Minutes[*]

Senate Committee on Faculty Affairs
Wednesday, May 20, 2009
1:00 – 3:00
510 Morrill Hall

Present: Kathryn Hanna (chair), Ben Bornsztein, Carol Carrier, Vladimir Cherkassky, Randy Croce, Jayne Fulkerson, Holly Littlefield, Theodor Litman, Luis Ramos-Garcia, Joe Ritter, Roderick Squires, Elizabeth Stallman

Absent: Marilyn Bruin, Arlene Carney, Dann Chapman, Tom Clayton, Jessica Reinitz, George Sheets, James Wojtaszek

Guests: Greg Brown (Office of the General Counsel), Jon Binks (Office of the Provost); Joe Kelly (Office of the Vice President for Human Resources); Jackie Singer (Director of Retirement Benefits); Joe Kelly (Office of the Vice President for Human Resources)

[In these minutes: (1) chair's comments; (2) copyright dispute-resolution procedures; (3) conflict-of-interest issues; (4) RECESS program]

1. Chair's Comment

Professor Hanna convened the last meeting of the year at 1:05 and began by noting that she will continue as chair next year. She said she enjoyed the work and has seen a number of good things come out of committees. There will be a planning session this summer to identify issues of concern to the faculty that should come before the Committee next year; she urged Committee members to send her a message if they have issues to suggest.

2. Copyright Dispute-Resolution Procedures

Professor Hanna welcomed Greg Brown to discuss the draft "Resolution of Copyright Ownership Disputes" policy. She recalled that the Committee had earlier reviewed the administrative policy on copyright; as part of the discussion there was agreement that dispute-resolution procedures would be drafted.

Mr. Brown began by introducing Jon Binks from the Provost's office. He explained that he was presenting the procedure instead of Professor Ruth Okediji (Law School) and University Librarian Wendy Lougee, had co-chaired a faculty committee that drafted the copyright policy and procedures, who were not available. He and Mr. Binks had worked together with Professor Okediji and University Librarian Lougee on these draft dispute-resolution procedures. He said he would provide the context for the procedures, review them, and then respond to questions and hear concerns that he would relay to the Provost.

[*] 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.

The administration originally proposed dispute-resolution procedures as part of the administrative copyright policy, but various faculty groups questioned the procedures, Mr. Brown said. So the administration re-thought the procedures to integrate faculty concerns into this new draft. One question posed was whether copyright disputes could be incorporated in the University's regular conflict-resolution processes under the direction of the Office for Conflict Resolution headed by Carolyn Chalmers; that office deals with employee-related grievances and problems. There are two phases to the established conflict-resolution process, one informal and one formal. The latter can lead to arbitration, the results of which can be appealed to the Minnesota Court of Appeals. That process cannot be used for copyright disputes because copyright is based upon federal law and the University has no authority to set the kind of rules governing appeals that it does for other employment disputes. So copyright disputes cannot be subsumed under the Office for Conflict Resolution processes. What they did was work with Ms. Chalmers to develop procedures for copyright disputes that embrace the principles in the existing conflict-resolution process.

The committee that drafted the copyright procedure concluded that it would be best if the copyright dispute-resolution procedures were voluntary. Both sides must agree to use it, either party can opt out of the process at any time, and use of the process does not preclude any claim an employee might wish to make in court. They decided against creating a mandatory arbitration process that would bind everyone.

The draft procedure provides for a three-person panel that is empanelled by the Provost. The affected individual nominates one member, the unit head nominates one member; the Provost appoints all panel members, including a third individual whom he or she selects. The Provost designates the chair. If a University unit or department is not a party to the dispute, each of the parties nominates a member of the panel and the Provost again appoints the third member and designates the chair. The procedure provides that "each member shall be knowledgeable in copyright law" but that does not mean the individual must be a lawyer. Nor must panel members be University employees. The idea is that over time, there will develop a short list of individuals willing to provide this service.

There also arises the question of justiciability, Mr. Brown said: is the dispute covered by the procedures? Some can be, some cannot. First, all must agree to use the process or it cannot be invoked. Two, if the dispute is about a work not covered by the University's copyright policy, the procedures cannot be invoked. Three, if a resolution would include a person not bound by University policy, the procedures cannot be used. Fourth, for prudential reasons, there is a need for finality, so the dispute must be brought up within a year of the creation of the work in dispute. The Provost decides if the dispute is covered by the procedures, although his or her discretion is bounded.

Under the procedures, the panel chair has considerable authority to decide how the panel will work, within limits. The panel must accept written statements from the parties to the dispute; it is not obligated to take oral testimony. The panel must act by majority vote and must create a written decision. The decision may be appealed to the Provost; he or she decides and the process is over. The parties can abide by the decision or they may go to federal court. The outcome of the dispute-resolution procedure is not binding and is not relevant to federal court proceedings EXCEPT that statements made during the University process could be evidence and could find its way into court. The University's process, however, does not affect the ability of the federal court to decide a case.

They have tried to address faculty concerns, Mr. Brown concluded, and the fewer cases that end up in federal court, the better off everyone will be.

Professor Cherkassky asked how many cases there are. Mr. Brown said he did not have data but his impressionistic sense is that there are perhaps six in a 12-month period. Professor Cherkassky asked if most are faculty versus faculty, faculty versus student, or faculty versus the University. They are mostly faculty versus student, Mr. Brown said. He recalled three cases where a graduate student claimed a faculty member infringed on his/her copyright. These incidents might be academic misconduct, there could simply be a misunderstanding, or there could be an authorship dispute. When the disputes are between a faculty member and the University, it typically arises for one of two reasons. One, a dispute occurs because the faculty member is leaving and the University wants access to instructional materials; with the change in the Board of Regents copyright policy and different department cultures about sharing work, the question of whether the faculty in a department or the University may continue to use a departing faculty member's work arises. Two, the disagreement is over distance-education materials (and these kinds of disputes, Mr. Brown surmised, may increase). If a lecture is broadcast and the faculty member is using PowerPoint slides, the University would assert ownership of the video but not the PowerPoint slides. The faculty member may not contest University ownership of the video but may want to retain some control over its use.

Professor Squires asked if one can appeal the Provost's decision that a dispute is not covered by the procedures. They cannot, Mr. Brown said. Such an appeal is a normal part of conflict-resolution processes, Professor Squires said. Professor Hanna said she has seen such appeals. Professor Squires said he would be concerned if the University is party to the dispute and a University officer is making the jurisdictional decision. If the Provost makes a decision, to whom should one appeal, Mr. Brown asked? To a panel, Professor Squires said, one appointed in the same way the panel to hear the facts would be appointed. That gives both parties confidence in the process. Ms. Stallman asked if the Provost decides where a dispute should go, if he or she determines it is not covered by the copyright dispute-resolution procedures. He or she does not, Mr. Brown said; the Provost only decides there is no jurisdiction, but he agreed that the point about appealing the decision is a good one.

Professor Ritter inquired first about the limits of the policy. He said what could be in dispute is whether someone is covered by the policy. He also questioned the time limit; it sounds short, he said, given that it takes to produce and publish something. The dispute could arise well after the creation of a work (e.g., a department wants to use a syllabus created earlier).

Mr. Brown said the time period selected was a compromise to avoid what they see in other areas: one year from the time the claim arose or a combination, such as within X years after one learned about the claim but in no event more than Y years later. He said it is a legitimate point: the Provost could decide there was no jurisdiction because the claim was stale—but that no one even knew there was a dispute before a certain time (but more than a year after the creation of the work). It would be better to have language such as "when created or when one becomes aware there is a dispute," Professor Hanna suggested. A student-faculty dispute typically could be delayed until after publication, Professor Ritter said, because the student would not necessarily even know about a work until it is published.

In terms of disputes about whether someone is covered by the policy, Mr. Brown said, as a practical matter the individual or the unit would not agree to participate. For example, a Civil Service employee might claim copyright ownership in a work and the department denies it; where is that dispute

taken? That is the question, Professor Ritter said, and it should be addressed if one idea behind the procedures is to avoid taking disputes to court. Mr. Brown said that in line with Professor Squires' suggestion, they need to think more about the Provost's decisions on jurisdiction.

Professor Garcia asked about copyright ownership of an article in a journal sponsored by the University and what procedures exist for deciding who owns what. Mr. Brown said he could give an abstract answer but much would depend on the facts of a case. If a journal is sponsored by a professional society, such as the American Psychological Association, the society typically owns the copyright or it sets the rules on who owns the copyright. If an informal group sponsors a journal and shares the editorial work, but there is no legal entity, the members of the group that started it "own" the journal collectively, which is usually just a name and a trademark. It would not be owned by the organization they work for—it is difficult to imagine circumstances under which the University would own such a journal, Mr. Brown said. The partners would decide where copyright ownership resides. One thought behind the proposed procedures is that the University should provide a forum for resolving ownership disputes even when the University does not have an interest in the dispute—if the dispute is internal to the University. The procedure would not, for example, cover a dispute that includes a faculty member at another university. The dispute about who owns that kind of journal, not run by a professional society, is like disputes about who owns a church, Mr. Brown said, and most attorneys would despair at trying to determine who owns a journal that was started five, ten, or twenty years earlier. Would the University have a position if the journal said it was sponsored by Department X at the University of Minnesota, Professor Hanna asked? Could the University say such wording should not appear? It might imply an institutional role. Mr. Brown said he did not have an answer to that question.

Mr. Brown reminded the Committee that it is important to remember what one needs to do to transfer copyright from an author to someone else: the transfer must be in writing. If a paper first appears without a transfer of copyright to the journal, the faculty member likely resides with the faculty member. He said he was not sure that University sponsorship of a journal means it has a copyright interest in it.

Professor Ritter inquired about the case of a dispute between a faculty member and a graduate student when the graduate student has graduated and left the University to take a job elsewhere. Would the graduate student be covered? One would want him or her to be, he suggested. Mr. Brown agreed. Especially if the dispute were related to the student's dissertation, Professor Ritter added.

Professor Cherkassky posed the hypothetical of a graduate student who does a project with research content and a faculty member publishes an article based on the project—but the graduate student does not wish to participate because he or she is too busy or for whatever reason. Does the graduate student have a claim on the copyright and must the faculty member obtain the permission of the graduate student to use the research in the publication? It depends, Mr. Brown said. If the student was hired as a graduate assistant, the student does not have a claim. The University recognizes the "teacher's exception" to copyright law, which provides that faculty members own the copyright for their works (even though generally employers own the copyright to work produced by employees as part of their work). The student hired as a graduate assistant is an employee, and that exception is not carved out, so the University backs into part ownership because the employer owns an interest in the work. The administrative policy, however, provides that the University will not exercise its ownership rights. So he would conclude the student employee need not be asked permission, Mr. Brown said—although his opinion in this case says nothing about the ethics of such behavior. In the case of coursework, a student

owns work he or she produces for a course, although the University can require that students relinquish their copyright ownership or give the University a license to use the work. In that case also, permission would not be required. If a student wrote a great paper for a course, a faculty member can draw on it as a matter of fair use and treat it as any published work, but he would advise the faculty member to get permission in that case.

Professor Bornsztein said the best point of the procedures is its intent to keep matters out of the courts. But there seems to be an imbalance in them because a lot of power is placed in the hands of the Provost. The Provost decides if a dispute is covered by the procedures and the Provost gets to decide the outcome. Why cannot the panel decide if the dispute is covered by the procedures? The Provost should not be the gatekeeper both at the beginning and the end. Mr. Brown said that is a reasonable solution, along the lines that Professor Squires suggested. If the Provost's jurisdictional decision is contested, he or she should compose a panel and let it decide. The Provost would then not make the final jurisdictional decision (but would still make the final decision on the merits if the panel's judgment were appealed). Mr. Brown said he would draft changes in the procedures to reflect this point. It is usual that the chair of the panel makes the decision, Professor Squires pointed out.

If the procedures are meant to be persuasive, why is an appeal allowed, Professor Ritter asked? Because, Mr. Brown joked, they were drafted by lawyers. They are intended to parallel the University's general conflict-resolution procedures.

Professor Squires said that "Each member shall be impartial" is an odd sentence to include. That is supposed to be presumed. Mr. Brown responded that there would be a lot less need for lawyers if people relied more on what is implicit.

Professor Hanna suggested including a statement, in this document and perhaps in materials from the Office for Conflict Resolution, about why there is a separate process for copyright dispute resolution. She thanked Messrs. Binks and Brown for joining the meeting.

3. Conflict–of-Interest (COI) Issues

Professor Hanna turned next to Lynn Zentner, Director of Compliance for the University, to provide an update on conflict-of interest issues.

Ms. Zentner noted she has been at the University about 13 months and has had a busy first year. In September of last year the responsibility for the conflict-of-interest program was transferred to her office, from that of the Vice President for Research.

With the assistance of two external consultants, they have conducted an exhaustive review of the University's conflict-of-interest (COI) program. The program has existed for a number of years, since the mid-1990s for individual COI and since 2005 for institutional COI. As she became involved in the COI issues, she learned that the University was unique in adopting an institutional COI policy and the infrastructure to implement it.

The core team dealing with COI are the three COI committee chairs (Professor Art Erdman for non-Academic-Health-Center COI matters (the Provost Committee), Professor Robert Cipolle for the AHC COI matters, and Professor Dan Feeney for institutional COI matters), attorney Barbara Shiels, and

staff member Meg Adson from her office. Matters are referred to the COI program largely through the REPA and the senior-official disclosure processes. The Senior Official Financial Disclosure form is used to identify institutional conflicts of interest. Each full committee has an executive committee which reviews the disclosure forms and decides if there is a potential COI. In the past, if the executive committee believed there was a straightforward way to eliminate or manage the COI, it was approved. Typically, matters involving a "significant financial conflict of interest" or which involve human-subjects research are referred to the full committee for resolution. The executive committee process will change as a result of the external review. That committee will gather background information and recommend the elements needed to eliminate or manage a conflict of interest but will not make a final decision.

The REPA process covers about 9000 employees; the senior-officer disclosure form covers about 240 (such as the president, all vice presidents, chancellors, vice chancellors, deans, University-wide directors, etc.).

The overriding question from the external review was this: given that the University's policies and procedures provide for a multi-stage triage process, how confident are we that all matters that should be referred to the COI Program are in fact being referred. Local unit leaders can make decisions in narrowly-defined instances, but to the extent there is "seepage": some matters may not be receiving sufficient COI review. The COI Program is evaluating this issue via the REPA process. The external reviewers also suggested that the University shore up the monitoring of COI management plans and the University's training program. When Ms. Zentner reported to the President's Executive Committee, the President asked if she had an advisory group; at the time, she did not but one has since been appointed that includes Senior Vice Presidents Cerra and Sullivan, Vice Presidents Carrier, Mulcahy, and O'Brien, General Counsel Rotenberg, Associate Vice President Klatt (Audits), Dean Crouch, Associate Dean Moldow (Medical School), and Vice Chancellor Neuhauser (Rochester).

The big question is whether they should centralize the REPA-review process so reviews take place in a central office. The completeness and accuracy of the information reported on the REPA form would be determined at the local level, with the actual COI review and analysis taking place at a central level to be sure that potential COIs are being dealt with consistently across the University.

Another recommendation from the review concerned training. The Senate Research Committee has expressed an interest in the topic. At this point, COI training is included in Responsible Conduct of Research training and to some extent in the Compliance portion of New Employee Orientation. Decisions need to be made about what to include in COI training, whether an in-person or online approach or a combination of both be offered, whether there should be refresher training, who should be trained, and so on. Staff of the COI Program are working to get their hands around this issues and are trying to develop a training program that will be effective and work within existing training programs so it is not overly burdensome.

Revisions to the REPA form are also needed to add clarity, Ms. Zentner said. Moreover, the REPA is largely, although not entirely, focused on COIs that occur in the context of research, but they need to broaden that focus so that it also includes teaching and outreach.

Ms. Zentner noted that:

-- term limits for the COI committees members and chairs will likely be established;

-- P&A voting members will likely be added to the Committees because COI concerns go beyond faculty (only faculty members have been voting members of the three COI committees up to now);

-- deans will likely be included in the decision-making process when a faculty member is conflicted as a result of a consulting arrangement with a commercial entity which also sponsors the faculty member's research, because a decision will need to be made regarding whether the individual should withdraw from the research or the consulting arrangement; and

-- A formal appeal process will likely not be implemented for decisions of the COI committees because, under the current system, individuals are allowed to return to a committee with revised proposals and they are always invited to participate in the meetings.

Ms. Zentner and Senior Vice President Cerra convened a committee to look at standards to govern relationships with industry, something that universities across the country are looking at. The medical-device and pharmaceutical industries have established standards. A couple of key issues include whether there should be public disclosure of these relationships and, where a consulting relationship has been established, whether written consultation agreements should be required. The committee looked at more than a dozen university policies as well as industry codes to see what others are doing and will produce a draft document for discussion.

Professor Squires commented on training: the workshops are usually geared to the medical or hard sciences. The University needs to recognize that there are a lot of others who are not in those fields. Ms. Zentner said it was a good point and they need case studies that fit the college. She said they are also interested in a "train the trainer" approach, so the trainer then adapts training to fit the college, which also provides it more credibility. Professor Garcia pointed out that the University is comprised of many different cultures and that the term "conflict of interest' is defined and interpreted differently by different cultural groups. He said he supported the idea of pre-emptive training so that employees are not coming to the Conflict of Interest program with a situation that is already problematic. Ms. Zentner again agreed and pointed out that having a COI is not necessarily a bad thing; it may simply arise because a researcher is highly-sought as a consultant, so has relationships with the private sector, and a relationship may overlap or "conflict" with his or her university responsibilities. Those relationships can typically be managed; what is bad is a failure to disclose them. Having a COI should not reflect negatively on the individual, who may be able to provide a lot of value outside the University and can help move society forward. Managing the relationships is key. The question of different cultures is important, especially as the University becomes more international, Professor Ritter added, and it will be important to recall that the people who fill out the REPA forms will also come from different perspectives.

Professor Hanna recalled that there were a couple of issues in the higher-education press in the last year that were of concern. One was the relationship between financial-aid officials and companies that provide financial aid (an area in which the University is clean); another was learning-abroad centers, an issue which came up for discussion at the University and was dealt with (there were no problems). Ms. Zentner agreed that these have not come to her attention during as problems at the University.

Ms. Stallman asked who oversees training. She represents graduate students, and they have talked about CsOI in her department that they see, but graduate students are not involved in the process. Would training also involve students? Ms. Zentner said the senior officers have indicated it should include graduate students.

Ms. Zentner also noted that the University has a confidential reporting system, EthicsPoint, where anyone can submit reports. They have received about 480 reports in three years. The vast majority of the reports are anonymous (and most would not indicate whether the individual making the report is student or employee), but people may be willing to reveal their identity if it is needed in order to gather the information necessary to respond to the complaint. While only about 20% of the complaints are substantiated, that does not mean the other 80% are frivolous, because people may misunderstand the facts or the provisions of state or federal law or what the University's policies require. It is only a small percent of the complaints that are without merit.

What has been done to let people know that this system exists, Dr. Littlefield inquired? This is the first she had heard of it. Perhaps not enough, Ms. Zentner responded, but she noted that reference to the system is made on the appropriate websites (Office of Institutional Compliance and the HR websites). Professor Hanna recalled that there have been email messages drawing attention to EthicsPoint.

Professor Cherkassky said he was aware of an institutional COI issue that has arisen: the directors of interdisciplinary research centers are also the individuals who evaluate requests for funding for the centers. The Vice President for Research has issued guidelines and asked Associate Vice President Lawrenz to be involved, but there was a clear COI, he said.

Professor Hanna thanked Ms. Zentner for joining the meeting.

4. RECESS Program

Professor Hanna next welcomed Mr. Kelly from Vice President Carrier's office to talk about the RECESS Plan (Reduce Employment Costs through Employee Salary Savings).

Mr. Kelly reported that one question that comes up, vis-à-vis the RECESS plan, is why it exists when anyone can take a leave of absence. That is true, but the University wanted a named program that it could promote to allow units to talk with individuals who might be interested in dropping to 75% or 50% time for a period—in order to save the salary and help the University avoid layoffs. The individual's base appointment stays the same and he or she receives full health and insurance benefits (although contributions to retirement funds would be on the basis of actual salary paid). In the case of represented staff, the option will be negotiated through the bargaining agent.

It is a little more difficult to implement this option for faculty. Probationary faculty, for example, would need an agreement about what expectations would be—and there would have to be a conversation with the Provost's office. For tenured faculty, a reduction in time could have an effect on merit-salary decisions, so there would also need to be a conversation about expectations for those individuals.

Ms. Stallman asked if the program has begun (it has). How many people are using it? Right now, about 10, Mr. Kelly said, and the majority are P&A or Civil Service staff. This is just a tool for departments, he said, and they are finding that many will drop 25% from their appointment or will go to 50% time for the summer months. There has to be an agreement with the supervisor about how the work will get done—the employee cannot reduce his or her time and the department then turn around and hire a temp. The decision must be mutual; in some cases, units may have people they cannot afford to reduce their appointments, and it must also allow, by mutual agreement, an early termination of the reduction in

time. The employer can end the arrangement with 30 days' notice, and the employee may not be given notice of termination or non-renewal during the period of a reduced-time commitment.

Mr. Croce said the program had been presented at CAPA and had received a positive response; it was also presented to the Civil Service Committee, Dr. Carrier reported.

Ms. Stallman asked what the goal is; a certain number? Mr. Kelly said there is no goal; it is simply an additional tool for colleges and departments. The money saved stays with them. Vice President Carrier said they could not estimate the salary savings from those who use the program because it is very decentralized.

Dr. Carrier also noted that the appointment itself is not changed, so the tenure-code requirement of at least a 67%-time appointment would not bar taking advantage of this program. They have, however, received no applications from faculty, Mr. Kelly said. And there is no drop-dead date by which someone must apply. It is a pilot program that they will try for three years.

Professor Hanna thanked Mr. Kelly for the report and suggested he check back with the Committee next year to let it know how the program is working.

Committee members thanked Professor Hanna for her service as chair. Professor Hanna wished everyone a good summer and adjourned the meeting at 3:55.

-- Gary Engstrand

University of Minnesota