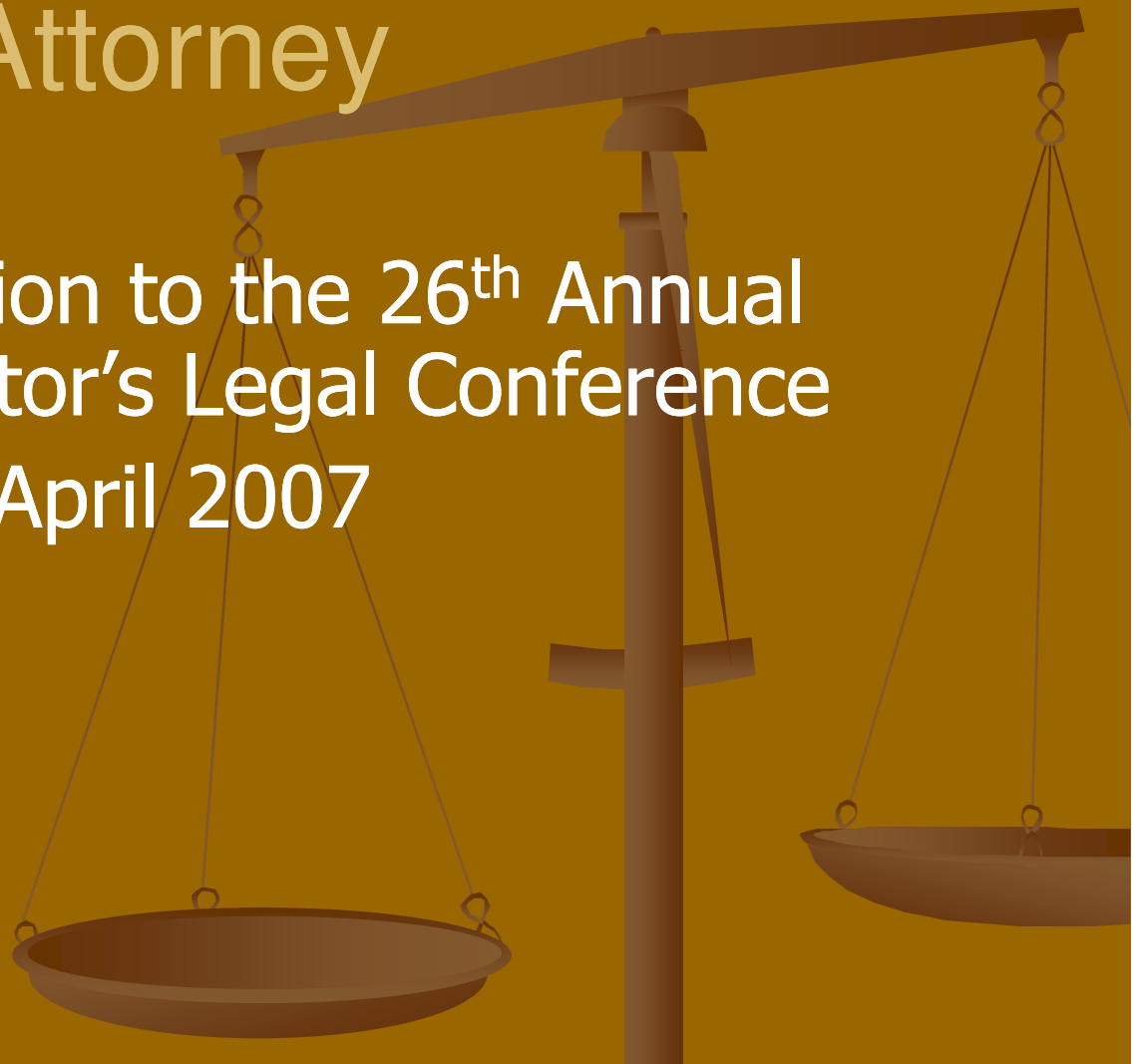


Working with your County Attorney

A Presentation to the 26th Annual
Health Director's Legal Conference
April 2007

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THEMES

- COMMUNICATION
- DOCUMENTATION
- PRESENTATION

Outline

- Care and Feeding of your County Attorney
- Preventative Law
- Difficult People, Presenting Evidence, & Other Challenges
- Other Issues



Care and Feeding of your County Attorney



Preventative Law

- Educate your County Attorney:
 - Duties and Responsibilities
 - State v. Local delegation of duties and representation
 - Important and/or persistent issues (L.E.P. populations, HIPAA, smoking bans etc.)
- Understand your County Attorney's role and responsibilities (private counsel or in-house counsel; retainer v. hourly rate, etc.)

Preventative Law, cont'd

- Bring in your County Attorney before threat of litigation. It is far better to ask permission than beg forgiveness.
- Create contemporaneous documentation of issues and relevant facts
- Document actions and basis for response to issues and controversies; i.e., demonstrate rational basis for actions

Preventative Law, cont'd

- Request County Attorney to draft or at least review all contracts
- Develop a policy/interpretation file
- Create collection procedure (debt set-off)
- Involve your County Attorney in HIPAA compliance

Enforcement of Public Health Law and Rules

- Right of Entry
- Site inspection matters
- Presentation of Evidence
- Representation before Quasi-judicial Boards
by Non-attorneys
- Dealing with difficult clients/violators

The Inspection

Access to Property

- ▶ **Statutory right of access for inspections:** The Secretary and a local health director shall have the right of entry upon the premises of any place where entry is necessary to enforce the provisions of this Chapter or the rules adopted by the Commission or a local board of health. If consent for entry is not obtained, an administrative search and inspection warrant shall be obtained pursuant to G.S. 15-27.2. However, if an imminent hazard exists, no warrant is required for entry upon the premises.
- ▶ **Trespass--** (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff
- ▶ **Administrative search warrant—**
 - oath or affirmation
 - probable cause
 - circumstances which legally justifies such a search or inspection of that property
- ▶ **Court Order**

What to do with the SOB citizen ?

- Do not put yourself at risk
- Bring a witness
- Do not prolong antagonistic discussion
- File charges if necessary
- Communicate effectively
 - Be professional
 - Speak strictly to ordinance provisions
 - Give appeal options

Board of Health as Judicial Body

- **Final agency decision-maker**
- **Role of the Board**
 - **decide case**
 - **provide due process opportunity**
 - **build record**
- **Appeal process**

Non-lawyer Representation Before Quasi-Judicial Boards

■ Authorized Practice Advisory Opinion 2006-1

October 20, 2006

Quasi-Judicial Hearings on Zoning and Land Use

■ Inquiry:

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party?

Answer:

The committee believes that the law is also clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding is the practice of law. N.C. Gen. Stat. § 84-2.1 and 4.

Professionals may still present their evidence in support of the position of their clients. However, they may not examine or cross-examine other witnesses or advocate the legal position of their clients.

The committee's opinion is also not intended to affect the ability of city and county staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the committee understands is the proper, current practice and role of the planning staff.

Enforcement Officers as Witnesses

Keep in mind all goals

- The Enforcement Officer must persuade the Judge or Board to uphold the decision or penalty.
- The Enforcement Officer must create a sufficient record upon which to base a decision.
- Note: Here again, the Enforcement Officer must do another balancing act between knowing to sit down when you've won and making sure enough evidence gets in the record to win on appeal as well.

Presentation of Evidence

Relevancy and Reliability

- ▶ Relevancy
- ▶ Rule 404(b) of the North Carolina Rules of Evidence
- ▶ relevant to any fact or issue other than the character of the accused
- ▶ "rule of inclusion" rather than a "rule of exclusion."
- ▶ Limitations
- ▶ Undue prejudice
- ▶ Redundant

Presentation cont'd

- Reliability
- Hearsay – Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." North Carolina Rules of Evidence 801(c).
- Hearsay exceptions
 - – public record and reports
 - – **Contemporaneous** routine records
 - – Statements may be admissible to prove

WITNESS 101: THE THREE RULES ON PRESENTING TESTIMONY

1. ANSWER THE QUESTION YOU ARE ASKED (AND ONLY THE QUESTION YOU ARE ASKED).
2. MAKE SURE YOU UNDERSTAND THE QUESTION. (APPLY THE 2 SECOND RULE.)
3. TELL THE TRUTH.

Liability Issues

Governmental immunity-- complete and absolute bar to any action against the County or its public officials

Waiver-- may waive immunity through the purchase of liability insurance or statute, i.e., Tort Claims Act or some other means

Immunity of public officials v. Immunity of public employees – *Piggott* case

1. Is position created by statute
- 2. Oath taken? Sworn officer?
- 3. Discharging a public duty?
- 4. Discretion

When is a County Employee a Public Official ?

1. Is the position one created by statute? [A municipal office is created by legislation while the relation of an employee to a municipal corporation is based solely on contract.] Note: there is a specific statutory provision for Animal Control Officers, N. C. Gen. Stat. § 67-30.]
2. Is the individual required to take an oath or be sworn in?
3. Are the duties delegated to him or her as part of the public duties to be performed by the governmental entity? [According to *Pigott*, an officer performs public functions delegated to him as part of the sovereign power of the state while no share of the sovereign powers or functions of the government is vested in an employee.]
4. Is the person afforded official trust or responsibilities? Are the duties mandated by statute?
5. Does the position have a significant degree of discretion or decision-making responsibility? [The duties of an employee are of non-governmental nature, and are neither certain nor permanent; that an officer is sometimes vested with a certain measure of discretion . . . whereas the duties of an employee are purely ministerial; and that an officer is empowered to act in the discharge of a duty or legal authority in official life, whereas an employee does not discharge independent duties, but acts by the direction of others.]

When Could a Public Health Official be held liable?

- With regard to **sewage treatment and disposal and the issuance** of improvement permits, **local health departments** act as agents of the State and are therefore "**immune** from suit" in the **courts of general jurisdiction**, unless there exists a **liability insurance policy covering** the loss with limits in excess of \$ 150,000.

When Could a Public Health Official be held liable? Cont'd

- 'Corrupt or malicious' acts
- Acts outside of and beyond the scope of his/her duties
- Proprietary activities
- Actions in violations of federally guaranteed rights
- Section 1983

Public Records and Record Retention for Public Health Entities



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- North Carolina's **Public Record Act** can be found at N. C. Gen. Stat. § 132-1 *et seq.* The definition of public records is extremely broad and includes photos, tapes, emails, artifacts, data collection and virtually any other form of information.
 - N. C. Gen. Stat. 130-45.8 establishes a very **broad exception** for Health Department Records
 - Federal requirements (HIPAA) create additional exceptions

Public Records Act

(non health department entities)

- **Personal notes** may be considered to be part of the public record. Personal notes made as aids in preparation of information on documents have sometimes been treated as not public; otherwise, notes generally are considered to be public records. E.g., notes made during an interview which were used in preparing a more detailed transcript later have been found not be part of the public record.
- **Drafts** of documents are not generally deemed to be part of the public records. However, it is not permissible to create a document that will be widely relied upon and keep it out of the public record simply because it may be modified at some later time. (E.g., the Poole Commission report)

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- **E-Mails:** Electronic data, such as e-mails, are generally considered to be public records and should, generally, be considered in the same way as written correspondence. If e-mails pertain to a specific page or subject they should be treated as part of that case file even if not actually stored in that file. Document management becomes an important issue with e-mail. Document attention is an IT or computer management issue as well as a public records matter. Your department should adopt and comply with a consistent policy towards the retention of e-mail documents.

Records Retention

- The State has established a recommended Schedule for Retention of all Public Records generated by Local Governments
- Typically the standard retention period is 3 years; however, you should check the schedule for each kind of document
- Schedule has recently been revised

Medical Records exceptions to the Public Records Act

130A-45.8. Confidentiality of patient information

(a) Medical records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

(b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

Other medical exceptions

- Emergency medical provider records
(N. C. Gen. Stat. 143-518)
- Peer review records (N. C. Gen. Stat. 130A-45.7)
- Competitive health care information such as contracts etc. (N. C. Gen. Stat. 130A-45.11)
- Sex offender records (N. C. Gen. Stat. 14-208.10)
- Health care info related to terrorist incident
(N. C. Gen. Stat. 130A-476)

Other exceptions to note

- Law enforcement investigation records
- Personnel records
- Trade secrets
- Certain records on children
- Mental health records
- Records related to drug dependency/treatment

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- *Note: the rule of thumb for **public records act** issues is that if the document is of sufficient interest or importance to be it in your file then it is a public record.*
 - *Note: the rule of thumb for **medical records** is that unless there is a clear requirement to release the documents are not public and should not be released*

Public Records and HIPAA

- Requires protection of all personal health information
- Major exceptions: health info used for purposes of treatment; payment or health care operations (TPO)
- TPO no longer confidential under N. C. Gen. Stat. 130A-12
- IOG offers excellent resource:
<http://www.medicalprivacy.unc.edu/index.html>

North Carolina's Open Meetings Law

- All official meetings of public bodies open to the public.

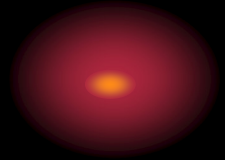
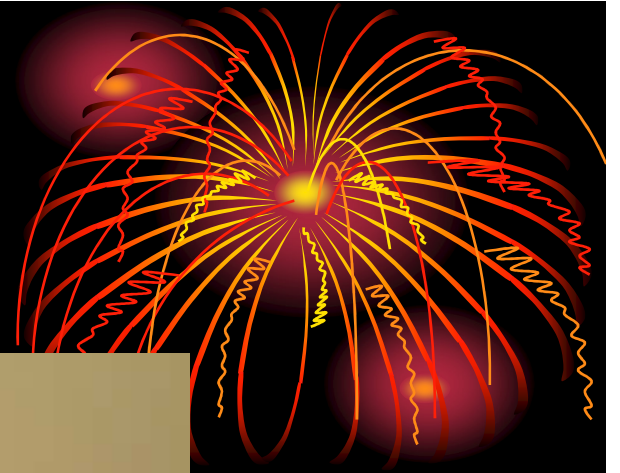
N. C. Gen. Stat § 143-318.10

- Every public body shall keep *full and accurate minutes* of all official meetings, including any closed sessions
- When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings.

N.C. Gen. Stat. § 143-318.10(e)

- What is a “public body”?
- What is an “official meeting”?
- When can you go into closed session?
 - to prevent disclosure of federally protected info
 - matters within the attorney-client privilege
 - certain personnel matters, including employment contracts
 - Investigations into criminal activities
 - “To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity”
 - Acquisition of real property and economic development

Questions?



Thank You

