Legal Services Post-SB 242

Thoughts and Considerations for the OUS Transition

Presentation to the Board’s Finance & Administration Committee
Ryan J. Hagemann, OUS Legal Counsel
July 8, 2011
ORS 180.060(6): The Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state.

ORS 180.210: There hereby is constituted an executive department to be known as the Department of Justice. The Attorney General shall be the head of this department and the chief law officer for the state and all its departments.

ORS 180.220: (1) The Department of Justice shall have:

...  
(b) Full charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state.  
(2) No state officer, board, commission, or the head of a department or institution of the state shall employ or be represented by any other counsel or attorney at law.
ORS Chapter 180

Special Assistant Attorneys General

ORS 180.140(5): Special legal assistants or private counsel may be employed by the Attorney General, under the direction and control of the Attorney General, in particular cases or proceedings, whenever the Attorney General deems it appropriate to protect the interests of the state. The cost of such special assistants or counsel shall be charged to the appropriate officer or agency pursuant to ORS 180.160.

Presently, the Attorney General has authorized ten OUS attorneys (3 at UO, 3 at OSU, 2 at PSU, and 2 in the Chancellor’s Office/smaller campuses) internally and numerous outside counsel for specialized work, such as employee benefits, intellectual property, and immigration.
Section 19

The Oregon University System is established as a public university system, consisting of the office of the Chancellor of the Oregon University System, the public universities listed in ORS 352.002 and any related offices, departments or activities. The State Board of Higher Education, on behalf of the Oregon University System, shall exercise and carry out all of the powers, rights and duties that are expressly conferred upon the board or that are implied by law or incident to such powers, rights and duties. The Oregon University System is an instrumentality of the state and a government entity performing governmental functions and exercising governmental powers. Notwithstanding the status of the Oregon University System as an instrumentality of the state, the Oregon University System is not eligible to request or receive legal services from the Attorney General and the Department of Justice pursuant to ORS chapter 180, except as otherwise expressly provided by law. The Oregon University System is not considered a unit of local or municipal government.
Section 36

Hire or retain attorneys for the provision of legal services, including but not limited to general advice, representation in litigation and representation in appellate matters. The State Board of Higher Education shall reimburse the State Treasurer for legal fees incurred in connection with borrowings done at the request of the Oregon University System.
Before the operative date of section 29 of this 2011 Act or the operative date of section 29a of this 2011 Act, the State Board of Higher Education and the Oregon University System shall enter into an agreement, as applicable, with the Department of Justice, the Oregon Department of Administrative Services regarding its risk management function, the State Treasurer and the manager of the Insurance Fund established in ORS 278.425 with regard to:

(1) The transfer of duties and responsibilities concerning legal actions and liabilities in existence before the operative date of section 29 of this 2011 Act or the operative date of section 29a of this 2011 Act, as applicable;

(2) The reimbursement of reasonable costs and expenses associated with the legal representation of the State Treasurer for bonds issued for the board and the system on and after the operative date of section 29 of this 2011 Act or the operative date of section 29a of this 2011 Act, as applicable; and

(3) Any other topic necessary for the orderly transfer of duties and responsibilities incident to the previous statutory duty of the Department of Justice to provide legal representation to the board and the system and the responsibility of the Department of Administrative Services to insure the board and the system.
Senate Bill 242

Section 41


- ORS Chapter 180 references are to the Department of Justice

- ORS Chapter 291 (ORS 291.047 specifically) is the reference to the Attorney General’s role in legal sufficiency review of public contracts
TRANSITION

Four Dualities

(1) Larger Campuses versus Smaller Campuses
(2) Centralized versus Decentralized
(3) Inside (employees) versus Outside (retained counsel)
(4) Billable Service Center versus Assessment/Appropriation
TRANSITION

Considering current landscape, Senate Bill 242 and the four dualities, a new paradigm should be constructed to accomplish:

The provision of legal services to the Oregon University System in a cost-effective, efficient, risk-conscious, accountable manner that builds on current expertise and culture and takes advantage of Senate Bill 242 flexibilities to enhance legal representation across all institutions, departments, and divisions of OUS.
TRANSITION

Assumptions

- Risk management will be configured to address costs of defense and litigation.
- In-house counsel, at any institution or department, are not like other OUS employees.
- Because of the multi-faceted and complex dimensions of the provision of legal services, a Board policy on legal services, capturing many, if not all of the elements discussed today, will need to be in place before the operative dates of Senate Bill 242 pass.
- A completely decentralized or centralized model or a completely in-house or outside counsel model will not permit for a “cost-effective, efficient, risk-conscious, accountable” enhancement of legal services across the System.
- We have to get this right the first time. Substantial attention from stakeholders, constituents, and decision-makers—particularly with the backdrop of performance and outcomes—require a thoughtful consideration of this facet of Senate Bill 242’s flexibilities.
TRANSITION: Thoughts and Considerations

• Because the authority to “hire and retain” attorneys is vested with the State Board of Higher Education, all in-house counsel, employed by an OUS institution, department, or division, should be authorized to provide legal services across institutions and departments.

• Permits the full compliment of internal expertise to be deployed across institutions, departments, and divisions.

• Need process or procedure to secure permission from the cognizant executive to “loan out” an in-house counsel to a different institution or department for a project.
TRANSITION: Thoughts and Considerations

• For the 2011-2013 biennium, by Board policy, authorize the three larger campuses to employ, as in-house counsel, up to four attorneys.

• Allows to build on current culture, but, at the same time, permits consideration of whether any accountability mechanisms designed to monitor legal services across the System were effective.
TRANSITION:

Thoughts and Considerations

For Board, Chancellor’s Office, and smaller campuses, assemble core group to enhance service in a cost-effective manner, making efficient use of scarce resources:

- House 4.5 attorneys: General Counsel (existing), two Deputy General Counsels (one existing), an Assistant General Counsel for Real Estate (for use by all institutions), and 0.5 Assistant General Counsel for Labor & Employment (reclassification of current Labor Relations position for use by all institutions).
TRANSITION:

Thoughts and Considerations

- **General Counsel:** Contact attorney for Board and Chancellor’s Office, interface with external audiences regarding legal services, interface with insurance carriers and/or risk management function to supervise litigation, supervise outside counsel, manage accountability mechanisms for legal services across system; regular travel to Eugene and Corvallis

- **Deputy General Counsel:** Contact attorney for SOU and OIT, develop expertise to compliment WOU/EOU deputy general counsel; located in southern Oregon to facilitate legal services, reports to General Counsel and travels between southern Oregon and other locations as required by General Counsel

- **Deputy General Counsel:** Contact attorney for EOU and WOU, develop expertise to compliment SOU/OIT deputy general counsel; located in Portland to split difference between Monmouth and La Grande, reports to General Counsel and travels between locations as required by General Counsel

- **Assistant General Counsel for Real Estate:** Expert attorney for use by all OUS institutions, provided that substantial DOJ costs were attributed to real estate projects; equitable distribution of work to be monitored by Assistant General Counsel and General Counsel

- **Assistant General Counsel for Labor & Employment:** Expert attorney to work both legal and administrative elements of labor issues across the system. Start with bargaining responsibilities and labor arbitrations under agreements and monitor workload. Potential to add discrete employment responsibilities, depending on workload. Reclassified current position.
TRANSITION: Thoughts and Considerations

OUTSIDE COUNSEL

• Transition current compliment of outside special assistant attorneys to OUS contracts with a thoughtful, yet streamlined process that focuses attention on reduction of rates and/or alternative fee arrangements for cost-savings

• For outside attorneys that work on topic of regular interest to the institutions—employee benefits, intellectual property, including technology transfer and patent, telecommunications, and immigration—develop a retainer program that allows any institution or department to execute a “scope of work” addendum to use the retained attorney

• In addition to retained outside counsel, include in the Board policy, authority and process to hire outside counsel for discreet, special projects

• For all outside counsel—whether through a retainer program or contracted for a specific project—have copies of all scopes of work, contracts, retainer agreements, and bills sent to the General Counsel in order to monitor legal services across System and, potentially, prepare Board reports and letters to external auditors
TRANSITION:

**Thoughts and Considerations**

- **To extent feasible**, accomplish new legal services model through assessment and/or appropriation. Billable models can have effect of discouraging preventive advice. In-house counsel, when most effective, should assume a significant role in preventing legal risk from evolving into larger, more costly legal liabilities.

- In a non-billable, in-house model, though, some care will need to be exercised in order to ensure the real estate attorney and the labor attorney—which are shared across OUS institutions and departments—are used equitably and fairly.

- In addition to a shared real estate attorney, in the future, pro formas for real estate projects with bonded indebtedness should include reasonable amounts for legal services as, under Senate Bill 242, OUS will need to bear the State Treasurer’s legal and other costs for its projects. These funds could also be used, if necessary, to enhance funds available for complicated or large real estate projects beyond the shared real estate attorney.

- Legal services budgets, in addition to the above-referenced considerations, should include amounts for unexpected outside counsel engagements, amounts necessary if OUS wishes to be a plaintiff, which would likely not be covered in a risk management engagement, and whether or not internal departments may be assessed by the legal services office.

- Current line item—one of OUS’ former 6000+ lines—for DOJ expenses, in addition to actual expenditures should serve as a rational starting point to discuss legal services budgets.
In a new paradigm balancing centralized and decentralized functions, with in-house counsel and a cadre of outside engagements, Board policy should address a reasonable internal accountability mechanism.

Thoughts include:
(1) General Counsel travels to institutions for regular updates;
(2) Monitor and document inquiries to the internal, privileged listserv;
(3) Regular videoconferences among general counsels;
(4) Reports to Board leadership and/or Chancellor by general counsel(s)

Any mechanism should enhance accountability and legal services to the institutions and departments, without being overly and unnecessarily bureaucratic.
TRANSITION:
Thoughts and Considerations

TO DO LIST

• Draft and approve Board Policy on Legal Services with elements discussed
• Draft and approve “legal sufficiency” analog
• Negotiate transition with DOJ, Treasurer, and DAS, as required by SB 242
• Make necessary budget allocations decisions
• Draft and approve, for inclusion in policy, reasonable accountability mechanisms
• Consider use of technology to enhance services necessary with a multi-institution, multi-location operation (videoconference, paperless office)
• Explore use of benchmarking—widely used in corporate sector—to measure efficacy of legal services enterprise
• Consider whether or not legal services should be an exempt procurement
• Explore an “updating” project—consistent with the significant transition associated with SB 242—that would allow for a systematic revision of “higher risk” system-wide policies and rules
• Reclassify current positions, as appropriate