

Howling Counsel

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LEGAL SPOTLIGHT

CONTRACTS: TRUTHS V. URBAN LEGENDS

“Can I sign this contract for the university?” If you have to ask, the answer is likely a resounding “No!” **Authority to sign contracts** on behalf of the university is delegated by the Chancellor to a relatively small number of Vice Chancellors and sub-delegated to a select group of other officials. This practice helps to ensure that the substance and form of contracts are in the university’s best interests, and that the contracts comply with applicable laws, policies and regulations. It also helps to vest the appropriate officials with responsibility for administering the university’s rights and obligations under the contract.

“What happens if I sign a contract without authority?” University employees who sign contracts without authority are acting outside the scope of their NC State employment. Employees who act outside their authority may be subject to discipline up to and including termination of employment, may be held personally liable for their unauthorized acts, and may not be de-

fended by the State in any resulting proceedings. An unauthorized signer’s department may also find itself on the hook financially. In one recent case, a university department was responsible for funding a \$300,000 settlement and paying thousands of dollars in outside attorney fees after a contract was signed by an employee without delegated authority to bind the university and without prior legal and administrative review.

“Can I sign if it’s just a memorandum of understanding?”

No! The label on a document has no bearing on its legal character. A document does not need to be called a “contract” within its four corners in order to be a contract. MOUs, agreements, affiliation agreements, MTAs, NDAs, licenses, grants, research agreements, and purchase orders are all contracts. Any mutual exchange of promises or obligations can result in a legally binding contract, so only persons with delegated authority may sign for the university.

“What if there is no money changing hands? Can I sign then?” No! Contracts with “no money” can still create significant liabilities for the university, and must still comply with all applicable laws, policies and regulations. Put that pen down!

“I need to get a contract negotiated and signed. What should I do?” You’re finally in luck! The **Contracts Library** on the OGC website contains a wide variety of **pre-approved standard university contract templates** and **identifies the persons who are authorized to sign each contract for the university**. Find your agreement and contact the office of the authorized signer to get things rolling.

Contact OGC at 515-3071 or contracts@ncsu.edu with any questions. Please also let us know if you need assistance drafting a new standard agreement, or have an existing agreement that should be added to the Contracts Library.

LEGAL BRIEFS

U.S. Department of Education Finalizes Changes to FERPA—On January 3, 2012, FERPA, the federal student records privacy law, was changed in three ways. First, the law now clarifies who, other than a small list of senior federal and state officials, has authorized non-consented access to FERPA-protected information for research purposes. Second, FERPA now confirms that

schools and colleges may adopt limited directory information policies which allow release of directory information (such as names and phone numbers) to specific people or for specific purposes, or both. Finally, authority to enforce FERPA was extended to *any* organization that received federal funds through programs administered by the Department of Education,

not just to colleges and universities as the regulation provided prior to the change in law.

To learn more about FERPA, visit OGC’s legal topic on **“Student Records.”**

Please contact the Office of General Counsel for analysis or discussion on how these changes may affect your office or college.

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We make house calls!

Send your inquiries to:
howlingcounsel@ncsu.edu
or call (919) 515-3071

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Achieving Diversity in Student Body Admissions

Near the end of 2011, the U.S. Departments of Justice and Education released legal guidance on the voluntary use of race to achieve diversity in student body admissions (“[Guidance](#)”). The Guidance follows the 2003 Supreme Court cases involving the University of Michigan where the Court held that the empirical evidence presented by Michigan showing actual educational benefits gained by all students in achieving diversity in the student body amounted to a compelling state interest. [Grutter v. Bollinger](#), 539 U.S. 306 (2003), and [Gratz v. Bollinger](#), 539 U.S. 244 (2003).

The Justices, however, came to two different conclusions regarding Michigan’s attempts to achieve diversity in a constitutionally permissible way. For race based

programs or policies to be constitutional, they must meet the strict scrutiny judicial standard established under the 14th Amendment of the U.S. Constitution: 1) they must serve a compelling State interest; and 2) they must be narrowly tailored to further that compelling State interest. While Michigan law school was found to have “narrowly tailored” its admissions process; the Court found that the undergraduate college failed to satisfy the second prong of the test.

The Guidance emphasizes what the law school did right in narrowly tailoring its policy: Considered workable race neutral alternatives; provided for flexible and individualized review of all applicants; ensured that the consideration did not unduly burden students of other racial

groups; and did not use race as the “defining feature” of an applicant. Such an admissions practice must be time limited and be periodically reviewed to determine when a critical mass of diverse students is achieved. The Guidance provides critical steps for implementing legally defensible programs to achieve diversity and sets forth several useful examples.

For questions regarding the Guidance or to seek advice on specific admissions practices or protocols at NC State, please contact Eileen Goldgeier at 515-3932. OGC will be watching closely to see if the Supreme Court grants certiorari this session to hear an appeal of [Fisher v. University of Texas at Austin](#), another diversity case regarding admissions in higher education. Stay tuned to the Howling Counsel.

NC High Court O.K.s Campus Cops for Religious Schools—Colleges and universities founded by or affiliated with religious denominations may constitutionally operate campus police departments, according to a recent state supreme court opinion.

The case arose after a motorist was convicted for driving while impaired (DWI) following an arrest by a Davidson College police officer. The motorist defended by claiming that the state’s delegation of its discretionary arrest powers to religiously-

affiliated schools violates the Establishment Clause of both the state and federal constitution. Read more about this case, [State v. Yencer](#). NC State’s police department is authorized under State law.

QUESTION OF THE MONTH

“Can I hire a private attorney to handle university business?”

No. OGC provides legal services and counseling to all university units and personnel for matters related to the operation of the university. The university can only be represented by the attorneys in OGC or for litigation purposes, the Attorney General’s Office, unless express permission is

granted by the Governor and the Attorney General to OGC to engage outside counsel on the university’s behalf. This permission is required regardless of funding source. To determine if your matter falls within this exception and get approval, contact OGC for consultation before engaging in

the services of a private attorney or law firm. Also visit OGC’s legal topic on “[Managing Outside Legal Counsel](#)” for more information. We’d like to hear from you. Send your questions to howlingcounsel@ncsu.edu or any member of OGC.

NEWS & NOTABLES

Did You Know? The Policy Regulation & Rules (PRR) website was visited 321,061 times since July 2011. The most viewed policies and regulations were: Undergraduate Grade Exclusion; Intracampus Transfers; Release of Medical Information; Code of Student Conduct; and the Attendance Regulation. During the PRR project review implemented in July 2011 to reduce bureaucracy and clarify university procedures, administrators have revised 107 policies and regulations and repealed 129. Stay abreast of changes in university policies and procedures by visiting the “[PRRs Recently Enacted](#)” webpage.

Sarah Lannom, Associate General Counsel, has been selected to serve on the Wake County Superintendent’s Parent Advisory Council (SPAC). Members of the SPAC represent Wake County parents throughout the year and at quarterly Summit Meetings with the Teacher’s Advisory Council, the Principal’s Advisory Council, the Support Staff Advisory Council, and select members of the business community. These groups, together with the Superintendent and his strategy team, discuss and digest issues critical to the Wake County School System and serve as a sounding board and resource for the Superintendent’s office.

Countdown to Pie Day: Mark your calendars and don’t miss OGC’s annual “Pie Day” event March 14, 2012, 2:30-4:00 p.m. The pies are as endless as π !

2012 Krispy Kreme Challenge: The “Legal Superheroes” are accepting the challenge again at this annual fundraising event on February 4, 2012. Come show your support or join members of OGC and fellow UNC System colleagues as we run (or walk) for a good cause. And see if you can spot your favorite Legal Superhero!