

UNT SYSTEM OFFICE OF GENERAL COUNSEL

GUIDE TO POLICY LEGAL SUFFICIENCY REVIEW FOR SYSTEM AND CAMPUS OFFICIALS

INTRODUCTION

Rule 02.200 of the University of North Texas System Rules of the Board of Regents (hereinafter “Regents Rule(s)”) delegate authority to the Chancellor of the UNT System to develop and adopt System and System Administration policies and authority to the Presidents to develop and adopt policies for their respective institutions. Subsection 02.206 of this rule requires the UNT System Office of General Counsel (“OGC”) to conduct a legal review of all “System, System Administration, and Institution policies considered for adoption or amendment” prior to approval. The purpose of this document is to explain the purpose, scope and meaning of policy reviews conducted by the OGC pursuant to Rule 02.200.

I. Responsibilities of Institutional Policy Makers

The responsibility to make policy rests solely with system and campus officials. In fulfilling their general policy making duties, officials are responsible for developing, drafting and publishing policies that reflect their business, administrative, financial, ethical and operational judgment; contain sufficient technical, administrative and operational guidance to achieve the desired policy outcome; address relevant business, operational, financial, reputational, competitive, technological, environmental, political and strategic risk; take into account the impact, if any, new policies or changes to existing policies will have across the entire campus and to overall System operations; and initiate the coordination necessary to address the impact policies have across the campus or system.

In particular, system and campus officials are responsible for and expected to determine whether a policy, as written or amended:

1. complies with Regents Rules and System policies;
2. is consistent with and not duplicative of other campus or system administration policies, as applicable;¹
3. satisfies accrediting bodies and external industry/professional association requirements (e.g. AAUP, SACs) , as applicable;
4. achieves its intended business, administrative, financial, ethical and operational purpose(s);
5. clearly defines the roles and responsibilities of officials and employees in the execution of the policy;
6. is sufficiently clear so that substantive questions concerning execution of or compliance with the policy can be answered;

¹ System Administration policies apply solely to the UNT System administration and do not control campus policies.

7. provides the guidance necessary to achieve the policy's objective(s); and
8. clearly explains any decision-making processes required by the policy.

II. Responsibilities of the OGC and Purpose of the Legal Review

System and campus officials are presumed to have fulfilled their responsibilities and policies are presumed to be complete when they are forwarded to the OGC for legal review. The UNT System OGC is responsible for reviewing these policies before they become effective.²

The general purpose of the legal review is to analyze policies to determine whether they are consistent with applicable law, identify and address legal risks, and improve legal defensibility. Therefore, in conducting the review, every effort is made to support the policy's objective(s) and the system's or institution's approach to addressing the issue(s) covered by the policy so long as doing so does not conflict with legal requirements and standards.

Attorneys assigned to review a specific policy are primarily responsible for:

1. analyzing the policy (and any procedures contained therein) to determine whether they comply with federal and state constitutional and statutory law, regulations, attorney general opinions, executive orders (hereinafter collectively referred to as "law"); Regents Rules; and System policies;
2. identifying potential legal risks that might arise from the use of a particular word, term, or phrase, from the way the policy is structured, or from any procedures contained in or missing from the policy; and,
3. recommending changes that cure noted legal deficiencies.

The reviewing attorney may comment on administrative, operational, reputational or other non-legal aspects of a policy. However, comments and recommendations of a non-legal nature are not intended to and should not be interpreted as encroaching on the policymaker's judgment or otherwise substituting for policy decisions. Further, comments and recommendations of a nonlegal nature do not go to legal sufficiency and do not have to be accepted in order for the policy to be legally sufficient.

III. Determining that a Policy is Not Legally Sufficient

Because system and campus officials are responsible for determining their respective organization's business, financial, operational, administrative, and reputational risk tolerance, the fact that a policy or policy revision may create potential non-legal risks will not result in a policy being found to be legally insufficient.

² The Vice Chancellor and General Counsel is responsible for developing certain policies related to contracts and agreements. See Regents Rule 03.900.

A new policy or revision to an existing policy is legally insufficient only when it:

1. does not comply with, conflicts with or is inconsistent with federal or state law, Regents Rule, or System policy (including when the policy fails to include a provision required by law, Regents Rule or System policy);
2. contains words, terms, phrases or provisions that are so ambiguous, vague, or confusing as to raise serious doubt concerning whether the policy complies with law, Regents Rule or System policy;
3. is written such that the policy's organization itself raises questions concerning whether the policy complies with law, Regents Rule or System policy; or
4. is written in a manner that the language itself raises material doubt concerning whether the policy complies with law, Regents Rule or System policy, or doubts about the policy's legal defensibility.³

If a policy is deemed legally insufficient, the reviewing attorney will identify the law, Regents Rule, or System policy with which it conflicts and recommend corrections that will bring the policy into compliance. For example, an attorney may recommend adding the phrase "to the extent allowed by state law" or "in accordance with Regents Rules" to a section of a policy that, as written, exceeds authority granted under law, Regents Rule or System policy.

If the words used in a policy are ambiguous, vague, or confusing, if a policy is incomplete, or, if a policy itself is organized in such a manner as to raise material doubt about whether it complies with law, Regents Rule or System policy, or about its legal defensibility, the attorney will propose language that will render the policy legally sufficient when possible.

Generally, comments concerning legal sufficiency can be categorized as legal, substantive, or non-legal. These comments are defined as:

1. Legal Comments. Comments that identify provisions in a policy that do not comply with, conflict with or are inconsistent with the law, Regents Rules, or System policies, and must be addressed before the policy will be approved as legally sufficient.
2. Substantive Comments. Comments that identify potential legal risks created due to word choice, lack of clarity, poor organization, internal inconsistencies, incompleteness, syntax, grammar, excessive use of jargon, reference to other policies that may have been deleted, and improper grammar. These comments will render a policy legally insufficient only if the deficiency creates a material legal risk.

³ A well written policy or revision makes it easier for an attorney to review the document for legal sufficiency. Attorneys in the OGC should not be expected to ignore their training in the precise and careful use of language. But, in and of themselves, poor grammar and poorly organized policies are not legal matters and will not result in a determination that a policy is legally insufficient.

3. Non-Legal Editorial Comments and Edits. Comments and edits that address non-legal matters and represent the reviewing attorney's opinion as to ways the document (not the policy itself) can be improved. These comments do not render a policy legally insufficient and do not have to be accepted by the policy proponent.

IV. Documenting the Legal Sufficiency Review

All efforts will be made to document the review so that the policy proponent and the campus policy office are able to understand why a policy has been deemed legally insufficient. Therefore, all edits will be made using the "Track Changes" function and comments regarding the legal sufficiency of a policy will be made, in writing, using the "Comment" feature.⁴

1. Legal comments concerning whether a policy does not comply with, conflicts with or is inconsistent with laws, Regents Rules, or System policies will identify the section or language in the policy that is problematic and will recommend language that brings the policy into compliance if this can be done without changing the policy's objective(s). A note will be made on the Policy Approval Form stating that the change must be made in order for the policy to be legally sufficient.
2. Substantive comments concerning possible legal risks caused due to word choice, clarity, organization, internal consistencies, incompleteness, syntax, poor grammar, or excessive use of jargon will be noted on the document and the reviewing attorney may suggest changes that clarify the policy if this can be done without substantively changing the policy. In this instance, comments on the policy and the Policy Approval Form will note that the edit does not have to be accepted in order for the policy to be legally sufficient (e.g. "COMMENT DOES NOT GO TO LEGAL SUFFICIENCY" OR "ACCEPTANCE NOT REQUIRED FOR LEGAL SUFFICIENCY").
3. Non-Legal editorial comments and edits that address non-legal matter will be prefaced or followed by a statement indicating that they do not have to be accepted in order for the policy to be legally sufficient (e.g. "COMMENT DOES NOT GO TO LEGAL SUFFICIENCY" OR "ACCEPTANCE NOT REQUIRED FOR LEGAL SUFFICIENCY").

V. Protecting the Legal Sufficiency Review from Disclosure - Attorney Client Communications

Legal sufficiency reviews are a legal service provided to system and campus officials by attorneys in the UNT System OGC. Comments and edits made on policies are made to communicate the reviewing attorney's legal advice to the system or campus official(s) who submitted the policy and official(s) who need the review in order to perform their official responsibilities, as well as the campus policy director. The review is not intended

⁴ These functions will be used when the review is conducted electronically.

to be disclosed to third persons and therefore is protected from disclosure by the attorney-client privilege.

Attorneys will generally include the phrase "ATTORNEY-CLIENT COMMUNICATION" on the policy document upon completion of the review. However, system and campus officials, including campus policy directors, should make every effort to ensure that the legal sufficiency review is not given or otherwise disseminated to individuals who do not need it to carry out his or her official duties even if the review is not marked as an attorney-client communication.

VI. Document Management – Saving Legal Sufficiency Reviews

The Office of General Counsel will maintain a copy of the legal sufficiency review. However, the campus is the official custodian of the review and the policy approval form.

CONCLUSION

We hope this document explains the purpose and scope of our legal sufficiency reviews and assists you when developing and revising policies.

Questions, comments and suggestions concerning this guide are welcome and should be directed to the Vice Chancellor and General Counsel at (214) 752-5920.

References

1. "Improving the Quality of Environmental Documents", A Report of the Joint AASHTO/ACEC Committee in Cooperation with the Federal Highway Administration. May 2006.
2. The Administrative Law Handbook 2010, Office of the Attorney General, www.oag.state.tx.us/open/publications_og.shtml.