

UNIVERSITY COMMITTEE ON ACADEMIC FREEDOM

MINUTES OF MEETING

FRIDAY, NOVEMBER 18, 2011

Attending: Roberta Rehm, Chair (UCSF), Gregory Pasternack (UCD), Carol Uhlaner (UCI), Cameron Gundersen (UCLA), Erik Menke (UCM), Thomas Morton (UCR) (telephone), Jean Brodie (UCSC), Harold Pashler (UCSD), Mohana Amirtharajah (UCSF), Jessica Rubaii (Graduate Student Representative) (telephone), David Birnbaum (Deputy General Counsel, Office of General Counsel), Wendy Streitz (Executive Director, Office of Research and Graduate Studies), Marty Simpson (Managing Counsel - Business & Land Use Office of General Counsel), Martha Winnacker (Executive Director, Academic Senate), Brenda Abrams (Policy Analyst)

I. Welcome and Introductions

Chair Rehm welcomed committee members to the meeting and members introduced themselves. Last year was not busy for UCAF but there are several issues this year. The committee plays a critical role because academic freedom is key to the academic mission. When people bring concerns about academic freedom to the campuses, the issue is referred to the local committee and if there is a need for a systemwide review it comes to UCAF. An example is an issue that the UCSD representative brought to UCAF. There is a change to the agenda because of a new patent acknowledgment policy and this will be discussed this afternoon. Chair Rehm described the process by which UCAF proposed changes to APM 010 and 015 due to a number of court cases. When there are no implications for academic freedom UCAF does not have to opine but it will comment when there are.

II. Legal Fees for Faculty Accused of Misconduct in Research

- *David Birnbaum, Deputy General Counsel, Office of the General Counsel of the Regents*

Chair Rehm explained that the issue of reimbursement for legal fees was discussed by UCAF in the past. Deputy Counsel Birnbaum was contacted three years ago by UCAF with a request to come up with a policy for chancellors on how to deal with whistleblowers and what the considerations would be if a faculty member requested reimbursement. It was reviewed by the Council of Chancellors and individuals in the Office of the President. The guidelines were also shared with campus counsel at each campus because chancellors often consult with them when there are cases.

Discussion: UC sees a lot of whistleblower cases, but the number against faculty is minimal and some of them are trivial. A campus might have one or two a year focused on faculty research misconduct. There are between 100 to 200 whistleblower cases annually systemwide that include faculty and other UC employees. Deputy Birnbaum is not aware of any cases where a faculty member was reimbursed for legal fees. The guidelines cover a variety of issues such as sexual harassment as well as academic freedom. The guidelines do not apply to cases involving external investigations. The guidelines do not address cases where a faculty member or any UC employee is investigated by an external agency for misconduct based on a complaint the agency received. An outside investigation would not allow UC to take any action before conducting its own internal investigation.

Someone who is the subject of an investigation can consult with General Counsel at UCOP or campus counsel as long as there is no conflict of interest. Faculty can consult about procedures but beyond that faculty would need outside counsel. It is conceivable to that there could be a situation where faculty spend more than fifty thousand dollars on legal counsel and the chancellor decides the amount to be reimbursed. If the chancellor was somehow implicated in a case, it would be referred to UCOP or to the chancellor at another campus for investigation. Members agreed that UCAF should submit a memo that indicates that the guidelines are reasonable. The General Counsel will communicate with the chancellors that UCAF reviewed and supports the guidelines. A crucial element of the guidelines is that faculty have to be vindicated when a case is found to be without merit. Chair Rehm remarked that this is a good example of how UCAF can initiate a discussion that results in a new policy.

Action: The Chair and analyst will draft a memo to submit to the Office of General Counsel.

III. Consultation with the Academic Senate Office

- *Martha Winnacker, Executive Director, Academic Senate*

Executive Director Winnacker noted that UCAF, although not a Council committee, is able to bring issues to Council. Several years ago, UCAF did ask to become a standing member of Council and this was not approved. The logistics of arranging Senate travel were explained. Major issues the Senate is dealing with currently are being driven by the budget even though there are many other issues. It is not clear if any of the new academic programs will have implications for academic freedom.

Discussion: A member suggested that every year, committees not on Council could be appointed on a rotation. If the merit process includes a revenue component in the future, this will be a problem. The Senate is paying close attention to the online instruction pilot project. A member commented that top tier students are not applying to UC and Executive Director Winnacker indicated that BOARS is looking at admissions. UC is not competitive with private schools which are actively recruiting them.

IV. APM 210

The UCSD representative explained that a colleague asked about language in APM 210 that imposes a content based steering of research. Chair Rehm suggested that there may be different ways to interpret the language of APM 210. A concern for Chair Rehm is the language that says “encourage and given recognition.” Executive Director Winnacker researched the history of the policy.

Discussion: In the social sciences, a member commented that there has been under counting of research that has to do with diversity. Research that is not addressing diversity should not be undervalued. The administration should not be dictating to faculty the criteria of excellence. A question is whether special recognition should be given to research that highlights inequalities. The policy directs the promotion system and CAPs to weight this type of research heavily. Chair Rehm indicated that at UCSF can highlight research that addresses diversity. It is not clear if the policy disadvantages faculty who do not conduct research on diversity. Several members suggested that changing the word “highlights” would help. There is a significant difference between rewarding research that reaches certain conclusions and research that addresses certain topics. The academic freedom question is that UC cannot create a policy that tells faculty how to evaluate their peers.

Others taking a similar risk in a different field will not get the extra bump. A member suggested the language in the APM creates the possibility for abuse. Executive Director Winnacker indicated that in 2003 and 2004, the president at the time asked how faculty could be engaged as part of their core work in outreach and academic preparation. UCAAD drafted language in 2004 and Council was not satisfied with the language or dictating what is researched. The language was revised and is what is in the current policy. The language about research showing inequalities is one of the things included to show what faculty could do to bring a wider range of California students to UC. It was intended to allow CAPs to recognize this type of research according to Executive Director Winnacker and it was not meant to punish faculty who do not conduct research on diversity.

The policy gives the appearance that new politically correct core values could be added. It is not clear to Executive Director Winnacker where the language about highlighting inequalities came from and a friendly amendment could be proposed. The president has a campus climate committee so this is a sensitive time for this discussion. If the underlying premise is that APM 210 disadvantages certain faculty members, it is a problem and Chair Rehm indicated that UCAF could propose a change. A member noted that it is not clear why faculty are not responsible for deciding the merits of a peer's research because colleagues understand the research. Diversity does not need to be singled out in a research context but members agree that it could be promoted in teaching and service. It is not clear if there is an implication that bad research would still be rewarded if it is in the field of diversity. If UCAF wanted changes, a memo would be submitted to Academic Council. According to the UCLA representative, a CAP member advised him that there was pressure from an administrator in one case to specially reward a faculty for research on diversity. Executive Director Winnacker commented that the aim was to broaden

the range of activities that could promote diversity at UC.

The committee did not reach consensus about whether APM 210 is a problem and open to being misinterpreted. The UCSD representative would like to get the views of faculty at the campuses as well as experts in the nation. Chair Rehm would like to poll either the CAPs or the systemwide committee, and the analyst contacted UCAP about this topic. If it is true that CAPs are being pressured in the name of APM 210 this will indicate that there is a problem with the language and UCAF can take action. An immediate solution is not clear to Chair Rehm. Vice Provost for Academic Personnel Susan Carlson could be invited to UCAF's next meeting to discuss this.

V. Management Review of Proposed Revisions to APMs 010, 015 and 016

The UCD representative provided the committee with the history of APMs 010 and 015. The courts have said that employees words are subject to discipline by their employers. One court case was very egregious and the university implemented a number of punishments. A question is what happens with a faculty member's scholarship. UC faculty were notified that they are in jeopardy if they make comments that are not strictly about scholarship. UCD came up with language which was proposed to UCAF. There are problems related to faculty speech at UC. There are still restrictions in APM 010. There is an area of ambiguity about when speech is made in the context of scholarship or institutional policy. UCAF did not add the language to APM 016. UCAF is being asked for comments on the APMs.

Discussion: There should be clarification in the policy about when a faculty member is not acting as a member of the faculty. The Office of General Counsel has not explained why this language needed to be added and the committee would like to know why the limitation was added to the policy. UCAF members agreed that the limitation is not necessary. With numerous policies there are potential for conflicts among them. Examples should be included in UCAF's memo. The analyst will email OGC to ask for an explanation for the language. Members agreed that the language is a significant improvement and enhances and protects the rights of faculty.

Action: The Chair and analyst will draft a memo.

VI. RE 89

At UCSF there are a number of researchers who conduct research on tobacco. These researchers promoted a policy that faculty should not accept funding from the tobacco industry. A process was set up to have proposals for tobacco funding for research approved by the chancellors. Since the policy has been in effect, no one has gone through the process. Chair Rehm noted that perhaps the existence of the policy has caused faculty to not pursue tobacco funding.

Discussion: It impacts any research of any kind that is funded by a tobacco company. This is an example of trying to direct the research agenda. UCAF did recommend that a member of the CAFs be a member of the review body, but since no one has applied for this funding the review body has never been established.

VII. Patent Acknowledgment Policy

- *Wendy Streit, Executive Director, Office of Research and Graduate Studies*
- *Marty Simpson, Managing Counsel - Business & Land Use Office of General Counsel*

Chair Rehm added the patent acknowledgment policy to the agenda at the request from Academic Senate Chair Bob Anderson and UCAF is asked to consider potential sanctions for faculty who do not sign the new agreement. Executive Director Streiz explained the background of the new policy. A professor joined Stanford and signed the university's patent agreement which stated that when he made an invention he would assign the patent to Stanford. The professor later signed an agreement with Cetus (now Roche) that assigned his rights to the patent for a future invention to Roche. The agreement with Roche stated "I agree to assign and do hereby assign" inventions made as a consequence of work done at Roche. The researcher returned to Stanford to work on NIH funded projects and made an invention with others. Stanford followed the required procedures to move forward

with licensing the invention. Roche and Stanford ended up in a dispute when Stanford reported that Roche was infringing. The Supreme Court affirmed that the later agreement with the present assignment trumped the earlier agreement with the future assignment, so there were no rights left to assign to Stanford. UC was surprised by the ruling because the Office of General Counsel felt that Stanford has several good arguments. Universities across the country began asking about the types of consulting agreements that faculty have made that sign away rights for inventions created while at UC. There are risks to UC since licensees could sue the university and UC has obligations to the federal government. The Supreme Court laid the groundwork for this to be a compliance issue. When UC licenses an invention, it had the right to the invention, but it is not clear if this will be true in the future. Stanford's patent agreement was not effective because the right language was not used.

Some universities have language stating that they own the patent. The policy UC has is fine but the agreement is not because it states the rights shall be assigned which places UC at risk. Everyone coming to UC after November 1st will sign the new agreement but over two thousand employees have signed the agreement that does not have the right language. These employees will now sign an amendment but there will be some people who will not want to sign it. The patent policy is not changing. Language that clarifies that the agreement applies to inventions created during the course of working at UC. Executive Director Streitz and Managing Counsel Simpson have talked about the amendment to a number of Senate committees. There has been discussion about making compliance a part of the merit review process. Signing the agreement is a condition of employment. The logical approach is to say that an employee cannot participate in activities if the agreement is not signed because UC will not be able to meet its legal obligations.

Discussion: A member suggested that it would be easier to withhold pay if a faculty member does not sign the patent agreement. It was also noted that there are many faculty who will never have a patent, so the policy is irrelevant. Everyone signed the agreement when they were hired. Refusing to put grants forward would be one place where non compliance can be addressed and this would restrict a faculty member's ability to conduct research, thereby infringing on academic freedom. A faculty member can ask funders to extend grants, making UC vulnerable indefinitely. A member suggested withholding an employee's paycheck since this issue is related to employment, not research. It was proposed that employees could sign the agreement during open enrollment or employees will not receive their benefits. Refusing to pay an employee could be construed as an adverse or punitive action. The most nimble process with the least impact possible is desired. Any action related to research will impact fewer people than some of the other actions that might be taken. UC will eventually have data on how many people signed CDIS like agreements.

Human Resources is in charge of the process and have hired a vendor. Employees will receive an email from the vendor and be asked to sign the electronic agreement within a three week period. Employees may not remember all of the agreements they have signed. There will be people at the campuses to assist employees but legal advice will not be provided because the consulting agreements are private so faculty would need to get private counsel. For clinicians, one approach could be to threaten their hospital privileges since they have many other compliance issues. Employees should be informed that the amendment is designed to protect their rights. Consulting work is not within the scope of employment at UC so employees will not be in breach of contract with respect to earlier agreements signed with other entities. There are a number of reasons UC's policy does not execute future rights that include issues like co-inventors. A member recommended that the FAQ should be revised to incentivize employees to sign the amendment. The academic freedom issues are centered on sanctions, not the policy per se. UC has a risk it did not anticipate having and there could be costly consequences. UCAF can point out the academic freedom implications.

Action: The Chair and analyst will draft a memo.

VIII. Privacy and Information Security

There is a Privacy and Information Security Initiative started by the Office of the President. Officially electronic communications are not monitored and email is not screened. There are issues related to HIPPA which governs patient information. Chair Rehm noted that there have been cases where patient data was uploaded to a computer

that was not encrypted. A way to screen emails and websites that reduces the liability to UC is being explored. A workgroup at the chancellor level is drafting language and a representative from this group spoke to the UCSF CAP to ask for faculty input. A working document has been developed but it is not finalized yet.

Discussion: The graduate student representative reported that there is serious concern among graduate students following an incident that resulted in the FBI being given permission to monitor students' online behavior for three days. There is no monitoring of individual students at UC but there is some monitoring of file sharing. The UCSF representative commented that it is surprising that UC has not had a policy before now. Any concerns the committee has can be shared with the UCB representative to UCAF who is on the initiative working group.

IX. Research Using Animal Subjects

Researchers using animal subjects and researchers in other areas have been the focus of violent attacks. The UCLA representative stated that the question is whether UC can do anything proactively to protect researchers who use animal subjects or other types of research. Efforts to counter the attacks have decreased the amount of faculty support.

Discussion: Professor Jentsch's car was blown up and he now lives in a gated and guarded house. There is a parallel to how people protest against abortion. The problem is violence against people conducting a variety of types of research in areas such as stem cell, IQ, or defense. Academic freedom to conduct research in controversial areas is impeded when protestors attack the researchers. The graduate student representative reported receiving hate mail as a result of her research on Palestine. It is not clear what UCAF can do. There is a proposed student conduct policy that may be helpful. Students at Irvine disrupted a speech and were subject to criminal action. APM 015 restricts the bounds of academic freedom. The courts have never stipulated that disrupting a speech is free speech.

Previous discussions have noted that providing public support may result in a backlash from activists. Threats of violence are in a different category from verbal attacks. Prevailing public opinion does not come down strongly enough in response to violent attacks. The public needs to be better educated about violent activists but it is not clear how this could be done. UCAF could communicate with institutions that work with young people in order to teach what has been achieved as a result of the controversial research. The larger issue of not using violence is more difficult to address. Conversations with Student Affairs could be a place to start. Commentary on violent activists have been somewhat arrogant.

Members agreed to finalize the statement drafted last year and submit it to Academic Council. Chair Anderson could be prepared to respond to any media inquiries following any future incidents. Council could be asked to suggest ways to support researchers. The UCLA representative will send the committee the statement which could be submitted to Council in the form of a resolution. There is a need to tone down the national rhetoric. The value of research at UC needs to be reasserted. The graduate student representative reported that while at UCD, students were able to tour labs and talk to researchers which allowed the students to see that the researchers cared about the animals. UCLA is spending one million dollars a year to protect Professor Jentsch. UC development offices could find a funder to sponsor forums on controversial research topics across campuses and this idea could be included in UCAF's letter to Council. PETA could be invited to participate on the panels. Psychologists could be on the panel to speak about non-violent. Council will be asked to send the letter to development offices and other offices. These will be two separate letters.

X. Sharepoint

- *Todd Giedt, Associate Director, Academic Senate*

Associate Director Giedt joined UCAF to present the committee's Sharepoint website.

XI. Campus Reports and Member Items

San Diego: A dean at this campus sent a professor a letter instructing him not to publish his research critical of a book authored by a colleague in the same department. The criticism was about the integrity with which the colleague's research had been done. The local committee agreed that the administration should not have taken this action. A resolution was passed by the Representative Assembly calling on the administrator to acknowledge the violation of the professor's academic freedom.

Santa Cruz: The graduate student representative indicated that there was an incident at UCLA related to teaching assistants and course content.

Riverside: The representative asked how much UCAF has dealt with APM 668 which deals with negotiated salary because the question was raised at UCR about whether there were academic freedom issues. Salary is not part of shared governance so it is not protected. Students at Irvine were prosecuted for interrupting a speaker. The UCR CAF will follow the lead of the UCI CAF if any action is to be taken.

Discussion: Chair Rehm reported on UCAF's earlier discussion about activists. Faculty at UCR are concerned about the role of civil authorities made a decision to act after the students had already been appropriately disciplined at UCI. There were three students from UCR and eight from UCI. They considered a statement deploring the selective prosecution of the students. The UCSF representative commented that the prosecution of the students was a positive action that showed students that there are consequences. The UCI representative indicated that the protesters made their point but continued to disrupt the speaker for another hour. The Muslim student group was disbanded. The UCR representative reported that his campus will follow the lead of the UCI campus.

There is a systemic lack of understanding about academic freedom. The UC wide forums could include a discussion about what academic freedom means. Everyone who is hired by UC should be given information or scenarios that aims to educate faculty about academic freedom. UCAF should write a letter reporting concern about the lack of understanding and asking how a course could be added for faculty. The UCSF representative remarked that for clinical faculty, the training should not be mandatory because so many compliance issues for these faculty already exist. The UCR representative will share a three page document that defines academic freedom.

Irvine: The committee discussed academic freedom for lecturers and the MOU resolves this issue. There was a question about whether the online evaluations of courses being online was an academic freedom issue. Anyone with a UC identification including students could access the online system.

Discussion: UCSF has tied completion of the online evaluation to grades. The UCR representative reported that students are not allowed to access their grades until the beginning of the next quarter unless they complete the evaluation. One option is to continue to conduct the surveys on paper.

Davis: A letter was sent from a dean to a faculty member. Privilege and Tenure cannot be interfered with.

XII. New Business

There was no new business.

XIII. Executive Session

There was no executive session.

Meeting adjourned at: 3:45

Minutes prepared by: Brenda Abrams

Attest: Roberta Rehm