Howling Counsel presents:

Trending Now

The Second Annual Legal Symposium for University Leaders

April 10, 2013
TOP MOVERS
Employee Privacy in the Workplace
Whose stuff is it anyway?
Fourth Amendment

- 4th Amendment protects citizens from unreasonable searches by the government where a person has a reasonable expectation of privacy.
- U.S. Supreme Court addressed whether searches of employee offices by government employers are subject to limitations imposed by the 4th Amendment.
O’Conner v. Ortega

- Hospital suspected a physician of theft of hospital property and sexual harassment
- Physician suspended and hospital executive director and others searched his file cabinets and desk; items found in search used as basis to dismiss physician
O’Connor established:

• 4th Amendment does apply to searches of employee offices by government employers

• Balance the government’s need to know with intrusion on employee’s privacy

• Reasonableness of search is going to be determined on a case-by-case basis

• If an employee has a reasonable expectation of privacy in the area or things being searched, a search is only constitutional if employer’s interest in having a safe and efficient workplace...
Reasonableness Factors

- Based on credible tip
- Limited scope of search
- Lowered expectation of privacy
- Limited purpose of the search
- Enforcing workplace rules
Service of Alcohol on the NCSU Campus

The Who, What, When, Where and How of Holding a Successful Event
Who?

Applies to Units Campus-Wide
What?

Invitation-only, private events

Not open to the public
When?

No alcohol may be served at any campus location on a University business day until after 5:00 p.m.

Reception with alcohol not followed by a full meal may last no longer than 2 hours.
Where?

May use campus facilities and open spaces with permission from:

1. Dean of the academic unit/Vice Chancellor of non-academic unit requesting to hold the event

2. Vice Chancellor in charge of the facility where the event will be held
How?

Sale of alcohol generally prohibited

No cash bars

No cover charges where alcohol given away
**How?**

Beer and wine: no ABC permit required

Liquor: unit must obtain limited special occasion permit from ABC Commission

- $50.00 fee
- Application form available [here](#)

Again, no sales
How?

Must use a professional bartender

No self-service
How?

Must also provide nonalcoholic beverages

Much also provide substantial, wholesome food
How?

Persons under age 21 should **not** be prohibited from attending events at which alcohol will be served solely on the basis of age.

If minors will attend the event, precautions must be taken to ensure those minors are not served alcohol. For example:

Color-coded name tags, place cards, or wristbands
Permission Form

Request for Permission to Serve Alcohol at NC State University

<table>
<thead>
<tr>
<th>Person Requesting Permission:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Responsible Party (Print Name and Signature):</td>
<td></td>
</tr>
<tr>
<td>Date and Time of Event (beginning and ending):</td>
<td></td>
</tr>
<tr>
<td>Location of Event:</td>
<td></td>
</tr>
<tr>
<td>Funding Source:</td>
<td></td>
</tr>
</tbody>
</table>

Has serving of alcohol been approved by the dean or vice chancellor with responsibility for the location?

- [ ] Yes
- [ ] No

Purpose of Event: (e.g., alumni dinner or reception, fundraiser, wedding, etc.)

- [ ] No

Will there be a charge to attend the event?

- [ ] Yes
- [ ] No

Approximate number of attendees:

- [ ] No

Will students or anyone under 21 be attending the event?

- [ ] Yes
- [ ] No

Alcoholic beverages that will be served:

- [ ] beer
- [ ] light wine
- [ ] fortified wine
- [ ] liquor

Please indicate how each of the following requirements will be satisfied:

- Access to the event must be limited to invitees and controlled throughout the event. The event may not be open to the public. For outdoor events, special steps must be taken (for example, tents with sides or other significant barriers) to control access and delineate the area for the event.
- A sufficient amount of alternative, nonalcoholic beverages must be available.
- A sufficient amount of substantial, wholesome food (heavy hors d’oeuvres or dinner) must be served.
- There must be a professional bartender.

No self-service of alcohol is permitted.

A reception with alcoholic beverages that is followed by a full meal may last no longer than one hour. A reception with alcoholic beverages that is not followed by a full meal may last no longer than two hours.

The undersigned acknowledges that if this request is granted, that the service of alcohol will comply with all NC ABC laws and the University’s Alcohol Policy.

Dean or Vice Chancellor Signature  
Date

Available at:  [http://policies.ncsu.edu/sites/default/files/AlcoholPermissionForm.docx](http://policies.ncsu.edu/sites/default/files/AlcoholPermissionForm.docx)
Applicable PRRs

Alcohol Policy:  http://policies.ncsu.edu/policy/pol-04-20-02

Alcohol Regulation:  http://policies.ncsu.edu/regulation/reg-04-20-01

Procedures for Serving and Consuming Alcohol at NC State Student Centers, Thompson Theatre and Price Music Center:  http://policies.ncsu.edu/regulation/reg-11-60-02

Alcohol at McKimmon Center:  http://policies.ncsu.edu/rule/rul-06-21-01
Data Sensitivity Framework

Coming soon! New resources to categorize and secure data.
We all work with data.
Data must be protected.

Or else!
What color is your data?

- Ultra: SSN
- High: DOB
- Moderate: Cell number
- Normal: Campus address
- Unclassified: Salary Info
Coming soon!

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<tr>
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<tbody>
<tr>
<td>Student name (first, middle)</td>
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<td>Minor's name (first, middle)</td>
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<td>Citizenship or nationality</td>
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<td>Personal photograph (have school&gt;&amp; faculty?)</td>
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“You Want Me to Write What?”: How FERPA applies to Student Recommendations

April 10, 2013
“You Want Me to Write What?”: How FERPA Applies to Student Recommendations

What We’ll Cover

- FERPA Refresher
- The Recommendation Letter Pitfall
- What’s the Harm?
- Best Practices and Other Thoughts

When Bad Students Ask For Letters of Recommendation
“You Want Me to Write What?”: How FERPA Applies to Student Recommendations

FERPA Refresher

- **Family Educational Rights and Privacy Act (FERPA)**

- President Ford signs into law on 8/21/74
  - Clifton Williams born one month later

- Floor amendment to General Education Provisions Act (GEPA)

- Amendments enacted six months later (“Buckley/Pell Amendment”)

- Protects privacy of education records from un-consented release
  - Requires signed, written consent
The Recommendation Letter Pitfall

- FERPA = Shield, FERPA ≠ Escape Hatch
- Proposed beneficial release not considered harmful
- Still a violation of FERPA unless student provides consent

(Helpful Recommendation Letter?)
“You Want Me to Write What?”: How FERPA Applies to Student Recommendations

What’s the Harm?

- “Policy or Practice” of violations
- Increased external scrutiny
- Potential for loss of federal funding
- Potential brand damage
“You Want Me to Write What?”: How FERPA Applies to Student Recommendations

Best Practice and Other Thoughts

• Get the request in writing!!
• OGC Recommendation Letter Release Form

• Consider benefits of confidentiality

• Avoid discriminatory practices (or their appearance)

• Lend credibility to student while honoring requester’s need for clear distinctions among candidates

Source: “Writing Recommendation Letters Online: A Faculty Handbook”, Penn State University John A. Dutton e-Education Institute
DON’T MISS
Debunking the Myth of the Umstead Act

Gov. William B. Umstead

Image courtesy of the State Department of Archives and History
Facts

1. Prohibits the sale of goods and services in competition with private business
2. Many exceptions
3. Criminal statute (misdemeanor)
4. Injunctive relief and declaratory action
5. No private cause of action - Limited case law
Key Exceptions Relevant to NC State University

1. Mission
2. Alumni
3. Education
4. Bookstore/dining and C stores/dorms
5. Student health
6. Centennial Campus
7. University hotel and restaurant
8. Products from experimental stations or test farms
9. Serving students and employees and immediate families and their guests
10. Howling Cow Ice Cream and other dairy products
11. Surrounding community or the people of the State
Umstead Panel at GA

1. Created in 2006
2. Nine members
   1. Review activities under certain exceptions
      • Alumni and their immediate families
      • Students/employees and their immediate families
      • Serving community or the people
<table>
<thead>
<tr>
<th>Campus</th>
<th>Activity</th>
<th>Request</th>
<th>Umstead Exception</th>
<th>Panel Determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNC-Chapel Hill</td>
<td>Opening a Subway Franchise</td>
<td>A Subway Franchisee with a store within .3 miles of the Rams Head Market Food Court asked for a determination whether placing another Subway franchise this close to his store was unauthorized and/or unfair competition</td>
<td>Franchisee: NC. Gen. Stat. §66-58(b)(8)</td>
<td>No jurisdiction</td>
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<tr>
<td></td>
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<td></td>
<td>UNC-Chapel Hill: NC. Gen. Stat. §66-58(b)(8)a</td>
<td></td>
</tr>
<tr>
<td>Western Carolina University</td>
<td>Provide construction management and specialized prototype and engineering services</td>
<td>Western Carolina University asked the Panel to determine if engineering services outreach by its Kimmel School of Construction Management and Technology was permissible</td>
<td>NC. Gen. Stat. §66-58(b)(8)o</td>
<td>Due to the Panel’s concerns regarding proposed construction management services, WCU withdrew that part of its request. The Panel determined that providing specialized prototype and engineering services would not be unfair competition and is authorized was not unfair competition.</td>
</tr>
<tr>
<td>Campus</td>
<td>Activity</td>
<td>Request</td>
<td>Umstead Exception</td>
<td>Panel Determination</td>
</tr>
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<tr>
<td>North Carolina Arboretum</td>
<td>Hosting Weddings</td>
<td>The North Carolina Arboretum (Arboretum) asked the Panel to determine if the rental of its facilities for “green weddings” was permissible</td>
<td>NC. Gen. Stat. §66-58(b)(8)o</td>
<td>Approved</td>
</tr>
<tr>
<td>UNC-Charlotte</td>
<td>Increasing the number and types of opportunities for faculty and students to participate in global public relations, provide alumni who work in global and domestic global relations with resources and mentors, and provide seminars and workshops</td>
<td>UNC-Charlotte’s Department of Communications Studies asked the Panel to determine if the proposed activities of its Center for Global Public Relations are permissible</td>
<td>NC Gen. Stat. §66-58(b)(8)m, n and o</td>
<td>Approved</td>
</tr>
<tr>
<td>UNC-Chapel Hill</td>
<td>computer repair services</td>
<td>UNC Chapel Hill asked the Panel to determine if its Computer Repair Center (CRC) could provide computer repair services to the Chapel Hill-Carrboro City Schools and Orange County Schools</td>
<td>NC Gen. Stat. §66-58(b)(8)o</td>
<td>Approved</td>
</tr>
</tbody>
</table>
NOTEWORTHY
EDITOR’S PICK
Copyright Fair Use

OGC Legal Symposium
Judith L. Curry, Associate General Counsel
Will Cross, Director, Copyright and Digital Scholarship Center
April 10, 2013
Why Should I Worry About Copyright?

Sometimes a © symbol is just a © symbol.
A Limited Right
What is Fair Use?
Purpose and Character

What are you doing?
Sony Corp. of America v. Universal City Studios

Is time-shifting TV shows with a VCR fair use?

“The primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors”
Nature of the Original

What are you using?
Amount and Substantiality

How much are you using?
Harper & Row v. Nation Enters.,
471 U.S. 539 (1985)

300 words from Ford’s 200,000-word manuscript

Only a small portion was published, but it went to the heart of the work – the Nixon pardon.
Legal Standard Today: Transformation
Commercial Parody as Fair Use

- Roy Orbison
- 2 Live Crew
Finding the Balance: Research and Education

- Reproducing drawings or artwork
- Posting course materials online
- Placing materials on library reserves
- Showing films or playing music without license
- Posting materials for distance learning
- Digitizing materials to share online
Case Study: Fair Use in
“I think it is time for Congress to think about the next great copyright act, which will need to be more forward thinking and flexible than before. Because the dissemination of content is so pervasive to life in the 21st century, the law also should be less technical and more helpful to those who need to navigate it. Certainly some guidance could be given through regulations and education. But my point is, if one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.”

Statement of Maria A. Pallante, Register of Copyrights
United States Copyright Office
before the Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary
United States House of Representatives
113th Congress, 1st Session, March 20, 2013
504(c)2
Limitation on Liability – Fair Use

Subjective Honesty +

Objective Reasonableness

= Good Faith
Resources

- http://www.lib.ncsu.edu/cdsc/resources/faqs/fairuse
- http://www.ncsu.edu/general_counsel/legal_topics/intell_prop.php#II
- http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/
What are the University’s Marks?

The University has many trademarks, including logos:

- NCSU®
- NC State® Centennial
- NC State® University
- North Carolina State University®
- Wolfpack®
- Wolfpack Women®
- GoPack™
- Pack™
- Mr. Wuf™
- Ms. Wuf™
- The Block S logo
- Tuffy Logo Strutting
- Tuffy Logo Head
- The Commercial Seal®
- The Official Seal®

- Centennial Campus®
- Campus logo (requires®)
- Carter-Finley StadiumTM
- Reynolds ColiseumTM
- “Red Means Go”®
- Lonnie Poole Golf Course®
- Howling Cow™ Ice Cream
- Wolf Village™
- The Bell Tower image
- The “Wolfie” hand gesture

The University has many trademarks, including logos:
What are the University’s Marks?
How can I use them?

Governed by University regulation and rules:
➢ REG 01.25.06—Use of University’s Names, Marks, Symbols, Images and Copyright
➢ RUL 01.25.01 Trademark Licensing Rules
In General . . .

➢ Cannot use in a way that would describe the University as a sponsor, endorser, or source of goods **without permission**
➢ Not used for commercial purposes **without permission**
➢ Vendor or Contractors cannot advertise or promote based upon existence of contract with the University
In General . . .

➢ Cannot alter the marks
➢ Use that would not be in good taste or reflect poorly on the University

In General . . .
Why is this important?

➢ Liability, Liability, Liability (agency law)
➢ Branding
➢ Competition with Private Industry?
➢ Non-profit status
➢ Hurts the brand (PR purposes)
Softball to Host Wolfpack Challenge this Weekend

The NC State softball program will host its annual Wolfpack Challenge this weekend, March 5-7, at the Curtis & Jacqueline Dial Softball Stadium on campus. Admission to all games is free, and live stats will be provided on GoPack.com.

RALEIGH, N.C. — The NC State softball program will host its annual Wolfpack Challenge this weekend, March 5-7, at the Curtis & Jacqueline Dial Softball Stadium on campus. Admission to all games is free, and live stats will be provided on GoPack.com.

Fans in attendance are asked to donate new and/or gently worn shoes to the “Share Our Shoes” charity program. A barrel will be setup near the press box area for donations. Fans are asked to please bring multiple pairs in a trash bag or box.

Next week NC State will play a midweek doubleheader at Campbell before heading to the Winthrop/adidas Invitational.
<table>
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<tr>
<th>REFERENCE #</th>
<th>LOCATION(S)</th>
<th>DESIGN DIMENSIONS</th>
<th><a href="http://www.thecottonexchange.com">www.thecottonexchange.com</a></th>
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COLOR COPIES ONLY ESTIMATE COLORS. PLEASE REFER TO YOUR SWATCHES FOR ACTUAL COLORS BEFORE ORDERING!
Chancellor's Seal

Filed under: Logos
05.15.2009

The Chancellor’s seal is used for formal or official university documents and special events. There are two versions, one for color and one for black and white.

Use of this seal is restricted to the Chancellor’s Office and graduation materials, official university certificates and awards only. Contact University Communications with any questions.

Acts of violence at NC State University cannot be tolerated. Students, faculty and staff should be prepared to respond to potential acts of violence. Employees are encouraged to be familiar with the information on the university Police Department’s website at www.police.ncsu.edu. For more information about campus lifestyle or counseling services, contact: Counseling and Psychological Services (CAPS) at 919-515-5790 (ext. 2825).
Who grants permission?

➢ Review REG 01.25.06

➢ Rule of thumb:
Consult with Gregg Zarnstorff, Trademark Licensing Director
What *can* I do?

➢ Can use for official University business purposes without prior approval:
  • University sponsorship of a program or participation
  • Publications
  • Documents
  • Department’s services
  • Equipment and supplies
Legal Briefs

Ears Wide Open: How to Conduct an Effective Reference Check

NC State employs approximately 7600 employees, give or take a few. At any given time, there are units all across campus who are hiring new employees all across the org chart.

A crucial part of the hiring process is the reference check—not only because of the timing (reference checks normally occur near the end of the search), but because of what they can tell you about the applicant. Failing to ask the right questions and/or to really listen to what references say (or won’t say) about an applicant can sometimes lead to a bad hire. After all, the best predictor of future performance is past performance. In addition, an effective reference check can help employers minimize the risk of liability for a negligent hiring claim. Some best practices for conducting effective and confidential reference checks by hiring officials include:

1) Use a standard set of open-ended questions to ask of all references and a standard form to document responses; (Check out Recommended Employment Reference Questions.)

2) Obtain permission from the applicant before calling the employee’s current employer/supervisor (it can be a red flag if permission is not granted);

3) Always ask: “Would you rehire the applicant?”

4) Check two or more references;

5) Inform the applicant if you decide to check references other than those listed;

6) References should be to persons who have supervised the applicant or who have direct knowledge of the applicant’s skills, abilities and experience. If a reference hesitates to talk about the applicant, consider seeking a release to grant permission from the applicant to allow the reference to speak truthfully without fear of liability (OGC can help with this!).

Lastly, hiring officials considering internal candidates for a position should always conduct as vigorous a reference check as for any outside applicant.

For assistance in conducting an effective reference check, do not hesitate to contact Kathy Lambert, Director of Employment Services at (515-4277), Carson Cook, Assistant EEO Officer (513-2099) or Sarah Lannom, Associate General Counsel (515-2333).

Let’s Ask the Librarians: Copyright & Fair Use

Who better to ask about copyright and fair use than librarians? The Association of Research Libraries (ARL), in partnership with the Center for Social Media and the Washington College of Law at American University, did just that when it engaged academic and research librarians from across the country to develop guidelines for fair use. The guidelines were released on January 26, 2012, as the Code of Best Practices in Fair Use for Academic and Research Librarians. The right to exclude others from reproducing the work is the most important right granted to owners of copyright. This right is subject to limitations, however, found in the copyright statute (17 U.S.C. 107-118) and case law.

Continued on page 2
We need an LLC!
(Or do we?)

Considerations for doing business outside of NC State through an associated entity.
Associated Entities

- **Associated entities** are private, non-profit corporations whose sole purpose is to support The University of North Carolina or one or more of its constituent institutions.

- Encouraged by NC statute §116-30.20
- Employees can be assigned to establish and operate
- University can supply office space, equipment, supplies and related resources
- Must be audited annually with report to BOG
History of Associated Entities at NC State

AEs fall into one of the following categories:

- Fundraising
- Investments
- Social clubs
- Special purpose entities (almost exclusively real estate development)
Process for Establishing an Associated Entity

A written request must be submitted through the VC for F&B to the Chancellor for approval.

- Proposed name of the entity
- Purpose of the entity
- Reasons to establish a new entity
- Concurrence to abide by Associated Entity Requirements
- Compliance with corporate formalities
<table>
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<tr>
<th>University</th>
<th>LLC</th>
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<tbody>
<tr>
<td>1. Sovereign immunity</td>
<td>1. No sovereign immunity</td>
</tr>
<tr>
<td>2. $1 mm tort claims limit</td>
<td>2. No tort claim limit</td>
</tr>
<tr>
<td>3. Can use state funds</td>
<td>3. Cannot use state funds</td>
</tr>
<tr>
<td>4. Full administrative support</td>
<td>4. Must contract with University for administrative support</td>
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<tr>
<td>5. Self-Insured</td>
<td>5. Purchase Insurance</td>
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Potential Advantages - LLC

University

1. Contracting process subject to various approvals
2. Contract terms less flexible
3. University exposed to liability

LLC

1. Contracting process simpler/nimbler
2. Flexible contract terms
3. May shield University from liability
The Bottom Line

• Conducting a project/transaction through NC State is almost always possible and strongly preferred. Seek assistance from relevant units.

• Inquiries into forming an LLC should be made by the appropriate VC or Dean.

• LLCs must be able to support significant set-up and carrying costs (accounting, audit, legal, etc.)
WHAT’S NEXT?
Questions?
Contact

For Additional Information:

Contact the Office of General Counsel
304 Holladay Hall, Campus Box 7008
(919) 515-3071
http://www.ncsu.edu/general_counsel/