



# Howling Counsel

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## Related Links:

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## LEGAL SPOTLIGHT

### Case Report: *White v. Trew* (North Carolina Supreme Court)

On January 25, 2013, the North Carolina Supreme Court issued its opinion in the case of *White v. Trew*. This case has some significant implications and guidance for public employers (and particularly universities) in North Carolina.

The facts of the case are these: the plaintiff, Dr. Mark White, was a tenured associate professor in NC State's Electrical and Computer Engineering (ECE) Department. In 2006-07, White's department head, Dr. Robert Trew, wrote an annual review for White (as required by [NC State REG 05.20.03](#)). The annual review found that White had not met performance expectations and that he had engaged in disruptive behavior and conduct. White, upset by the written review, filed a libel case in Wake County Superior Court; his complaint alleged that the annual review contained a number of false and defamatory statements made with malicious intent and that the review had been published to various administrators at NC State (including the dean and in-house counsel).

NC State filed a motion to dismiss the case on the grounds of sovereign immunity, but the motion was denied. NC State's appeal to the North Carolina Court of Appeals was also unsuccessful. However, the NC Supreme Court agreed to take the case and heard oral argument on October 16, 2012. In its opinion, the court found that, although White claimed to have filed his lawsuit against Trew in Trew's *individual* capacity, by all counts he was sued in his *official* capacity, therefore entitling him to sovereign immunity from suit. The court went on to note that even if Trew had been sued in his individual capacity, the facts in the case (writing an annual performance review for a faculty member as required by regulation and then sharing it with the dean and in-house counsel) would not support a libel claim.

The court reasoned that one cannot be held liable for an act that he was required to do in his capacity as department head and that the department head—per the State Personnel Act and also NC State regulation—had the

ability to share the review with the dean and others in the chain of command. The court also found it untenable to think the department head would put himself in jeopardy by consulting with the Office of General Counsel in writing the annual review. The court stated, "we cannot say that it was unreasonable for defendant to seek guidance from the University's in-house counsel given the contentious nature of his relationship with plaintiff. In fact, were we to follow plaintiff's line of reasoning, supervisors in state government effectively would be prohibited from seeking legal counsel in preparing performance reviews for state employees without fear of being subjected to a lawsuit for seeking such counsel."

The court then held, "It cannot be the case that, when state employees have statutory rights and obligations regarding the maintenance of employee records, communication in conformity with those rights and obligations constitutes publication for a libel suit." To read the [entire opinion](#), go to N.C. Appellate Courts.



## Recommending a Student for Work or Graduate School? Make Sure You Have That FERPA Release

“Can you give me a sample of Jane’s classwork? She has applied for employment here.” This request, or a similar version from graduate programs, is often warmly received by faculty and staff. After all, responding will assuredly help the student achieve their career or educational goals, right? Undoubtedly so, but did you consider federal privacy protections applicable to the student’s education record?

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects personally-identifiable student information maintained by NC State. This type of protected information obviously includes transcripts, but also covers student submissions like reports, written projects, theses, dissertations, as well as knowledge gleaned from these submissions by professors or instructors who grade them.

Before complying with this type of request, make sure you first obtain the student’s written consent to release their education record. A useful [consent form sample](#) can be found on the Office of General’s webpage.

For more information on FERPA’s application to student records or submissions, please contact OGC at 919-515-3071.

### Revised Policy on Illegal Drugs

In September 2012, the University revised its Policy on Illegal Drugs, [POL 04.20.05](#). These revisions were made in response to the UNC Board of Governors’ changes and amendments to the UNC Illegal Drugs Policy, 1300.1, adopted in June. NC State’s revised Policy now allows for a range of penalties and sanctions to be enforced for a vio-

lation of the Policy, depending on the nature and the seriousness of the offense. Previously, the Policy prescribed minimum penalties that the University must enforce for certain offenses, regardless of any mitigating factors or the circumstances. In addition, the revised Policy was reformatted to clearly reflect those penalties and sanctions applicable

to students and those that are applicable to employees only. Should you have any questions about the revised [Policy on Illegal Drugs](#), including as to how it will be implemented, please contact the Office of Student Conduct, Human Resources, or the Office of General Counsel.

**Did you know?** NC State’s colleges, departments, units, centers, and programs regularly sponsor or support a variety of activities that result in the presence of minors of all ages both on and off campus. They may be attending University- or third party-sponsored events or camps, using campus facilities, or be enrolled in university programs. However, hosting minors creates special and heightened obligations, concerns, issues, and other considerations. The university’s failure to appropriately address these obligations and

issues may jeopardize its limited financial resources and create legal exposure. Recent events have only highlighted the need for the university’s units, departments, centers, and programs to be hyper vigilant in understanding the university’s legal and ethical obligations to minors, and of the critical need for appropriate policies, procedures, and risk management practices to ensure that these considerations are understood and fulfilled. Therefore OGC and the Division of Academic and Student Affairs are teaming up to

present **“Minors at NC State: Obligations, Policies, Procedures, Legal Issues and Best Practices”** on **February 19, 2013 from 1:00-4:00 p.m.** at the Monteith Research Center, Auditorium (See the Attached Flyer). Space is filling up fast, please contact Irma Rose at 513-7838 to reserve a seat.

Speakers will include representatives from 4-H, Human Resources, University Police, Insurance and Risk Management, OGC and The Science House.

## SAVE THESE DATES:

### ANNUAL OPEN HOUSE “PIE DAY”

**MARCH 14, 2013**

**2:30 – 4:00 P.M.**

**305 HOLLADAY HALL**

OGC looks forward every year to hosting our colleagues at the annual open house. Please drop by and enjoy a wide assortment of homemade pies and entertainment. Most importantly participate by judging in the very competitive pie contest and meet the OGC staff as well as mingle with fellow colleagues from around campus.

### SECOND ANNUAL LEGAL SYMPOSIUM

**APRIL 10, 2013**

**2:00 – 5:00 P.M.**

**MONTEITH RESEARCH  
CENTER AUDITORIUM**

This year’s symposium, designed for senior level administrators, will focus on legal updates relevant to your job, reducing risk and minimizing liability and much more. A reception will immediately follow the event. Space will fill up fast for this event. Please contact Irma Rose at 513-7838 to reserve your space early!