

Minutes*

Faculty Consultative Committee
Thursday, October 24, 2013
1:00 – 3:00
Room 238A Morrill Hall

Present: Will Durfee (chair), James Cloyd, Eva von Dassow, Jigna Desai, Janet Ericksen, Gary Gardner, Joseph Konstan, Russell Luepker, Alon McCormick, Karen Mesce, Ned Patterson, Paul Ranelli, Rebecca Ropers-Huilman, David Satin, Jean Wyman

Absent: Linda Bearinger, Avner Ben-Ner, Maria Gini, Chris Uggen

Guests: none

Other: Ken Savary (Office of the Board of Regents)

[In these minutes: (1) change to the Board of Regents policy *Commercialization of Intellectual Property Rights* (student intellectual property); (2) letter from bioethicists; (3) other business]

1. Change to the Board of Regents Policy *Commercialization of Intellectual Property Rights* (Student Intellectual Property)

Professor Durfee convened the meeting at 1:00 and turned to the proposed change in the Board of Regents policy *Commercialization of Intellectual Property Rights*. The proposed change originated in the Office of the Vice President for Research and was unanimously endorsed by the Senate Research Committee.

In essence, Professor Durfee said, the change addresses the situation when a student invents something in a course. Does this come up often? Yes, it does, for example in courses in his part of the University, where ownership of intellectual property generated by students is a significant issue. With the change in Regents policy that came in 2007, the University owns the intellectual property created by students in courses, not the students, and that change has been recognized as problematic for students, faculty members, companies, and the University. The proposal now is to change the commercialization policy so that students own their intellectual property developed in a course. Professor Durfee said he would like the Committee to endorse the change, or not, so that it can go through the normal policy process and be adopted by the Board of Regents.

Professor Konstan offered three observations. One, he didn't know that the change had been made in 2007 and would have objected, and this proposal is far more reasonable. Two, he suggested a change in the wording regarding the language about the exception not applying if a faculty member or other employee is an inventor. Read strictly, this would seem to say that the University is still claiming rights to student work in a class in cases where the student is a graduate assistant, or bookstore employee for that matter, but taking a class unrelated to her employment duties. Three, he said it is a very strange policy statement: the policy is that the University claims intellectual property and now indicates that the

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

policy doesn't apply in the case of this exception. But that leaves things ambiguous, because it doesn't specify what the default is. It would be better to either have an affirmative policy statement that student inventions (under certain conditions) belong to the students, or a statement that that University owns them, but cedes rights back to the students. As it reads now, one can't tell who actually owns those student inventions, since they simply fall outside the policy. He said he supports the concept as well as a requirement that if students are giving up their intellectual-property rights in a course, the course description or syllabus should say so in order that students know it before committing to the course.

Professor Durfee said that if a student is a TA or RA or holds some other appointment as a University employee and invents something in an unrelated course (in a way that is covered by this exception), the University would likely not assert rights to that technology. There will be FAQs about that instance. As for the language, he agreed that different wording might be better but the current proposal has been vetted by the Office of the General Counsel and the Office of the Vice President for Research and contains all the appropriate legalese, and if the meaning can be made clear with FAQs, he would urge letting the language stand.

Professor Gardner asked if the change applies to all intellectual property or just inventions. It does not include copyright, Professor Durfee said, which is covered in a separate policy; this change applies only to inventions. In response to a comment from Professor von Dassow that intellectual property does include copyright, Professor Durfee reiterated that inventions are separate from the Regents policy on copyright.

Professor Satin gave an example of a course he might teach in health-care quality improvements, for which students would do posters and companies invited to see them. The hope is that companies would collaborate with the students and use the proposals. He works with the students to develop the ideas; how would that play out? Professor Durfee said that if the faculty member is a co-owner of an invention created in the course (the criteria for which are set out in law), the University would own the faculty member's part.

Professor Cloyd surmised that when a student owns intellectual property from a course, the vast majority of them would have no clue what to do next. Is there a service or help for them? There is, Professor Durfee said: the Office for Technology Commercialization (OTC) will provide free advice for any student who contacts them. Professor McCormick asked whether, now, when a student wants to disclose a patent, OTC is obligated to take ownership if the student wants to turn the patent over to the University. Or can OTC decline? Under the current policy, the student is in the same position as the faculty member, Professor Durfee said, and must disclose inventions; the University decides whether or not it wishes to pursue a patent and licensing or turn the ownership over to the student (or the faculty member, if it is a faculty member). The process can be lengthy and often is an inefficient use of time. With the proposed change, the student owns the rights to the invention and has the option to go to OTC for help. But OTC could decline to take the intellectual property, Professor McCormick asked? Professor Durfee said the student could offer the intellectual property to the University, which would not be obligated to take it.

Professor Konstan expressed a cautionary note. If a student provides sufficient information about intellectual property at an open poster session, he or she is, by doing so, giving up an international patent and starts the clock ticking on obtaining a U.S. patent. If there is serious potential for the intellectual

property to become valuable, students should file for a patent before making it public. In 99% of the cases that won't matter, but it could in a few.

Professor Gardner said that it could be appropriate to have a standard paragraph for syllabi in courses where this issue could arise. Professor Wyman asked how this change will be communicated to everyone; it will affect a significant number of faculty and could affect a large number of students. Professor Durfee said it might be appropriate for this Committee and the Office of the Vice President for Research to do an all-University email—and noted that this will also be up to the Board of Regents because it is their policy and many are not aware of the change that was made in 2007.

This is an ongoing question, Professor Cloyd commented. When dealing with important issues that affect faculty, staff and students, how is a reasonable person making a reasonable effort to find out about a new policy or change in policy? He said the University does not do a particularly good job of communicating these changes. This is important; how can the University make sure that students do not lose intellectual property? And could it be liable if that did happen? It will be important to get this message down to the department level. Professor Ranelli noted that this is a system issue so any message needs to reach all campuses. Professor Durfee concurred.

The Committee voted unanimously to endorse the change in policy.

2. Letter from Bioethicists

Professor Durfee expressed apologies for the large amount of material that Committee members had been provided less than a day before the meeting and explained that it became clear fairly late that it would be best to discuss the issue at this meeting. He said the discussion would start on the record but that anyone could go off the record.

The Markingson case has had an impact on the University for about 10 years and there is a long history of events, Professor Durfee said. [Mr. Markingson committed suicide while a participant in a pharmaceutical clinical trial at the University.] The reason it is before the Committee today is that the president, Professor von Dassow (as vice chair of the Senate received a letter addressed to them and to members of the Senate from a large group of faculty members from outside the University expressing concern about the case. The letter makes a request of the Senate. He said he is interpreting the letter as being addressed to the Faculty Senate, so it is appropriately before this Committee because it is the executive committee of the Faculty Senate.

The president will respond on behalf of the University, Professor Durfee said, but the letter was also addressed to the Senate. This Committee has a number of options for what to do next. Before starting discussion, Professor Durfee reminded the committee that, the Senate and committees of the Senate can talk about the policies and procedures but the details of specific cases are never dealt with by the Senate (except in individual cases alleging violations of the tenure policy, which are heard by the Senate Judicial Committee, but the Academic Freedom and Tenure committee deals with policy issues). Over the past several years, the broader issues raised by the Markingson case have been discussed by a number of Faculty Senate Committees, including the role of the IRB, conflicts of interest, and the difference between academic freedom and academic responsibility when complex issues arise and some faculty members talk about the work of other faculty members. Professor Durfee then opened the floor for discussion and turned first to Professor von Dassow.

Professor von Dassow began by noting that the letter is addressed to President Kaler and to her as chair and vice chair of the Faculty Senate; it is further addressed to all (faculty) senators, and should accordingly be conveyed to them all for discussion and response.

Professor von Dassow said she wished to avoid giving her own view of the case at issue (with which she has no personal involvement). Differing interpretations of the facts are possible, and the response of the faculty—or of the University—does not turn on the question of competing interpretations. Rather, the point of departure is that in this case, a terrible tragedy occurred, and the details of the case give reason to believe that it occurred because things were done that shouldn't have been, or not the way they should have been. This generates a duty to inquire and discover what those things were in order to prevent the recurrence of tragedy. The Legislature already fixed one such thing as a direct result of this case: it passed a law prohibiting the obtaining of informed consent for participation in research studies from subjects under involuntary commitment (whether there is enforcement is however another question). Meanwhile the University administration has turned down repeated calls for an independent inquiry, claiming that the case has been repeatedly investigated and no wrongdoing was found. It may be argued that that claim is to some extent factually incorrect inasmuch as, when deposed in connection with a lawsuit against the University over the case, a University official testified that no investigation had been done; the FDA did conduct an investigation, but its mandate is limited; and the Minnesota Board of Social Work found the study coordinator in the case liable for several violations.

No matter how the question of wrongdoing is viewed, its resolution is necessary, Professor von Dassow said. This case and the continuing refusal of requests for an inquiry have caused the institution reputational harm. The events took place during the previous administration, which gives the present administration a golden opportunity to remedy that harm. As for the position of the faculty, it has an individual and collective interest in protecting the integrity and the perception of integrity of University research. The public does not differentiate between the Department of Psychiatry and the Department of Psychology or any other department. All of the faculty's reputations are implicated if the institution's is compromised, as in the Najarian case in the previous millennium. (Professor von Dassow clarified that she did not mean to imply that this case is parallel to the Najarian case.)

Finally, the Faculty Senate owes a collegial response to the letter addressed to it, at a minimum, out of courtesy. Professor von Dassow said that she would therefore argue that the right response to this letter is to convey it to all faculty senators—as the correspondents ask—and to bring it before the full Faculty Senate at its next meeting for discussion and possible action. She did not know how it should be brought forward or what action to propose but said she believes the Faculty Senate has a duty to address it, and said she would prefer that the Faculty Senate adopt a resolution asking the administration to appoint an independent panel.

Professor Luepker said he disagreed with Professor von Dassow. He said he has known about the case for the last four or five years and has a very thick packet of materials related to it. He said he believes it is beyond the purview of this Committee or the Faculty Senate to look into the case; there are many grievances against the University that impair its reputation that do not come to this Committee because there are other mechanisms for review. It is a tragedy when a 26-year-old dies, but the matter has been reviewed by the IRB, the state attorney general, the Board of Medical Examiners, the FDA, the federal courts, and the state courts, and none of them found wrongdoing. These are all independent bodies. The Board of Regents reviewed these reports and concurred with them. The Committee is now

being asked to look at the case again, but there are no new facts and it is being asked to look at the case by a number of faculty members from outside the University. The Committee should not take up the matter.

Professor von Dassow agreed that it is not the Committee's job to conduct an investigation; any inquiry would need to be conducted by an outside group. It appears that investigations that are said to have been conducted were not, she said, but in any event the Committee or the Senate would not investigate, rather it would ask that an external, non-partisan group be appointed to do so.

Professor Desai said that the Committee cannot be responsible for an investigation but she noted that the letter had also been signed by a number of University of Minnesota faculty members saying that the situation is problematic; that means a lot to her. A full investigation could suggest a way to think about what the faculty does, how it does it, and how to prevent such tragedies for better practices for the future. She said she did not think the process would be looking for scapegoats but should look at the process and ethics of knowledge production more broadly.

Professor Satin said that as a University of Minnesota Physician, and a bioethicist, he is caught between two parties and will recuse himself should there be a vote on this matter. He has colleagues and friends on both sides. He went on to say that he would like to offer comments and information in order to help the group come to a wise conclusion. He said the letter was signed by legitimate faculty leaders and he has to give considerable weight to it. But he also knows that the matter has been investigated by a number of organizations, and if anything is to go forward, there must be clear accounting for what has gone before. That must be done before anything more is done because the University has already spent considerable resources on this matter and it is harmful to those who are accused. Any further action will not be without opportunity costs. All of the questions the Committee considers ought to be based on process, not on facts, some of which are sealed; one can ask if due process was followed and if the Committee likes the process. It could say that the University's policies are not sufficient—but it could also find that they are. Professor Satin said he knows that this matter has been looked at from many different angles—civil, regulatory, etc.—but he does not know if there has been an ethics review. The IRB reviewed it, but critics of the process maintain that that is asking the very group that approved the study to evaluate whether they ought to have approved it. If anything is to happen, the focus should be on the process.

Professor Mesce said she agreed with Professor Satin about the complexities surrounding past and any future investigations and said that her only decision as a member of this Committee is to say that she believes the letter deserves a reasonable response—but she does not know what the content of the response should be. She said she does not have all the information so she is uncertain that it is appropriate to call for an independent investigation now. She said she had looked in Wikipedia for some general information about the mode of action of the antipsychotic drug (administered to the patient in question) and was surprised to find additional text about the controversy over whether the University of Minnesota had adequately responded to troubling questions posed by a number of bioethicists. At some point, with additional information, one might want to ask if the matter should be re-addressed or not.

Professor Konstan said he both agreed and disagreed with his colleagues. There is no question that there was a human tragedy and that there were mistakes, but that is not the question because human beings make mistakes. As to the question of reputational harm, he feels this is not a question for the faculty or the Faculty Senate (and is instead one for the administration), and it is an open question which

does more reputational harm, to keep beating the dead dog or to let sleeping dogs lie. Does the Committee owe the authors a response? If such a letter had been received from a number of faculty members both inside and outside the University calling for an investigation of the financing of TCF Bank Stadium, he would not say any response was called for. The mere fact that respected colleagues write a letter only means that the Committee must decide whether to circulate it to the Faculty Senate, as the executive committee; any faculty member who disagreed can appeal the decision on the floor of the Faculty Senate and the body could vote. This is actually a very small number of faculty members, and Professor Konstan expressed doubt that most of them know any more than he does about the matter, and writing the letter does not alone make it legitimate.

This gets to the question of process, Professor Konstan continued, and there are two questions that can be asked. Did the University as an institution do an effective job in learning from any mistakes even though it appears that it asserted legal immunity rather than have the case adjudicated on its own merits? If it asserts legal immunity, does that mean the University stops learning? He noted that there has been no recurrence of the problem in the last several years. Second, it is a good policy question whether there should be an ethics review in cases like this as they arise, but one can decide there should be without re-opening this particular case.

Professor Konstan said that he feels under-informed and that the matter should not be put on the Faculty Senate agenda, but there could be thought given to how to handle the case ethically, even if not legally.

Professor Gardner said that he probably knows less about the matter than most people at the meeting and noted that the letter calls for an independent inquiry. The case has been considered by the FDA, the district court, and the Minnesota Board of Medical Practice; those are independent agencies; what did they review? If they are not the right agencies to review the case, who would be?

Professor von Dassow said her understanding is that most of those agencies did not conduct an investigation so one cannot know what they looked at, but said that her knowledge on this point is incomplete. She said she did not know what ethical inquiry an outside agency would conduct. Some may think that the legal questions should be revisited, but that is not the job of the Committee, and neither is the question of who would conduct the ethical inquiry.

Professor Gardner said that what concerns him is that one can say that the Minnesota Board of Medical Practice investigated the matter and it also went before the courts. There was a lawsuit; if it was brought, one would think that the attorneys thought there would be a case, and if that were so, it would be pursued through the courts.

Professor Gardner asked if the Senate Research Committee had discussed whether procedures should be changed. Or consider whether something was not done that should have been.

Professor Durfee said he believes it is the job of committees in the governance system—the faculty governance system, in this case—to look at the implications of policies and procedures for how the University operates. He said he was struck by the thoroughness with which the Senate committees [in 2011] looked at the issues raised by this matter, including conflict of interest (always a delicate matter in these kinds of cases) and IRB practices (studies that include subjects with mental impairments are exceptionally difficult). He said he was also impressed that the committees thought that there was an

academic-freedom issue and found that the Academic Freedom and Tenure committee conclusions were explicit: if something is defamation, that crosses the line from academic freedom into a legal matter. He said he believes that the issues pertinent for faculty governance have been discussed, and while an outside ethics review could be conducted, he does not believe it would reveal anything new beyond what has already been discussed by Senate committees.

Professor Ranelli asked if there is a University ombuds system that could hear the matter. Professor Durfee said there is not. Professor Ranelli noted Professor Mesce's suggestion that there be a reasonable response: what would be a reasonable response, he asked? By whose definition? Professor Durfee said he believes the faculty governance system should respond to the letter. Professor Ranelli asked what could be hurt if there were an independent investigation. One hears that people are continually asking questions; what if the University says "no"? That does not seem right.

Professor von Dassow said, about the question whether this is a recurring problem and how one would know it, short of research subjects filing lawsuits (a high bar for many), one cannot know. There is no way that this Committee or the world at large could know unless there are lawsuits, the expense of which many are not likely able to bear.

Professor Satin said, apropos of the question of whether there is a mechanism to check, that while he is not 100% sure, he is 99% sure that no death happens in a psychiatric study without a massive investigation at many levels. The University should not await another death but there are many others who could inform the Committee about the quality-assurance mechanisms that are in place. There are a lot of them. Knowing how hospitals and departments work, he said he would surmise that there are a dozen mechanisms in place.

Professor Cloyd said that all clinical trials with human subjects that involve University of Minnesota faculty members have agreements with a clause about reporting adverse events: they must be reported to the IRB. He said he assumed the Committee could obtain information about the frequency of serious adverse events, although he did not know what the Committee would do with it if it did so.

Professor Durfee said that the IRB is "ground zero" for oversight of studies involving human subjects because this university and the federal government have invested authority in them.

Professor Ropers-Huilman said she did not know any more about the case than what she has read in the media or quickly read in the documents that were distributed, so knows that she does not have all the information. However, she thought that given the number of inquiries that have been made about this case, she is surprised that a document does not yet exist that identifies each investigation, the specific elements of the case it considered, and the findings it concluded. She said she was puzzled that such a document does not exist that the Committee members could look at, such that they would perhaps feel more confident about not reconsidering the case further. While she trusts the many colleagues who were involved in various aspects of this case earlier, she is surprised that a comprehensive and definitive response to inquiries such as the one recently received does not exist. It seems that in the spirit of efficiency, and given the number of inquiries related to this case, investing the time in creating a comprehensive document is warranted.

Professor von Dassow surmised that such a document does not exist or it would have been provided to the Committee. She said that the matter was more like a pustulating sore than a sleeping dog

and at a minimum the administration could compile a document such as Professor Ropers-Huilman described and make it publicly available. She repeated her view that the Faculty Senate could recommend there be an investigation but that it was not the Senate's responsibility to conduct it—it will have done due diligence as a faculty body by recommending the inquiry.

Professor Luepker noted that Professor Satin had mentioned that someone associated with this letter had already prepared a press release, which suggests that this was not just a group of university colleagues raising questions of ethics with the Senate.

Professor Durfee thanked Committee members for the discussion.

3. Other Business

-- Professor Durfee urged Committee members to read the discussion of changes to the student-rating-of-teaching form that had taken place at the Senate Committee on Educational Policy and the Senate Committee on Faculty Affairs; if anyone has opinions about the proposal, they should send a message to Dr. Gram in the provost's office.

-- Committee members voted on a new vice chair, to replace Professor Ropers-Huilman, who will be going on leave beginning February 1. No majority was reached, so Professor Durfee said he would contact the two leading candidates and ask about their willingness to serve. He will then ask Committee members to vote by email.

-- Professor Durfee provided a brief report from the annual meeting of the faculty leaders at the CIC schools. After a day and a half of meetings, he had reached several conclusions. One, "we are exceptionally fortunate how the governance structure is set up at Minnesota." Two, "we are exceptionally fortunate in how the regents are selected" compared to how it is done at some of the other schools. Three, "we are exceptionally fortunate in the way the governance system is set up vis-à-vis other campuses" compared to some of the institutions with multiple campuses. He also commented that governance access to administrators at Minnesota is outstanding and must be protected.

Professor Cloyd asked if there are any places the University's governance system falls below that of the other CIC schools. Professor Durfee said he couldn't think of one.

Professor McCormick asked if there is something distinctive about Minnesota's faculty senate in comparison to how other faculty senates work. Professor Durfee said he would provide the Committee the survey of the CIC schools that the Minnesota senate office has conducted about the structure and functioning of the governance systems.

Professor Konstan noted that one reads frequently about "no confidence" votes at other institutions but that one never reads about a "confidence" vote. This is not the time, he said, but if at the end of the strategic-planning process the faculty conclude they support the plan and the leadership in carrying it out, and if there remains a close working relationship with the administration, the Committee or the Faculty Senate might want to draw attention to that fact.

-- The next meeting will be a single-topic meeting with the president and provost, on the definition of quality, Professor Durfee reported in response to a query from Professor Gardner. Professor

Ropers-Huilman said that they had chosen that topic because there is the assumption that everyone agrees on the definition of quality, and it may be helpful to identify different definitions and how the term can and should be used. Professor Gardner commented that everyone is always looking for metrics, which are intended to take away the responsibility for making a decision, which is what the budget model has done. In the case of peer review, by comparison, the quality of work is judged by experts, not by the number of authors or the number of citations it contains.

Professor Durfee adjourned the meeting at 2:50.

-- Gary Engstrand

University of Minnesota