

## **AGENDA**

### **COMMITTEE OF THE WHOLE**

**Meeting: 1:00 pm., Tuesday, March 20, 2001**  
**CSULB, University Student Union-Multipurpose Room ABC**

Laurence K. Gould, Chair  
Dee Dee Myers, Vice Chair  
Roberta Achtenberg  
William D. Campbell  
Daniel N. Cartwright  
Martha C. Fallgatter  
Debra S. Farar  
Bob Foster  
Murray L. Galinson  
Harold Goldwhite  
William Hauck  
Shailesh J. Mehta  
Neel I. Murarka  
Ralph R. Pesqueira  
Frederick W. Pierce, IV  
Ali C. Razi  
Charles B. Reed, Chancellor  
Anthony M. Vitti  
Stanley T. Wang

#### **Consent Items**

Approval of Minutes of Meeting of September 20, 2001

#### **Discussion Items**

1. Welcome, *Information*
2. Technology Update, *Information*
3. Litigation Report No. 13, *Information*
4. Amended Policy on Punitive Damages, *Action*

**MINUTES OF MEETING OF  
COMMITTEE OF THE WHOLE**

**Trustees of The California State University  
Glenn S. Dumke Conference Center  
401 Golden Shore  
Long Beach, California**

**September 20, 2000**

**Members Present**

Laurence K. Gould, Chair  
Dee Dee Myers, Vice Chair  
William D. Campbell  
Daniel N. Cartwright  
Debra S. Farar  
Bob Foster  
Murray L. Galinson  
Harold Goldwhite  
Neel I. Murarka  
Ralph R. Pesqueira  
Frederick W. Pierce, IV  
Ali C. Razi  
Charles B. Reed, Chancellor  
Anthony M. Vitti  
Stanley T. Wang

**Members Absent**

Roberta Achtenberg  
Martha C. Fallgatter  
Shailesh J. Mehta

**Chancellor's Office Staff**

David S. Spence, Executive Vice Chancellor and Chief Academic Officer  
Jackie R. McClain, Vice Chancellor, Human Resources  
Douglas X. Patiño, Vice Chancellor, University Advancement  
Christine Helwick, General Counsel

Chair Gould called the meeting to order at 9:35 a.m.

**Consent Items**

The minutes of March 15, 2000 were approved as submitted.

**Discussion Items****Litigation Report No. 12**

Chair Gould asked Christine Helwick, General Counsel, to present the item. Ms. Helwick presented the biannual report on the status of significant litigation confronting the CSU.

Ms. Helwick stated that the Board had been provided with Litigation Reports twice annually for the last five years, and that she would present a retrospective look at what the reports tell about CSU litigation. The written report the Board receives summarizes CSU cases with public policy significance. Campus presidents also receive a report, but that report lists all of the active cases on their campuses. This presentation, she continued, was a retrospective look at all of the cases pending against the CSU.

Ms. Helwick reported that there are between 200 and 300 active cases pending against the CSU at any one time. She noted that the total number of cases had dropped significantly in the last couple of years, the result of early intervention and good preventative work being done by the Office of General Counsel in combination with campus officials.

Ms. Helwick stated that there has been a significant change in the type of cases filed against the CSU, and that employment and personal injury cases were the two high volume areas. The breakdown of cases by type in the March 2000 report, she said, showed that claims brought by students had become a high volume area, and that the percentage of employment claims had grown dramatically from 26 to 36%. Therefore, she said, at the same time that CSU experienced a drop in the total number of active cases pending in the last five years, the type of exposures that the CSU now faces has changed considerably, and has moved into areas of higher risk and greater exposure, with increased costs to defend. On average, she noted, payment to a claimant to resolve a case in March 1996 was roughly \$30,000 while the average payment to resolve a case on the March 2000 report was over \$73,000.

Ms. Helwick gave trustees a breakdown of the reported cases stating that there were a total of 60 lawsuits reported as resolved in the March 2000 reports: two were resolved by jury verdict, both in the CSU's favor; eight were resolved by motion rulings, again all in the CSU's favor; three were resolved on appeal, again all of these rulings were in the CSU's favor; in nine instances, the plaintiffs voluntarily dismissed their claims; and 38 were settled.

Ms. Helwick commented that even though the report represented a snapshot in time and that the numbers were specific to March 2000, the report was representative of the overall CSU litigation experience.

**Adjournment**

The meeting adjourned at 10:00 a.m.

**COMMITTEE OF THE WHOLE**

**Welcome**

**Presentation By**

Robert C. Maxson, President  
California State University, Long Beach

Robert Garcia, President  
Associated Students

Simeon Crowther, Chair  
CSULB Academic Senate

**Summary**

President Maxson, the chair of the Academic Senate, and the president of the Associated Students will welcome the Board of Trustees to California State University, Long Beach.

**COMMITTEE OF THE WHOLE**

**Technology Update**

**Presentation By**

David J. Ernst  
Assistant Vice Chancellor  
Information Technology Services

**Summary**

In March of 1996, the Board of Trustees endorsed the CSU's strategic plan for the use of technology—the Integrated Technology Strategy (ITS.) Since that time, several major initiatives have been launched based on the ITS. The plan continues to guide the University's strategic use of technology to further its academic and administrative activities.

This item will provide an overview of the ITS, discuss three of its major projects, and lay the groundwork for discussing how best to apply technology to support CSU's objectives going forward.

Background material will be handed out prior to the Committee of the Whole Meeting.

**COMMITTEE OF THE WHOLE**

**Litigation Report No. 13**

**Presentation By**

Christine Helwick  
General Counsel

**Summary**

This is the twice-annual report on the status of significant litigation confronting the CSU, which is presented for information. "Significant" for purposes of this report is defined as litigation: (1) with the potential for a systemwide impact on the CSU; (2) which raises public policy issues of significant interest or concern; (3) brought by or against another public agency; or (4) which, for other reasons, has a high profile or is likely to generate widespread publicity. *New information since the date of the last report is printed in italics.*

The cases contained in this report have been selected from over 188 currently active litigation files.

**New Cases**

*Beyene v. CSU, et al. -United States District Court - San Diego*

*Asfaw Beyene, an African Lecturer in the School of Engineering at San Diego State University for eleven years, claims that he was not hired into a tenure track position because of his race. He also claims to have been defamed in the search process by Dean Pieter Frick, a former South African military officer, who purportedly stated that Beyene was not qualified. An early motion eliminated all of his claims, except for the race discrimination claim. Beyene was granted an opportunity to restate his other theories.*

*Im v. Board of Trustees, et al. -- Orange County Superior Court*

*Ester Im, a student at Fullerton, alleges that she was sexually harassed while working as an intern for Professor Tygart through remarks and letters written to her by Tygart in which he professed his love for her. The case was settled in an early mediation for \$80,000, half of which was paid by Professor Tygart.*

*May v. Trustees – Monterey County Superior Court*

*James May is a former faculty member at CSU Monterey Bay who retired in 2000. He alleges that he was forced to take an early retirement due to continuing mistreatment. He alleges race, disability and age discrimination, harassment, retaliation, failure to prevent discrimination, and wrongful termination. The case is in the early pleading stage.*

Rivas, et al. v. CSU Monterey Bay – Monterey County Superior Court

*This action is brought Vicente Rivas, the former Vice President for Student Affairs at CSU Monterey Bay, who retired, Octavio Villalpando, the former Director of Institutional Research, who resigned, and Cecilia Burciaga, a current employee who was reassigned from the President's area. All allege discrimination on the basis of their race, ethnicity and sex, harassment and retaliation. The case is in the early pleading stage.*

**Previously Unreported Cases**

Arbesfeld v. Trustees, et al. -- Orange County Superior Court

*Shirley Arbesfeld was a Lecturer for two years in the Accounting department at CSU Fullerton, who was not reappointed and also failed to achieve a tenure track position. She alleged discrimination on the basis of her age and religion, notwithstanding very poor teaching evaluations. In February 2001, the court granted a summary judgment in favor of the CSU because Arbsfeld lacked evidence to support her claims of discrimination.*

Elsayed v. CSU, Hayward, et al. – United States District Court - Oakland

*Osman Elsayed, an African male, was denied tenure at Hayward in May of 1996. He sued claiming to have been the victim of discrimination on the basis of his Islamic religion, race and national origin. The case was tried for two weeks in September 2000. The jury returned a verdict for the plaintiff in the total amount of \$637,000. Elsayed was awarded \$100,000 for economic loss, \$500,000 for emotional distress, and \$37,000 in punitive damages against the president, provost and a dean. The CSU has filed a post trial motion seeking to grant a new trial or to set aside the damages. The court has not yet ruled on this motion.*

Elimimian v. Board of Trustees of the California State University, et al. – San Luis Obispo County Superior Court and United States District Court – Los Angeles

*Isaac Elimimian, a former tenure track faculty member in the Department of English at San Luis Obispo, filed a lawsuit in both state and federal court claiming he was denied tenure and promotion because of his race and national origin. He is a Nigerian.*

*The state court action was transferred to San Luis Obispo County and dismissed. The federal court action went to trial on January 23, 2001. After eight days of testimony, the jury returned a unanimous defense verdict. Elimimian has indicated his intention to appeal.*

Green v. SFSU -- San Francisco County Superior Court

*Marcia Green, a 15 year Lecturer at San Francisco State University, was not hired into a tenure track position and subsequently was not rehired as a Lecturer. She alleges that she was the victim of discrimination on the basis of her Polish ancestry, marital status and age. The case*

*was tried for three weeks in August and September 2000. The jury returned a verdict in favor of the CSU on the discrimination claim, but awarded Green \$1.565 million for retaliation. The CSU has filed an appeal.*

Yoo-Madriral v. Trustees – United States District Court – Sacramento

*Moon Jee Yoo-Madriral, a Lecturer at Chico for 23 years, alleges that she has been the victim of discrimination and harassment because of her race (Korean), gender (female), marital status (married) and age (56), in violation of several state and federal laws. She also claims that, due to the ongoing discrimination and retaliation, she has been repeatedly denied appointment to any of the tenure-track positions she has sought over the years. The case is in the discovery phase.*

### **Construction Cases**

Board of Trustees v. Blake Construction, et al. - San Diego County Superior Court

CSU filed this lawsuit against Blake Construction Company, the prime contractor, Richard Bundy & David Thompson, Inc., the architect, the stucco and window subcontractors, and the window manufacturer at the Chapultepec Residence Hall at San Diego State University, which has experienced significant water intrusion into some of the living units. This case is currently in the discovery phase. *Mediation has been re-scheduled for March 14, 2001. Trial is set for May 25, 2001.*

Board of Trustees v. Dillingham Construction - San Francisco Superior Court

CSU filed this lawsuit against Dillingham Construction, contractor for the Humanities Building on the San Francisco campus, which has experienced leaks through the windows and walls as a result of the failure of the exterior insulation finish system. *The case is in the discovery stage. Field tests are underway, which it is hoped will lead to a repair plan. A settlement conference is set for December 7, 2001, and the trial for January 7, 2002.*

Board of Trustees v. Perini Building Company – San Francisco County Superior Court

CSU filed this action against Perini Building Company, the design-build contractor on the Guest Center/Resident Apartments on the San Francisco campus, which has experienced significant leaks through the windows and walls as a result of the failure of the exterior insulation finish system. *An early mediation was not successful. Additional seismic issues in the building have also been uncovered. The case is in the discovery phase. A further mediation is anticipated. Trial is scheduled for December 3, 2001.*

### **Employment Cases**

Brown v. California State University - Fresno County Superior Court

Horsford, et al. v. California State University - Fresno County Superior Court

Auwana Brown, a former employee in the CSU Fresno Police Department, filed a lawsuit claiming to have been sexually harassed by the former chief of police, Willie Shell. Daniel Horsford and five other

employees or former employees in the CSU Fresno Police Department filed a separate lawsuit claiming that a variety of actions in the CSU Fresno Police Department while Shell was chief constituted reverse discrimination. The plaintiffs in the second action are white, Hispanic and Asian; Shell is black. Plaintiffs in both lawsuits are represented by the same attorney. Shell resigned his employment at CSU Fresno before either lawsuit was filed, and later pled no contest to felony charges of misconduct while he was chief of police at CSU Bakersfield before coming to Fresno. Brown was settled in December 1998. CSU filed motions for summary judgment against all six plaintiffs in Horsford. Three were granted. The other three were granted in part, leaving significant but narrowed issues for trial. The trial of this case began on May 16, 2000 and continued through August 11, 2000. The jury rendered a verdict for plaintiffs in the total amount of \$4.25 million. *On December 22, 2000, the court reduced this verdict to \$1.17 million. The case is now on appeal while both sides evaluate an appropriate final resolution, including an appropriate award of attorneys' fees to plaintiffs.*

Deutsch v. Hulsey, et al. – United States District Court – San Diego

Stuart J. Deutsch, a former professor at Northeastern University applied for positions at CSU Northridge and San Marcos in 1997 and 1999 respectively. He did not get either job. He filed this lawsuit against the CSU, various CSU employees, an employment search consultant, Northeastern University, and its in-house counsel, claiming that he was denied both jobs because of a conspiracy to retaliate against him for having earlier filed claims of discrimination against Northeastern and its counsel. The case is in the initial pleading stage. *CSU has filed a third motion to dismiss plaintiff's most recent effort to state a viable legal claim. It is scheduled for hearing on March 19, 2001.*

Donoho v. Trustees, et al. - Los Angeles County Superior Court

Sean Donoho, who is developmentally disabled, was employed, while still a minor, as a cafeteria dishwasher in the Forty-Niner Shops at CSU Long Beach as part of a transition program run by the Long Beach Unified School District. Donoho claims to have been the victim of a series of sexual molestations and attacks by a fellow cafeteria employee, and is suing the CSU, the Forty-Niner-Shops (a campus auxiliary), the Long Beach Unified School District and various individuals. The CSU is being defended and indemnified by the Forty-Niner Shops. *The case is in the discovery phase.*

McNier v. CSU – San Francisco Superior Court & United States District Court – San Francisco

Plaintiff is a Lecturer in the Accounting and Management Departments who claimed reverse discrimination because he was not interviewed for a tenure-track position in the Hospitality Management Department. He filed in both state and federal courts. After a three-week trial in the state court, the jury awarded plaintiff \$2.75 million for discrimination and \$2.3 million for retaliation. By agreement of the parties, only the larger award was entered. The court subsequently reduced the verdict to \$1.9 million. Plaintiff was also awarded \$315,000 in attorneys' fees. The university appealed. *The trial court outcome was affirmed. The federal court action has been inactive, pending outcome of the state court proceedings. Discussions to resolve both actions are underway.*

Rios v. Trustees, et al. – Santa Clara County Superior Court

Bartz v. Trustees – Santa Clara County Superior Court

Lidia La Garda Rios, director of the Office of Equal Opportunity at San Jose State University, was disappointed by a change in her reporting relationship as a result of organizational changes, and her failure to achieve certain high level positions in the department of Human Relations. She claimed in this lawsuit to have been the victim of race, national origin and sex discrimination, a hostile work environment, sexual harassment and retaliation. Rios was non-retained. She then added a charge to her lawsuit that her termination was also the result of discrimination and retaliation. *In October of 2000, the parties settled this case in mediation for \$207,500.*

Steve Bartz, director of Employee Relations at San Jose State University, was also disappointed when he was not appointed associate vice president for Human Resources, one of the positions to which Rios at one time aspired. The position was filled by a male Hispanic candidate, which Bartz claims in his lawsuit to have been reverse discrimination. At the mandatory settlement conference preceding trial, this case was settled for \$351,000.

Tillinghast v. Humboldt State University, et al. - United States District Court, San Francisco & Sacramento County Superior Court

Professor Tillinghast brought this action in Federal Court after he forfeited an offer for a lectureship in the Religion Department at Humboldt State University because he would not sign the loyalty oath required of all state employees by the California Constitution. He alleged that the oath interfered with his religious beliefs in violation of the Religious Freedom Restoration Act. Professor Tillinghast subsequently filed a separate lawsuit in State court on these same issues.

On June 25, 1997, the United States Supreme Court invalidated the Religious Freedom Restoration Act on constitutional grounds. CSU then filed a motion for summary judgment in the Federal action, which was granted on September 4, 1997. Professor Tillinghast has not continued to press his state court claim.

### **Personal Injury Cases**

Fowler, et al. v. Martinez, et al.- Sacramento County Superior Court

This is a wrongful death action brought by the parents of Steven Lucas Fowler, who died of head injuries ten days after he was assaulted in a campus parking lot while attending a CSU Sacramento football game. His parents asserted that CSUS failed to properly control alcohol consumption at the game. The UC Davis Medical Center was also accused of medical negligence. *The court dismissed CSU from the case based on its finding that consumption of alcohol in the parking lot did not constitute a dangerous condition of property, the only legal theory upon which the Fowlers could premise their claim. Plaintiffs did not appeal.*

Mora v. State of California et al - Los Angeles County Superior Court

Timoteo Mora, a CSU Dominguez Hills student, received a significant electrical shock upon plugging in a microscope in his chemistry class in February of 1999. A campus investigation determined that the plug was faulty. Mora has filed this action to recover for his physical injuries. The university has confessed liability and the only remaining issue is the extent of Mora's injuries attributable to this incident. The case is in the early discovery phase. Medical reports have been submitted. An initial mediation in August 2000 was unsuccessful. *Mora did not appear at a continued mediation session. The Court has set a mandatory settlement conference for May 22, 2001, and trial for June 2, 2001. Mora has a new attorney who has agreed to further mediation.*

Viboolpanth v. CSU San Bernardino; San Bernardino County Superior Court

Kanokpun Viboolpanth, a CSU San Bernardino student, claims that the campus was negligent in not warning her about, and keeping her safe from, the high winds on the campus. As she left a classroom building in December 1998, she was allegedly swept off her feet and thrown into a concrete pillar causing severe head trauma. The case is in the discovery phase.

**Student Cases**

Campos, et. al. v. San Francisco State University, et. al. - United States District Court, San Francisco

Elizabeth Campos, a disabled San Francisco State student, and STARS, an unincorporated association of 20 other disabled students at SFSU, filed this action alleging various civil rights violations and a denial of educational opportunity based on the alleged existence of multiple, although unspecified, architectural barriers throughout the campus. The plaintiffs sought to represent a class of disabled CSU students. The California Faculty Association is also named as a plaintiff in the action claiming injury on behalf of disabled SFSU faculty. The CFA, however, expressly did not seek certification of any class. The plaintiffs are collectively represented by Disability Rights Advocates, an organization that has gained some publicity in the past for pursuing similar litigation against other organizations involving these issues.

A class of mobility disabled and/or visually impaired students who have been denied access to university programs, services and/or activities due to the existence of physical barriers was certified. Following extensive mediation, a tentative settlement was reached in October of 1999, which, among other things, commits SFSU to \$5 million over seven years for various construction projects to improve campus access. The settlement has not been finalized, however, because of a dispute between the plaintiffs and their lawyers. Settlement discussions are continuing. *The court has set a pre-trial conference for May 8, 2001, and trial for May 29, 2001.*

Doe, et al. v. Regents, et al. - San Francisco County Superior Court

This is a class action challenging the legal validity of the higher education components of Proposition 187. The case was filed against CSU, the University of California and the California Community

Colleges. A preliminary injunction was entered on February 8, 1995, barring implementation of the new law before trial. On November 21, 1997, the court issued a tentative decision dismissing this lawsuit because of the unconstitutionality ruling in the companion federal court action described below, which rendered moot any need to reach the issues in the state court suit. With the entry of a final judgment barring enforcement of the law in the companion federal action, it is likely this case will be dismissed as moot. Plaintiffs have submitted an informal request for attorneys' fees. *The parties are currently discussing this request. If it is not resolved informally, plaintiffs will file a formal motion.*

Gregorio T., et al. v. Wilson, et al. - United States District Court, Los Angeles

This is one of several class actions filed in the Los Angeles Federal District Court challenging Proposition 187. The cases were consolidated before Judge Mariana Pfaelzer, who ruled in November of 1995, among other things, that the reporting requirements of the higher education components of Proposition 187 are unconstitutional. On November 14, 1997, Judge Pfaelzer ruled the balance of the claims was preempted by the Personal Responsibility and Work Opportunity (Welfare Reform) Act. Final judgment was entered in March of 1998. The state (not including the CSU or UC) filed an appeal. The parties to the appeal were directed by the Governor to mediate the issues, and agreed on July 29, 1999, to dismiss the appeal and allow the lower court ruling to stand (with minor modifications). Plaintiffs' attorneys' fees were left unresolved. *Plaintiffs have now filed a motion for their fees, which was taken under submission by the court on February 26, 2001.*

Hollander v Munitz, et al. - Sonoma County Superior Court

Lynne Hollander, the widow of 1960s Free Speech activist Mario Savio, sought unsuccessfully in this lawsuit to halt a Sonoma State campus referendum on a proposed student fee increase. The complaint alleged unfair election practices and noncompliance with Trustee policy. A limited temporary restraining order was entered before the election; the court refused to halt the election but stayed implementation of the results pending a subsequent hearing. The referendum was thereafter defeated. Hence, a fee increase is not currently planned for the Sonoma campus, and the parties stipulated that the issue in the subsequently scheduled hearing had become moot. The plaintiff's counsel has nonetheless refused to dismiss this case and indicated his intent to amend the complaint to challenge fee election procedures systemwide.

Lander, et al. v. Sonoma State University, et al. – United States District Court – Oakland

Inks v. Sonoma State University, et al. – United States District Court - Oakland

Three Sonoma State students with disabilities filed the Lander lawsuit alleging violations of the Americans With Disabilities Act and various other civil rights statutes, based on the alleged existence of multiple architectural barriers throughout the campus. *Recently, a fourth student filed similar claims in Inks. The two lawsuits have been consolidated.* The plaintiffs are represented by an attorney, whose law firm has gained publicity for similar ADA litigation in the past against, among others, Clint Eastwood. The case is in the *discovery* stage. In an effort to minimize litigation costs, the parties are

cooperating to identify and address all undisputed architectural barriers. *Mediation is set for March 7, 2001.*

Neal, et al. v. Board of Trustees of the CSU, et al. - United States District Court, Fresno

Members of the CSU Bakersfield wrestling team, both men and women, filed this lawsuit to enjoin the elimination of wrestling, or the placement of any cap on the male membership of the team, in order to comply with the Consent Decree in the Cal NOW litigation. The plaintiffs argued that both the Consent Decree and the federal regulations implementing Title IX are discriminatory.

In December of 1997, the court ruled that achieving proportionality in male and female participation in athletics is not a "safe harbor" against claims of (reverse) discrimination. The opinion acknowledged its inconsistency with five federal appellate opinions that have considered this same issue. It followed instead a lone Louisiana district court opinion.

In February 1999, the court granted plaintiffs' request for a preliminary injunction, stating that capping men's teams is a quota in violation of Title IX. CSU appealed. In December 1999, the Ninth Circuit Court of Appeals reversed the lower court, ruling that the capping of men's teams is not a violation of Title IX.

The plaintiffs filed and lost a petition for rehearing in the Ninth Circuit. The case has been returned to the trial court, where the plaintiffs argued a need for further discovery. *CSU has filed a motion for summary judgment which is now scheduled for hearing on March 26, 2001.* Plaintiffs have expressed their intent to take this issue to the United States Supreme Court.

Riley v. CSU San Bernardino – San Bernardino County Superior Court

Clinton Riley, a CSU San Bernardino student, was referred to Anthony Parrish, an employee in the campus accounting department, in connection with Riley's application for financial aid. Parrish solicited Riley to have sex in exchange for money. Riley reported Parrish's behavior to the campus police, who investigated and confirmed that the incident had occurred. Parrish was arrested, and has resigned his university employment. He was convicted of a criminal misdemeanor. Riley sued CSU and Parrish for damages for this incident. *On January 16, 2001, the case was settled for \$62,500.*

Serviss, et al. v. Trustees, et al - Humboldt County Superior Court

Board of Trustees v. Financial Pacific, et al. – Sacramento County Superior Court

Four Humboldt State students brought this class action on behalf of all students in campus housing during the 1996-97 academic year, for breach of contract and nuisance, because of construction noise and denial of access to amenities, such as the computer and weight rooms, during seismic correction work that was being performed on campus. Defense of the case was tendered to the insurance company for the contractor that named the CSU as an additional insured. After a two-week trial in August, 1999, the jury returned a verdict for the plaintiffs; the entire student class (approximately 1300 students) was awarded \$75 each, and subclass (of approximately 600 students) was also awarded

75% of the value of their dormitory contracts. The total value of jury award is approximately \$1.35 million

Subsequent to the jury award, the insurer attempted to deny coverage, but committed to fund an appeal, notwithstanding the coverage issues. CSU filed a separate declaratory relief action against the insurance carrier, Financial Pacific, to resolve the coverage issues.

*In December 2000, both the students' and the insurance coverage claims were settled by Financial Pacific's payment of \$1,625,000 to the students and their attorneys.*

Smallen v. Sacramento State, et al. – Sacramento County Superior Court

Darren Smallen, who is white, claims that he was denied admission to the graduate program in Social Work at CSU, Sacramento, in violation of Prop. 209 and federal law, because the university secretly considered race in its admission decisions. The case was submitted to non-binding arbitration in May 2000. *The University prevailed, but Smallen refused to accept this result. The CSU then filed a motion to dismiss the case in court. Before hearing, Smallen agreed to dismiss his claim in exchange for a waiver of the university's costs. The case has been dismissed.*

**Other Cases**

Board of Trustees v. Bello's Sporting Goods – San Luis Obispo County Superior Court

This lawsuit seeks a permanent injunction to prevent Bello's Sporting goods, a store in San Luis Obispo, from engaging in further sales of clothing and other merchandise bearing the "Cal Poly" name. Bello's contends that it has a right to do so because: (1) it sold clothing with the "Cal Poly" name before CSU began doing so; and (2) CSU waived its rights by not filing suit earlier. In April 1999, the court denied CSU's request for a preliminary injunction.

The court subsequently granted CSU's request to amend its complaint to include claims against Bello's based upon state and federal trademark, unfair competition and anti-dilution laws. Bello's filed a cross complaint for damages against CSU and the Cal Poly Foundation. After further motions, Bello's dropped its complaint for money damages, and is seeking an injunction only to prevent the CSU from enforcing its trademark rights.

*The case went to trial before the court on January 16 and was concluded on February 16, 2001. No ruling has yet been issued.*

City of Marina v. CSU, et al. – Monterey County Superior Court

Fort Ord Reuse Authority v. CSU, et al. – Monterey County Superior Court

Plaintiffs in these two lawsuits are challenging the adequacy of the final environmental impact report prepared for CSU Monterey Bay's Physical Master Plan. They allege that the city and FORA will

suffer unmitigated adverse impacts if the plan is implemented and that the CSU improperly fails to recognize the jurisdiction of FORA over campus development that does not involve education or research. After settlement discussions failed, the court issued an intended decision in favor of the City of Marina and FORA. The parties are finalizing the details of the written order. An appeal is contemplated.

The McClatchy Company dba The Fresno Bee v. California State University, et al. – Fresno County Superior Court

The Fresno Bee made a request under the Public Records Act for documents, which disclose the names of donors who have paid for luxury suites in CSU Fresno's new Save Mart Center. The IRS officially recognizes a significant portion of the cost of these suites as a charitable contribution. The CSU refused to disclose the names of its donors on the grounds of protecting their interest in privacy. Records detailing all financing for the Save Mart Center, including the cost of the luxury suites, has been provided to the Fresno Bee. This lawsuit seeks an order requiring the CSU to surrender the names of its donors. *On December 19, 2000 the court issued an order requiring CSU to surrender the donor names. The CSU has appealed this order. A hearing is scheduled for June 12, 2001.*

Seretan v. CSU et al. - Los Angeles County Superior Court

Glen Seretan, a Deputy Attorney General disappointed with a merit pay increase, filed a grievance against his employer. In connection with that effort, he sought records from the CSU under the Information Practices Act, which relate to his performance as the litigator on a CSU Northridge case in which he ultimately had to be removed and replaced by another lawyer. Those records were not provided, because they are protected by the attorney client and attorney work product privileges. Seretan filed this action, seeking an order from the court compelling the CSU to provide the documents he requested. The Attorney General's Office provided a defense for the CSU and also agreed to provide indemnification for any loss on this case. The judge determined preliminarily that the records are privileged, but requested that they be produced for her review. *On August 23, 2000, CSU was ordered to produce some, but not all, of the requested records. They have now been produced, and the case is closed.*

Southern California Velodrome Association v. CSU, Dominguez Hills Foundation, et al.

CSU, Dominguez Hills leased the operation of its velodrome to its Foundation, which in turn granted an operating license for the facility to the Southern California Velodrome Association (SCVA). The University terminated the velodrome lease, and the Foundation in turn terminated the rights of SCVA for its operation. The SCVA filed this complaint for a preliminary injunction against the University and the Foundation from interfering with its use and possession of the velodrome. The Foundation has accepted the University's defense under the indemnity provisions in the lease. *On January 17, 2001, this case was dismissed. The SCVA vacated the premises, and the velodrome has been closed. It is anticipated that a new velodrome will be constructed in connection with the development of a new sports center on the campus.*

## **COMMITTEE OF THE WHOLE**

### **Amended Policy on Punitive Damages**

#### **Presentation By**

Christine Helwick  
General Counsel

#### **Summary**

There continues to be concern over the caprice of California juries in entering punitive damage awards against CSU employees -- notwithstanding the statutory standards that restrict such to situations where there is clear and convincing evidence of "oppression, fraud, or malice" -- and the impact that this has on the quality of work performance within the CSU.

In 1995, this Board adopted a policy permitting its own investigation into, and conclusion about, the circumstances giving rise to any punitive award against a CSU employee or former employee, and in appropriate cases, encouragement of indemnification from non-state fund sources. In 1996, the Legislature enacted a new law which, for the first time, permitted state agencies in appropriate circumstances to use state funds to indemnify punitive awards against state employees, after approval by the Legislature. In accord with this new statute, this Board amended its policy in 1996 to allow the payment of punitive awards from state funds first, and encouragement of payment from non-state funds, only where such was not available.

This proposed policy further amends the Board's position, and permits the Board to make an election whether to seek payment of punitive awards from state funds, or to encourage such from non-state funds. The purpose of this new policy is to allow the Board greater flexibility to pursue the most appropriate route depending on the circumstances of a particular case.

## **Background**

The express purpose of a punitive award under California law is to make an example of, and to punish, a defendant who has been guilty of “oppression, fraud or malice.” Civil Code section 3294. Therefore, any safeguard that provides protection against a punitive award potentially takes away from this statutory purpose and frustrates the intent of the Legislature.

Government Code section 825(a) prohibits public agencies from paying punitive awards, at least out of any public funds. Notwithstanding this firm policy, the Legislature has, over time, acknowledged the unpredictability of California juries in making punitive awards. In 1985, local governments were granted authority in appropriate circumstances to pay punitive awards entered against their employees. In 1996, this same authority was extended to agencies of the state, after approval by the Legislature. Government Code section 825(b).

Before Government Code section 825(b) was amended to allow the state to pay punitive awards, the CSU Trustees adopted a policy, which allowed the Board to make its own determination, independent of any judge or jury, as to whether a punitive award should be indemnified. Where the Board concluded that: 1) the employee’s acts were within the course and scope of his/her employment; 2) the employee was acting in good faith and in the apparent best interests of the CSU; and 3) payment of the claim would be in the best interests of the CSU, then the Board was mandated to use its best efforts to identify a non-state source of funds (including the funds of CSU auxiliaries) to pay the punitive award, and to encourage payment as an appropriate service to the CSU. This policy was deemed necessary to give CSU employees assurance that their personal financial resources were not at risk in carrying out the complicated functions for which they were hired, and to preserve the quality of work performance within the CSU for the people of the State. The policy has never been used.

In 1996, after the Legislature adopted the amendment to Government Code section 825(b), which, for the first time, permitted state agencies access to state funds to indemnify their employees against punitive awards, the Board policy was amended to allow the payment of punitive awards from state funds first, and encouragement of payment from non-state funds, only where such was not available. This policy has also never been used.

Nevertheless, there is concern that the current policy does not give the Board sufficient flexibility to decide whether to seek Legislative approval for indemnification from state funds, or to encourage indemnification from non-state funds instead. No state agency has made a request for Legislative approval of the payment of a punitive award since the Government Code was amended. As a result, there is no established route, or precedent, to achieve that approval. There are only two instances in which punitive awards have been entered against CSU employees – one before the amendment to Government Code section 825(b), and one after. In both instances, the

amount of the punitive award was quite small. It would not have been efficient, or cost-effective, in either instance to inject all of the circumstances of these cases into the Legislative process.

The following amended policy would allow this Board the opportunity to decide which cases to present for Legislative approval of indemnification of punitive awards from state funds, and which to encourage indemnification, as under the original policy, from non-state fund sources. The policy also is amended expressly to include within its protection agents of the CSU, and individual members of the Board of Trustees.

**RESOLVED**, By the Board of Trustees of The California State University, as follows:

Whenever an award of punitive damages is entered by a judge or jury against any California State University employee, former employee, agent, or member of the Board of Trustees, an investigation shall be conducted into the facts and circumstances giving rise to the claim and the evidence presented at the trial of the action, and a report shall be prepared for the Board. The Board shall then reach its own conclusion as to whether all of the following circumstances pertain:

1. The judgment is based on an act or omission of the employee, former employee, agent, or member of the Board of Trustees, acting within the course and scope of his or her employment or other function within the California State University.
2. At the time of the act giving rise to the liability, the employee, former employee, agent, or member of the Board of Trustees acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the California State University.
3. Payment of the claim or judgment would be in the best interests of the California State University.

Where all of the above criteria are met, the Board shall either apply to the Legislature for approval of payment of the punitive award in accord with Government Code section 825(b), or use its best efforts to identify a non-state source of funds appropriate to the circumstances presented, including funds held by the various legally separate auxiliary organizations within the CSU, and to encourage payment from those non-state fund sources as an appropriate service to the mission of the CSU.