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OF COUNSEL – WINTER 2011
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NORTHEASTERN UNIVERSITY
OFFICE OF THE UNIVERSITY COUNSEL
378 COLUMBUS PLACE

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Stanford v. Roche – Important Case about Federally-Funded Research

United States Supreme Court is scheduled to hear arguments soon in Stanford University v. Roche Molecular Systems, Inc.

In February 2011, the U.S. Supreme Court will hear arguments in a dispute between Stanford University v. Roche Molecular Systems, Inc., regarding university ownership rights over a federally-funded project. The Supreme Court will determine whether an individual university employee or contractor can assign intellectual property rights in an invention arising from federally-funded research to a third party without the university's consent. Stanford claims the rights to the invention under the Bayh-Dole Act because the inventor was a university employee performing research under a federal grant to Stanford. This case arose, however, because the researcher also signed a confidentiality agreement assigning rights to a research company acquired by Roche with whom Stanford was collaborating. In late 2009, a federal court ruled that Roche possesses an ownership interest in the patents and rejected Stanford's claim of patent infringement. The question before the Supreme Court is an important one: whether the law permits inventors employed by universities to unilaterally assign intellectual property rights in federally-funded projects to a third party? The Court is expected to rule in this case by the end of the term in June 2011.

New Contracts Tracking System

In an effort to help you stay better-informed about the documents you send to us, the Office of the University Counsel launched a new computerized process in the fall for tracking agreements you send to our office for review. The automated system sends to your inbox timely announcements regarding your submitted agreement.

Upon our receipt of the document sent for review, the designated contact person in your office will be sent emails notifying your office of (1) our receipt of the document; (2) any need for additional information regarding the document; (3) the conclusion of our review and the processing of the document for signature; and (4) the execution of the document by an appropriate University officer and its availability for pick-up at that location.

In addition, you can advise us of additional individuals in your office to whom these emails should be sent by indicating their names on the contract cover sheet that can be found on the University Counsel website. That way, you can keep the appropriate persons in your office automatically updated with the latest information regarding the document.

Other aspects of the University's contract review policy and process remain unchanged. The policy is available on our website at http://www.northeastern.edu/legal/Contract_Review_Poli.pdf. For example, the use of templates (available from our website under the "Forms" tab) generally expedites the review process. In other cases, negotiations with parties you are seeking to contract with generally increase the length of a review. To obtain the most expeditious review of a non-template agreement, every possible effort should be made to submit the draft agreement in a form acceptable by the University. Early engagement of the University Counsel as well as careful use of model language (available from the University Counsel's website) can help in this regard.

Questions regarding the contracts review policy or procedure may be directed to the Office of University Counsel at x2157.

Spotlight on the ADA/Disability Access

Question: Who is a University resource for questions about accessibility of programs for students with disabilities?

Answer: The University's Disability Resource Center is one of the offices which has responsibilities for the University's compliance with Section 504 of the federal Rehabilitation Act. The Rehabilitation Act is a federal law which requires that the University provide equal access and opportunity to individuals with disabilities. It has been in effect since the early 1970s, and is a condition of federal funding which the University receives. You also may be familiar with the Americans with Disabilities Act (ADA), which has built upon and expanded the principles of the Rehabilitation Act.

Note: Understanding the ADA is particularly important now since new rules concerning the ADA become effective in **March 2011**. If you have questions about whether and how those rules may apply to your department, please contact Janet Faulkner in our office at x2157. If you have questions about how to handle student disability-related issues, or would like to learn more about how to enhance the accessibility of your department's programs, you should consult the Disability Resource Center (DRC) at x2675.

Immigration Updates

- **New Requirements by U.S. Citizenship and Immigration Services (USCIS) for its Form I-129 Petition for a Nonimmigrant Worker [For H-1B and O-1 visa statuses]**

Effective December 23, 2010, USCIS has revised its Form I-129 Petition for a Nonimmigrant Worker used by the University to petition for H-1B and O-1 Nonimmigrant Visa Status on behalf of employees. As a result, University Counsel will update its Immigration Questionnaires to reflect USCIS' changes on our website at <http://www.northeastern.edu/legal/immigration/index.html>. Some of USCIS' key changes include requiring more detailed information from beneficiary employees of prior immigration statuses held; attestations by the sponsoring employer regarding assignment of work off-site to the beneficiary employee; and new certification language for the sponsoring employer to recognize that USCIS may conduct on-site compliance reviews.

Please note that on December 22, 2010 USCIS announced that the new Form I-129 "deemed export" compliance attestation requirement by all sponsoring employers has been delayed until February 20, 2011. Thereafter, employers who wish to hire foreign nationals in H-1B (specialty occupations) or O-1 (extraordinary ability) status must attest that the technology or technical data involved in the work to be performed has been evaluated with respect to export control regulations under the Commerce Department's Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). Employers must indicate either that a license is not required to release

technology or technical data, or in the alternative, that a license *is* required and that the employer will prevent access to the controlled technology or technical data by the intended employee until and unless the employer has received the required license or other authorization to release it to the employee. These attestations are signed under the pains and penalties of perjury.

- **Travel Advisory for Foreign Nationals and Visa Processing Delays**

The U.S. Department of State may conduct additional administrative processing for professionals and academics in the areas of science, technology, engineering and math, and thereby sometimes cause lengthy delays in visa processing. In addition to the documentation that is typically required, consulates are requesting complete job descriptions as well as other information from the sponsoring employer. If a foreign national employee has any upcoming travel plans and needs to apply for a visa at a U.S. Consulate abroad in order to return to the U.S., s/he should contact Attorney Jigisha Patel in our Office and allow sufficient time for us to prepare and provide him/her the documents s/he will need when applying for a visa at a U.S. Consulate abroad.

Please note that at the time of the interview, if the Consular Officer decides and notifies the employee that additional time will be required to process his/her visa application, ***there is nothing that can be done to expedite his/her application***. Therefore, when making travel plans outside the U.S. please keep this in mind. To try to prevent the employee from having to remain outside the U.S. for longer than expected due to visa processing delay, our office will work with the employee's department/college to provide him/her a letter containing information that may be helpful to the Consular Officer in adjudicating his/her visa application. The employee should be sure to check the website of the U.S. Consulate that s/he will be using for current information and requirements. Please also remember that any communications regarding visa applications with a U.S. Consulate or the State Department on behalf of the University should be made by or in consultation with University Counsel. ***The State Department has noted that before making inquiries about status of administrative processing, applicants or their representatives will need to wait at least 60 days from the date of interview or submission of supplemental documents, whichever is later.***

General Information Regarding Visa Application Processing:

Appointment Backlogs: Obtaining an appointment to apply for a nonimmigrant visa varies from a few days to a few months, depending on the post. [See http://travel.state.gov/visa/temp/wait/wait_4638.html]

H-1B Petition Verification (At Least Four Business Days): U.S. Consuls may not issue H-1B or other petition-based visas until the State Department's Kentucky Consular Center (KCC) has verified the bona fides of the employer's petition through the Petition Information Management System (PIMS). The Consul requests PIMS verification after receiving a visa application from the applicant. The request for confirmation likely will be made that same day. The KCC needs two days to process the request, and another day to communicate back to the Consulate. As a result, no H-1B visa may be issued at any post anywhere in less than four business days. Inquiries should be sent via e-mail to the State Department's PIMS office at PIMS@state.gov (the KCC telephone number is unlisted).

Administrative Processing/ Security Delays:

Technology Alert List (TAL) Review (Approx. Four to Twelve Weeks): Visa applications from applicants with impressive science, technology, engineering and match resumes may be referred to Washington for administrative processing under the "Visas Mantis" rules. For example, U.S. Embassies in China and India often refer visa applications for TAL review. The U.S. Embassy in Singapore does the same for applicants without Singaporean passports. TAL review also has occurred to employees who applied for visas in Canada (making a weekend trip to Vancouver turn into over a month back home). There is no way to avoid TAL review if the Consul chooses to refer an application for it. For that reason,

visa applicants (at any U.S. visa-issuing post) should always present their resumes with their applications in order to promote quicker review.

TAL Response:

--By *Employee*: The Consul, when referring the employee's visa application for TAL review, will issue a "221(g)" letter to the employee that directs him/her to provide the Consul with extensive information regarding his/her education, work history, contacts, etc.

--By *University Counsel*: If the Consulate's 221(g) letter demands a letter from the employer (most do not), University Counsel will provide such a letter. Employee's who think their 221(g) letter requires this should e-mail it to Attorney Jigisha Patel, at ji.patel@neu.edu for review and action as appropriate.

Exceptions to TAL Review: Visas Mantis (TAL) reviews generally will not be carried out if:

--*H-1B worker*: has received Visas Mantis TAL review in the past two years;

--*B-1 business visitor*: has received Visas Mantis TAL review in the past year.

Processing Time Usually Four to Eight Weeks But May Be Longer: TAL review in 2008 usually took about five weeks. The State Department in 2009 announced that it would reduce the TAL review period to just two weeks. The State Department website, however, states that: "*Some visa applications require further administrative processing, which takes additional time after the visa applicant's interview by a Consular Officer... Most administrative processing is resolved within 60 days of the visa interview. When administrative processing is required, the timing will vary based on individual circumstances of each case... Important Notice: Before making inquiries about status of administrative processing, applicants or their representatives will need to wait at least 60 days from the date of interview or submission of supplemental documents, whichever is later.*"

SAO and TAL Review May Not be Accelerated: SAO and TAL review are based on national security. Requests for expedited processing are not accepted for any reason. Status report inquires, however, may be made **after 60 days** by University Counsel.

Muslim Countries, Visas Condor (Approx. Four Weeks): Visa applications by military-age men from Special Registration countries (and Malaysia) are referred to Washington for security advisory opinions (SAOs) under the "Visas Condor" rules.

High Risk Countries: Embassies in the mid-East are under pressure from Congress to strengthen their review of visa applicants to ensure that terrorists do not receive visas. That results in "administrative processing" of several weeks that likely is equivalent to the TAL and SAO review described above.

Visa Processing Speed, By Consulate: The State Department website at http://travel.state.gov/visa/temp/wait/wait_4638.html includes a page that informs visitors of how many days it takes to process an ordinary visa application, by Consulate. A disclaimer indicates that the day count does not include administrative processing, such as SAO or TAL, review time.

Going to Border Post for Visa? Prepare for Trip Home: If you visit Canada or Mexico to request a U.S. visa and your application is referred for administrative processing, you have the option of waiting until it is adjudicated or withdrawing your visa application and processing at your home country post. If your visa application is denied, you will need to travel home to request a new visa, even if your current visa has not yet expired, since *anyone who has applied for a visa at a border post may not return to the U.S. until a new visa is issued.*

If you have any questions or concerns, please call the Office of University Counsel at x2157.

If you have any questions you would like to see responded to in this space, please submit them to the Office of University Counsel at 378 Columbus Place. Depending upon the nature of your question, we'll either answer you personally or address your issue in a future edition of this newsletter.

Of Counsel has been prepared as a general summary of important developments. It is not intended as individual legal advice. Should you have any questions or need information concerning a specific situation or any of the content of this advisory, please contact the Office of University Counsel, 378 Columbus Place, x2157.

This edition of Of Counsel was developed with the assistance of Boston College Law School student Laura Prieston.