office of Equal Opportunity and Access, ASOSU executive team, Extension Service Regional Administrators, Finance & Administration leadership team, Registrar's Office, Procurement & Contracts Services and others.

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 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 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.

OGC Staff

The office includes six (6) attorneys, two (2) paralegals, and an executive assistant. While the office is staffed leanly, 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.

DYNAMIC ADVISING ACROSS DIVERSE SUBJECT AREAS

OGC provided advice in the following key areas in 2019-20³:

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. 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. Advised HR and other units in preparation for an SEIU strike in Fall 2019, as well as supported the Board Office in the 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, Clery Act timely warning/crime reporting, controlled substances issues, export control, Title VI and VII, IT security compliance, environmental health/safety regulations, COVID19, HIPAA/FERPA, NCAA rules, antitrust, financial aid regulations, and human/animal subject research regulations.

Research issues – Advised on COVID19 research projects, hemp and marijuana research questions, controversial research matters and academic freedom, research compliance, research misconduct actions, technology transfer issues, grant compliance matters, 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, as well as copyright clearance on certain OSU productions. Also advised on intellectual property disputes.

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.

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, NCAA issues, drug and COVID19 testing, safety protocols, public-private partnership opportunities, diversity and inclusion efforts, discrimination complaints, scholarships, gender equity in athletic opportunity and facilities, coach contracts, personnel matters, sports betting issues and national litigation/legislation regarding concussions and other injuries, use of student athletes' name/image/likeness, student athletes as non-employees, and payments to student athletes beyond the cost of attendance.

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, 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. Advised OSU (as co-lead plaintiff with UO) in instituting litigation in a 20-school coalition against the federal government successfully challenging federal prohibition of international students studying at fully online/remote university during pandemic.

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.

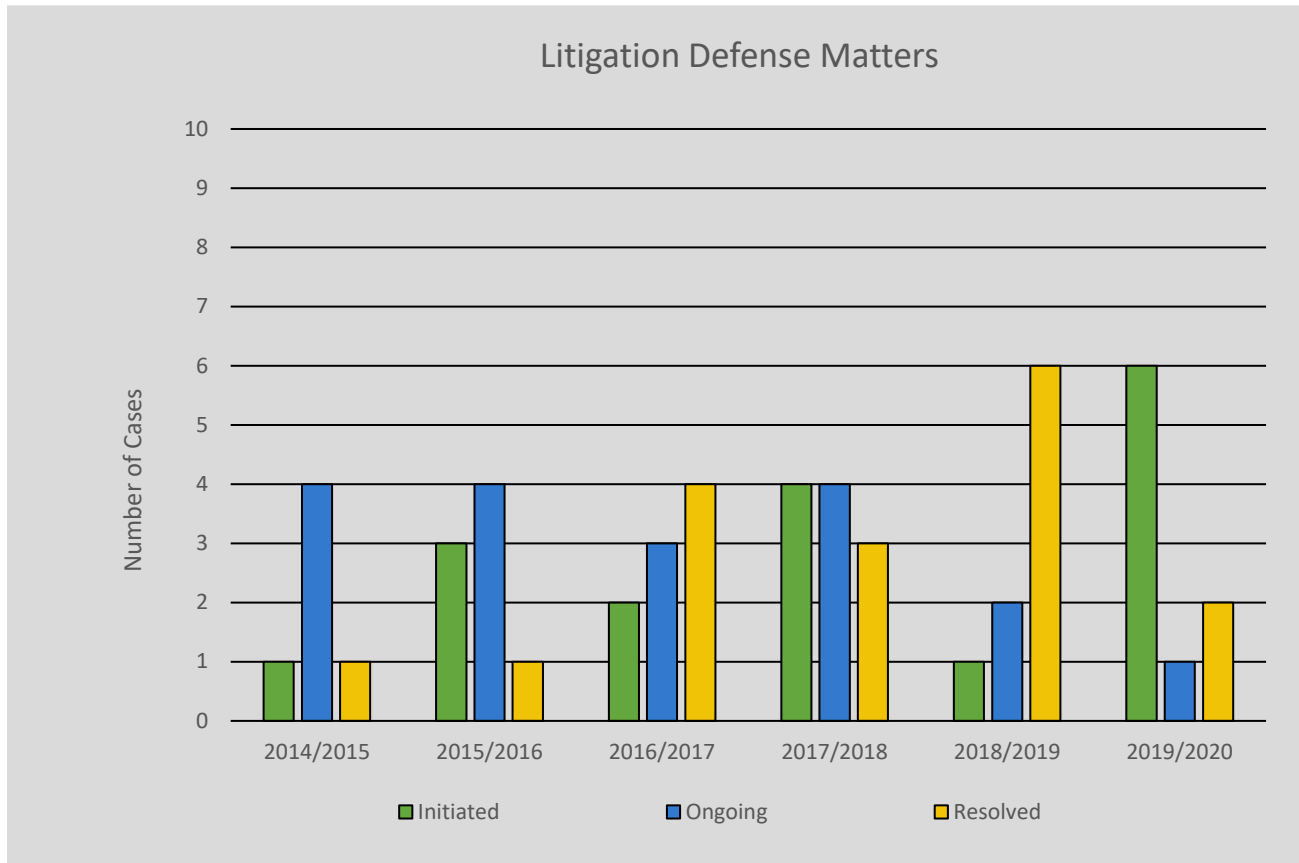
Legislation – Advised regarding variety of bills in the 2020 Oregon legislative session, as well as two special sessions related to COVID19 and policing/racial justice matters. Advised regarding variety of proposed federal bills.

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

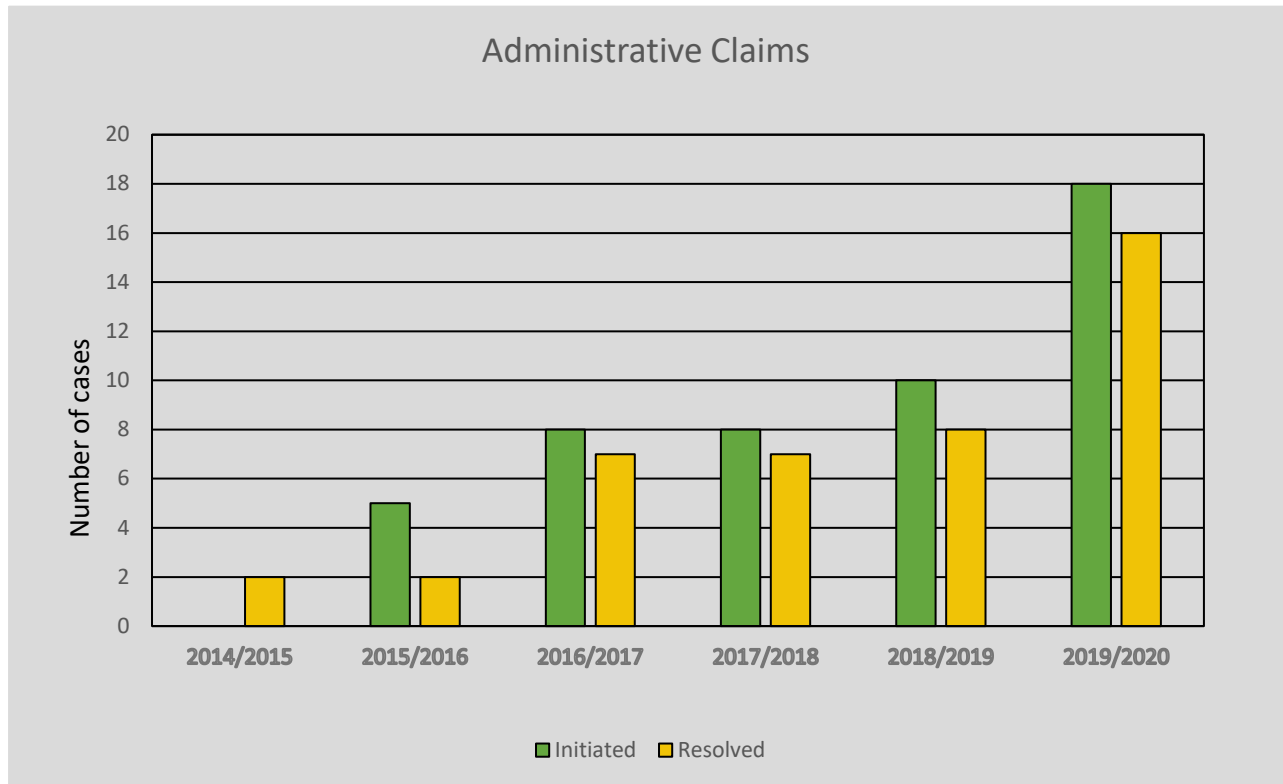
Ethics/audits – Advised on government ethics issues and internal/external audits.

Bankruptcy/collections matters – Advised on student, client and corporate vendor bankruptcies and collections matters to the extent they impacted OSU. Also advised OSU in instituting debt collection litigation in certain situations.

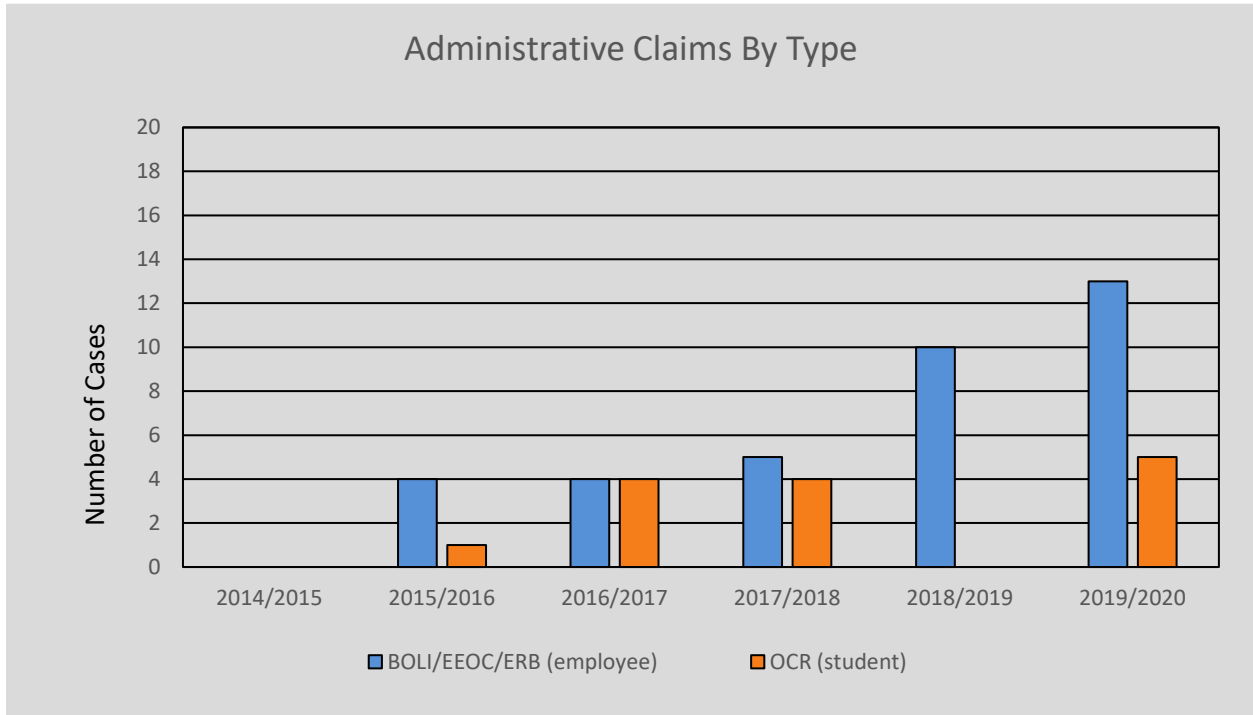
Litigation Matters: Six-year snapshot showing number of cases filed against OSU and resolved each year, as well as those carried over from previous years.



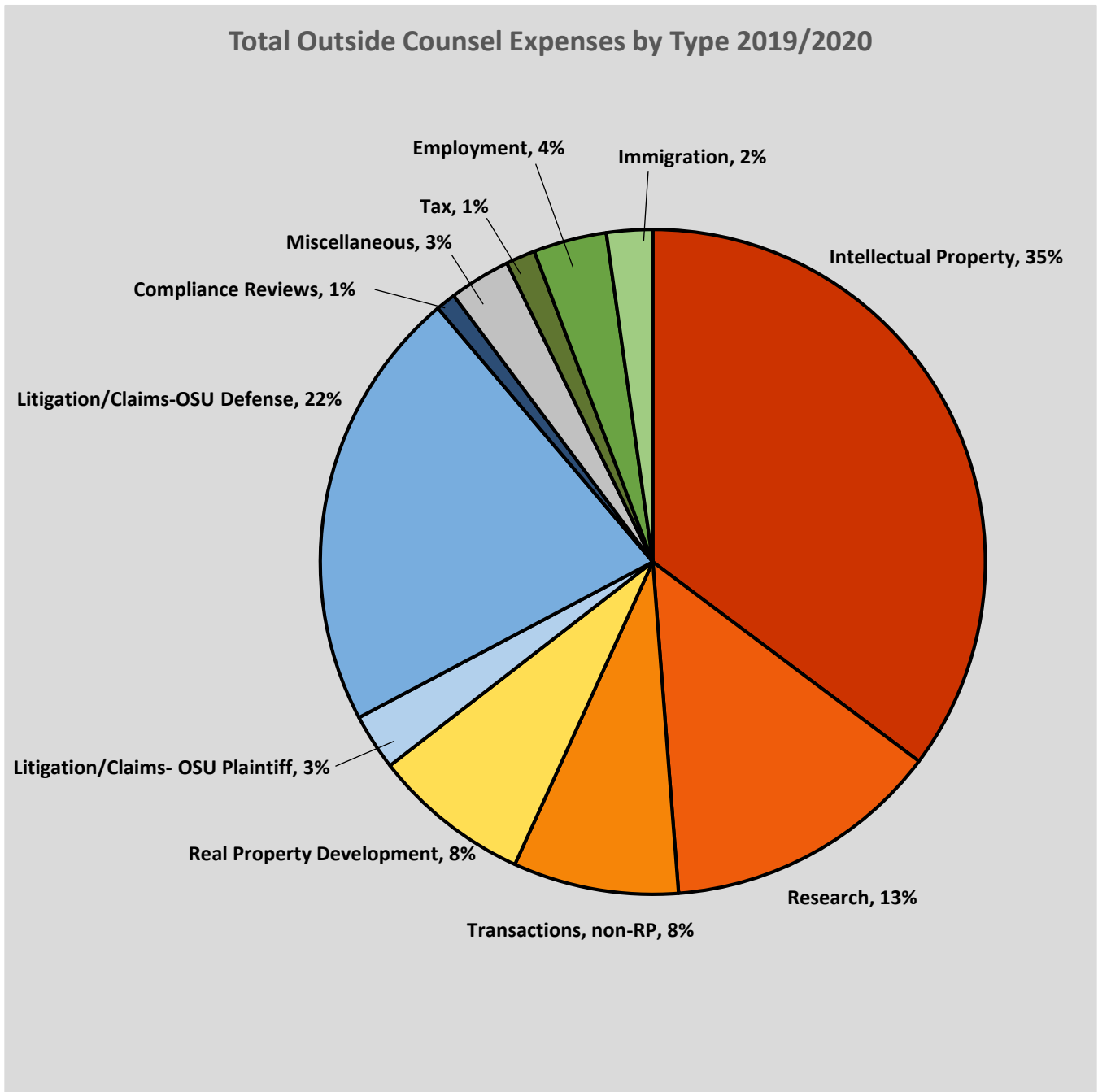
Administrative Claims: Administrative claims (claims by students or employees to and investigated by outside agencies) made over the past six years. Claims are generally resolved within a one-year period, but may carry over from year to year.



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



University-wide outside counsel expenses broken out by category for Fiscal Year 2020. Miscellaneous includes environmental, public finance, general advice, and other topics.



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

