Responding to Subpoenas

A Guide for Mental Health Facilities

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Public mental health facilities, like other public entities providing human services, accumulate a lot of personal information about the people whom they serve. On the one hand, they have a legal and ethical duty to hold this information in confidence. On the other hand, such information may be relevant in a range of legal proceedings. In a criminal case, for example, the prosecutor may want to review the mental health records of the person charged with a crime, or the defendant may want to review the mental health records of his or her accuser. Although the mental health facility and its employees do not have a direct interest in the proceeding (because they are not parties to it), they nonetheless are drawn in because they have information that the parties want.

The subpoena is the typical mechanism for obtaining records from someone who is not a party to a case. A form of court order, a subpoena directs the person named in it to appear at a designated time and place to testify, produce documents, or both. In responding to a subpoena, mental health facilities must balance their duty to protect confidential information against their duty to respond to a court order.

Through questions and answers, this guide discusses these potentially conflicting obligations. The first two sections discuss the basic rules governing subpoenas—how they are issued and served, when a person may obtain reimbursement for expenses, and so on. The remaining three sections deal with responding to subpoenas, discussing the differences in responding to subpoenas for nonconfidential and confidential information.

Although this guide may be helpful to anyone who maintains confidential information, it focuses on the obligations of individuals and facilities

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whose primary purpose is to provide mental health, developmental disabilities, or substance abuse services. These include the following:

- Facilities operated by "area authorities," the local governmental units in North Carolina that provide community-based mental health, developmental disabilities, and substance abuse services
- Facilities operated by the North Carolina Division of Mental Health, Developmental Disabilities, and Substance Abuse Services
- Public and private facilities or practitioners that contract with area authorities or the state division to provide mental health, developmental disabilities, and substance abuse services
- Veterans Administration facilities in North Carolina that provide these services
- Psychiatric units of general hospitals
- Facilities licensed under Article 2, Chapter 122C, of the North Carolina General Statutes (hereinafter G.S.)

The assumption throughout this guide is that the mental health facility is not a party to the case for which one of its employees has received a subpoena. When the facility is a party to the case, the opposing party usually will use devices other than subpoenas to obtain information, such as interrogatories (written questions that the facility must answer) or requests to produce documents. Also, the opposing party ordinarily will contact the facility's attorney first, who then will advise facility personnel on how to proceed. In contrast, when the facility is *not* a party to the case, the party seeking the information ordinarily will deliver a subpoena directly to the facility employee who is thought to have the records, not to the facility's legal counsel. This guide therefore is aimed at the mental health facility employee who has received or may receive a subpoena and who must decide, at least initially, how to proceed.

Readers should keep in mind that this guide offers general advice only. Although it discusses how to respond to subpoenas for information protected by certain confidentiality laws, it does not attempt to analyze in detail what information falls within the scope of each confidentiality law or what exceptions to confidentiality are recognized by each law. Further, mental health facilities should decide on a procedure for responding to subpoenas that meets their own needs. Some facilities may want to alert their counsel whenever an employee receives a subpoena. Others may decide to adopt a protocol for facility personnel to follow, consulting with legal counsel as questions arise. Readers are free to incorporate any of the information in this guide into their own procedure for responding to subpoenas.

GENERAL PRINCIPLES

1. Are there different types of subpoenas?

Yes. There are two basic types of subpoenas:

- A subpoena to produce documents, also called a "document subpoena" or a "subpoena *duces tecum*," which requires the person named in the subpoena to appear and produce documents
- A subpoena to testify, also called a "witness subpoena," which requires the person named in the subpoena to appear and give testimony

The subpoena that you as an employee of a mental health facility receive may not be specifically labeled as a document subpoena or a witness subpoena, but it will state whether you are being called to produce documents, testify, or both. This guide focuses on how to respond to subpoenas to produce documents. Responding to subpoenas to testify involves similar considerations, which are discussed briefly in the last section (see questions 31–32).

2. In what kinds of proceedings may a subpoena be used?

A subpoena may be used to summon a person to a wide range of proceedings:

- Trials and hearings in civil and criminal cases in either state or federal court
- Depositions in civil cases, which are proceedings before trial in which the parties to the case (the plaintiff and the defendant) have the opportunity to question witnesses and examine documents
- Arbitrations, which are like trials except that the "judge" who hears the evidence and decides the case often is a private attorney selected by the parties
- Hearings before an administrative law judge or an administrative agency

For all these proceedings, the general principles governing subpoenas are the same. However, there are some differences in the procedural details, such as how a subpoena is issued and how far a person may be compelled to travel.

This guide addresses trials and depositions in state court, the proceedings for which mental health facility employees are most likely to receive a subpoena. Rule 45 of the North Carolina Rules of Civil Procedure governs subpoenas for both civil and criminal trials.[1] Except for the payment of witness fees (see question 14), the rules on subpoenas are essentially the same for both types of trials. Rule 45 also applies to subpoenas for depositions. For purposes of this guide, the most important difference between a trial and a deposition is that at the latter no judge is present to rule on whether a subpoena is proper. This difference may affect how you respond to a subpoena, particularly when it calls for confidential records (see question 26).

3. Is a subpoena sufficient authorization for me to disclose confidential records?

Not necessarily. Most confidentiality laws—including those that apply to mental health, developmental disabilities, and substance abuse services—contain some provision permitting disclosure of confidential records in legal proceedings. These provisions are not uniform, however. Although some confidentiality laws permit disclosure in response to a subpoena, those applicable to mental health, developmental disabilities, and substance abuse services contain stricter conditions. Normally, disclosure of records relating to these services is not permitted unless a court specifically orders it, the person who is the subject of the records consents, or the confidentiality law explicitly makes an exception to confidentiality. Further, in some circumstances, prior notification of the person who is the subject of the records is required before the court may even consider ordering disclosure. Because confidentiality laws vary, on receiving a subpoena, you must consider the particular statute or regulation governing the information to determine the conditions under which disclosure is permissible (for discussion of those conditions, see questions 22–30).

4. What happens if I disclose confidential information without authorization?

Several adverse consequences may follow. Federal law restricts the disclosure of information concerning patients of federally assisted alcohol or drug abuse programs.[2] Violation of the federal confidentiality law is a crime, punishable by a fine of up to $500 for a first offense and up to $5,000 for each subsequent offense.[3] In addition, North Carolina law prohibits the disclosure of information relating to clients of area authorities and other mental health, developmental disabilities, and substance abuse facilities,[4] except as authorized by the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 (G.S. 122C). Unauthorized disclosure is a Class 3 misdemeanor punishable by a fine of up to $500.[5]

Failure to maintain the confidentiality of information also might result in disciplinary action. For example, employees of area authorities may face suspension, dismissal, or other disciplinary action if they disclose information in violation of either the state confidentiality law governing their facilities or the federal confidentiality law governing substance abuse services.[6] Further, the codes of ethics and standards of practice governing mental health professionals generally require them to protect client information and adhere to confidentiality laws.[7] Violations of these standards may jeopardize a mental health professional's license or certification.

Finally, the unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee disclosing the records.[8]

5. What are permissible responses to a subpoena?

Ordinarily you must respond to a subpoena in some fashion, even if you believe that a subpoena alone is not sufficient authorization to permit you to disclose the confidential records it seeks. You have three basic options:

- To "contest" the subpoena if it is objectionable
- To try to get the person who issued the subpoena to excuse you from its requirements
- To "comply" with the subpoena

As used in this guide, to "contest" a subpoena means formally to challenge it. You may do so by moving to quash (nullify) or modify it, which is a way of asking the court to invalidate or at least limit the subpoena; or by moving for a protective order, which asks for similar relief. In the case of a subpoena to attend a deposition, you may submit written objections to the party who issued the subpoena instead of filing a motion with the court (see question 20). To contest a subpoena, you ordinarily will need to consult with an attorney.

In some circumstances you may be able to make alternative arrangements with the party who issued the subpoena, as he or she has the authority to excuse you from the subpoena's requirements. For example, a party may be willing to excuse you from appearing at the proceeding if you provide the requested records in advance. You may agree to such an arrangement if the records are not confidential, but ordinarily you may not do so if they are confidential (see question 28).

Often the easiest course is to comply with the subpoena. It is important, however, to understand the limited meaning of "comply." A subpoena is a way of summoning you to a legal proceeding. To comply with a subpoena to testify, you must show up at the designated time and place. To comply with a subpoena for documents, you must produce the requested documents at the designated time and place. But complying with a subpoena does not necessarily mean disclosing confidential information. In many instances you may comply with the subpoena but leave the question of disclosure to the judge. For example, if you receive a subpoena to produce confidential records at trial, you may appear at the proceeding with the records—thus complying with the subpoena—and then ask the judge to determine whether the information should be released. Until the judge

addresses the issue of confidentiality and orders disclosure, you are not required to, nor should you, disclose the records to the subpoenaing party (see questions 26–27).

6. Are there any circumstances in which I do not have to respond to a subpoena?

Very few. As explained earlier, a subpoena is a form of court order. If you ignore it and a judge later finds that it was validly issued, you might be held in contempt.[9] Only in the rarest circumstance is it safe for you to disregard a subpoena (see question 13).

MECHANICS OF SUBPOENAS

7. Who may issue a subpoena?

Any judicial official may issue a subpoena for a trial or a deposition. Judges, magistrates, and clerks of court all are judicial officials. Also, an attorney for a party to the case may issue a subpoena. Often the subpoena you receive will be from an attorney. Further, a party to the case may issue a subpoena but only to require a person to testify, not to compel him or her to produce documents. For example, if John Smith is the plaintiff in a case, he may issue a subpoena to testify, even if he is not represented by an attorney. However, he would have to apply to a judicial official for a subpoena for documents.[10]

8. Does a judicial official have to review a subpoena before an attorney may issue it?

No. An attorney may issue a subpoena without obtaining permission from a judicial official. But a case must be pending (that is, already filed) before an attorney may do so.[11]

9. Is a subpoena issued by an attorney considered a court order even if a judicial official has not reviewed it?

Yes. A lawfully issued subpoena is a court order no matter who issues it. If you fail to respond, you might be held in contempt of court.

10. How are subpoenas served?

The law specifies both the persons who may serve a subpoena and the procedure they must follow. A sheriff, a sheriff's deputy, a coroner, or any other person eighteen years of age or older may serve a subpoena, as long as the person serving the subpoena is not a party to the case.

Ordinarily a person must serve a subpoena by delivering a copy of it by hand to the person named in the subpoena or by mailing a copy by registered or certified mail, return receipt requested, to the named person. If the subpoena requires the person only to appear and testify, not to produce documents, law enforcement personnel or a coroner may serve it by a telephone call to the person.[12]

If you are not properly served with a subpoena, you may not be obligated to respond.[13] Disregarding a subpoena is risky, however. If you are wrong about the sufficiency of service, you might be found in contempt. Even if you are right, defending against a motion to compel compliance or against a charge of contempt could be time-consuming and expensive. Thus, even if service is technically defective, the most prudent course is to respond—by complying with the subpoena, contesting it, or making other arrangements with the issuing party.

11. How long in advance of a proceeding must a subpoena be served?

As a general rule, there are no formal time limits on service of a subpoena. You might receive it weeks before the date and the time when you are supposed to appear, or right before your scheduled appearance. However, if you cannot appear or do not have enough time to assemble the documents requested in the subpoena, there are some steps you can take (see question 21).

12. May a subpoena require me to go anywhere within North Carolina?

If the subpoena directs you to appear in court, you may be required to go anywhere within the state. Thus, for cases in state court, a person residing in one part of North Carolina may be subpoenaed to appear at a trial or other court proceeding in a distant part of the state.

A subpoena to appear at a deposition is more limited. For cases in state court, a North Carolina resident may be required to attend a deposition only in the county where he or she lives, is employed, or conducts business in person.[14] If the subpoena directs you to attend a deposition outside these areas, you may object. If the issuing party is unwilling to change the site of the deposition, you should consult with an attorney about submitting written objections or moving to quash the subpoena.[15]

13. May a subpoena require me to go out of state?

The answer depends on the type of proceeding. A subpoena issued under the authority of a court of another state—for example, Georgia—and served on a person in North Carolina—say, a Raleigh resident—is ineffective to require the person to attend a proceeding in either the state of origin or in North Carolina. (The caption, or heading, of the subpoena should identify the court from which the subpoena is issued.) This is one of the few situations in which you may safely disregard a subpoena. Even so, you probably should consult with an attorney before deciding how to proceed.[16]

Federal courts have greater authority than state courts to compel witnesses to travel outside their home states. In criminal cases in federal court, a subpoena might direct a witness to attend a trial anywhere in the United States. In civil cases in federal court, the general rule is that a subpoena may require a person in one state to attend a proceeding in another state only if the proceeding is within one hundred miles of the place of service of the subpoena.[17]

14. Am I entitled to any fees in responding to a subpoena?

You are entitled to an appearance fee of five dollars for each day of your attendance, plus travel expenses (discussed further in question 15). The procedure for obtaining these fees differs in civil and criminal cases. In civil cases (including both trials and depositions), the party who subpoenaed you is responsible for paying the fees. Some parties will include a check for appearance and travel fees with the subpoena, but a party is not obligated to pay you in advance of the proceeding. If the party does not pay you once you have appeared at the proceeding, you have the right to sue. In light of the small amount involved, however, a lawsuit rarely would be worth the time or the expense. The clerk of court will certify your attendance and travel expenses if you need proof that you appeared at the proceeding.[18]

In criminal cases, appearance and travel fees are paid from state funds. You must apply for payment within the statutory time limits, though. If you wish to be paid, you should apply to the clerk of court immediately after your appearance.[19]

In limited instances (in civil and criminal cases), the court may require payment of an expert witness fee, which may be significantly higher than the nominal appearance fee due most witnesses.[20]

15. What travel expenses may I recover?

If you reside within the county where you are required to appear, you are not entitled to any travel expenses. If you reside outside the county and less than seventy-five miles from the place of appearance, you are entitled to mileage reimbursement for each day of travel, at the rate authorized for state employees. If you reside outside the county and more than seventy-five miles from the place of appearance, you are entitled to mileage reimbursement at the state rate for one round-trip; and if you are required to attend the proceeding for more than one day, you are entitled to your actual expenses for lodging and meals (up to the maximum authorized for state employees) instead of daily mileage.[21]

16. Am I entitled to reimbursement for time spent in compiling the records?

In most cases, no. Although it often is burdensome, responding to subpoenas is considered a civic obligation, and normally neither you nor your employer is entitled to reimbursement for time spent doing so. If a subpoena is unduly burdensome, however, you may move to quash it. Instead of granting the motion, the judge may require the subpoenaing party to advance the reasonable cost of producing the records.[22]

You usually are not entitled to copying costs either. In most instances you must produce the originals of the requested records, which you are entitled to get back (see question 18). In some circumstances, however, the party seeking the records may ask you to provide copies for his or her use, and you may ask the party to pay copying costs (assuming, of course, that you may release the records).[23]

GENERAL CONSIDERATIONS IN RESPONDING TO SUBPOENAS FOR DOCUMENTS

17. What should I do if I am served with a subpoena directing me to produce documents?

You first should determine what records the subpoena seeks, whether you have them, and whether they are confidential. Only after you make these determinations will you be able to decide on an appropriate response. This section of the guide reviews the general rules for responding to subpoenas for documents, leaving to the next section the more specialized rules on subpoenas for confidential information.

The wording of the subpoena itself will tell you what records it seeks. You then must determine whether you have "possession, custody, or control" of the records. "Possession" means actual, physical possession. "Custody" and "control" mean the right to obtain the records on request. To comply with a subpoena, you must produce all the requested records within your possession, custody, or control.

For example, assume that you are the custodian of records for a treatment facility and you are served with a subpoena for all documents concerning a particular client of the facility. If you intend to comply, you must produce the records pertaining to the client that are located in your own office (because they are within your actual possession) and the records that are maintained as part of the facility's client record system (because they are within your custody or control). You would not necessarily have to produce materials kept by individual employees, such as notes made by clinical staff members for their own use. Whether you have custody or control of those records would depend on the facility's policies regarding access to and use of materials kept by individual staff members.[24]

18. How do I comply with a subpoena for documents?

To comply with a subpoena for documents, ordinarily you must appear at the proceeding with the requested records and remain until the person who issued the subpoena, or the court, excuses you (if the subpoena is directed to the custodian of records of the facility and not a particular individual, any person serving in that capacity may appear). You must produce the originals of the documents (or if you do not have originals, copies of them) unless the court or the subpoenaing party excuses production of the originals.[25] If you do not have any of the requested documents, you still must appear at the proceeding unless you have been excused.

If you are subpoenaed to a proceeding in court, you should make copies of any documents before you appear because the court may retain the originals while the case is

pending. If you are subpoenaed to a deposition, the party who issued the subpoena is responsible for having copies made; he or she does not have a right to retain the originals.[26]

If you want to reduce the time that you might have to spend at a proceeding, you should telephone the subpoenaing party ahead of time. He or she may be able to give you a more specific time to appear, cutting down on your waiting time in court, or put you "on call," allowing you to remain at work or at home until needed. When possible, you should have the issuing party put in writing any change in the time of your appearance.

19. Is there any way that I can produce the records without appearing at the proceeding?

Yes. The person who issued the subpoena may be willing to excuse you from appearing if you provide him or her with the records in advance of the proceeding. Generally you may agree to such an arrangement if the documents are not confidential. If they are confidential, however, you should not disclose them to the subpoenaing party in advance of the proceeding without the consent of the person who is the subject of them.

In addition, Rule 45 of the North Carolina Rules of Civil Procedure contains a "mail-in" procedure that may be used in limited circumstances. Instead of appearing and producing the original documents, you may send certified copies, along with an affidavit of authenticity, to the judge presiding over the case (or the judge's designee, such as the clerk of court). If you are eligible to use the mail-in procedure but do not have any of the requested documents, you may send an affidavit so stating.

The mail-in procedure is available only if (1) the subpoena is directed to a custodian of "hospital medical records" (or of "public records") and (2) the subpoena does not require the custodian to appear in person and testify. The term "hospital medical records" is defined broadly to include any records made in connection with the diagnosis, care, or treatment of any patient.[27] But the second condition allows the issuing party to eliminate the mail-in option simply by indicating in the subpoena that the custodian must appear and testify as well as produce documents.

Even when a treatment facility is eligible to use the mail-in procedure, it ordinarily should not do so with confidential records unless the subject of the records consents (see question 28).

20. On what grounds may I contest a subpoena for documents?

Probably the most common complaint about subpoenas (other than that they call for confidential information, discussed later) is that they are too broad and impose too heavy a burden on the recipient (in legal terms they are "unreasonable and oppressive").[28] For example, when the proceeding concerns a narrow part of a patient's life, a subpoena for all the patient's records, without limitation as to time, date, or contents, might be considered unreasonable.[29]

If you believe that a subpoena is too broad or burdensome, you or your attorney should contact the party who issued the subpoena to determine whether he or she is willing to narrow it. If you decide to contest the subpoena, you almost certainly will need the assistance of an attorney. Briefly the procedures for contesting subpoenas are as follows:

- *To contest a subpoena directing you to produce documents in court,* you must file a motion to quash or modify the subpoena, or a motion for a protective order. You must do so promptly after receiving the subpoena but in no event later than the time you are scheduled to appear.
- *To contest a subpoena directing you to produce documents at a deposition,* you must file a motion to quash or modify within ten days of receiving the subpoena, or if you receive the subpoena less than ten days before the deposition, on or before the date of the deposition. Alternatively you may contest the subpoena by submitting written objections to the party who issued it. You must serve the objections on the issuing party within the same time frame allowed for motions to quash or modify a subpoena to produce documents for a deposition. It is then up to the issuing party to file a motion with the court to compel compliance. You still may have to appear at the deposition if the subpoena requires that you both testify and produce documents; but until a court order is obtained, the issuing party is not entitled to look at the documents.

21. What if a subpoena arrives so late that it is impossible for me to compile the documents in time or to attend the proceeding?

If you cannot compile the documents in time, you or your attorney should call the party who issued the subpoena and try to work out an alternative. If you cannot reach a satisfactory agreement, your best course is to go to the proceeding and explain why you could not assemble the documents. Alternatively you may move to quash the subpoena if it is served so late and is so burdensome that requiring compliance would be unreasonable.[30]

The trickier situation is when you cannot attend the proceeding at all and do not have time to make any formal response. Rule 45 of the North Carolina Rules of Civil Procedure states that the failure to obey a subpoena may be treated as contempt of court only if the failure is "without adequate cause." Courts have recognized that inability to comply with a subpoena is a defense to a charge of contempt.[31] Thus if you truly cannot be present, you should be protected from a contempt charge. You should try to notify the subpoenaing party that you cannot attend and if

the subpoena is for a proceeding in court, notify the clerk of court as well.

CONSIDERATIONS IN RESPONDING TO SUBPOENAS FOR CONFIDENTIAL RECORDS

22. How do I respond to a subpoena for confidential records?

As with any subpoena to produce documents, you first must determine what records the subpoena seeks (see question 17). If the subpoena calls for confidential records, you then must examine the statutes and the regulations that apply to the records being sought. How you respond to the subpoena depends on both the rules governing subpoenas, discussed in the preceding section, and the confidentiality rules governing the particular records. Facilities and professionals covered by the federal law governing substance abuse records or the state law governing mental health, developmental disabilities, and substance abuse services must keep two basic principles in mind:

- You should not release confidential information on the authority of a subpoena alone.
- You should not ignore the subpoena.

The first principle arises from the confidentiality laws, the second from the rules governing subpoenas. Although some confidentiality laws permit disclosure of records in response to a lawfully issued subpoena,[32] the state and federal laws governing facilities that provide mental health, developmental disabilities, and substance abuse services do not permit disclosure of client information in response to a subpoena alone.[33] On the other hand, the rules governing subpoenas require you to respond to the subpoena in some fashion, even if you believe that a subpoena alone is not sufficient authorization to release the requested information.

23. Do I have to notify the patient whose records are being sought about the subpoena?

Neither the federal confidentiality law governing the records of substance abuse patients nor the state law governing mental health, developmental disabilities, and substance abuse services requires treatment facilities to notify the person who is the subject of the records being subpoenaed. In many instances, however, the party seeking the records will have to apply for a court order before obtaining the records, and when the records are protected by the federal confidentiality law, the party ordinarily must notify the patient before a court may order disclosure.[34]

Although a treatment facility is not legally required to notify the patient, there are at least two good reasons for the facility to do so. First, the patient may want to take legal action to prevent disclosure. By notifying the patient, the facility will help ensure that the patient has an adequate opportunity to assert his or her rights.[35]

Second, the patient may have an interest in waiving confidentiality. Most confidentiality laws, including the federal and state ones under discussion in this section, permit disclosure of confidential information if the patient consents in writing to release of the information. Generally, if you obtain proper written authorization, you may lawfully disclose the information without further judicial action.[36] For this reason you also should check the patient's medical file for a current consent form authorizing the disclosure sought by the subpoena. Of course, any written authorization to disclose confidential information must comply with the requirements for consent set forth in the applicable confidentiality law. Further, the kinds of information you disclose, the person to whom you make the disclosure, and the purpose for which the information is to be used must be expressly permitted by the terms of the written authorization.

24. Do I still have to appear if the patient consents to disclosure of the information sought in the subpoena?

Yes. The patient's consent allows you to disclose confidential information in advance of the legal proceeding. However, the party who issued the subpoena still may want you to attend the proceeding to testify or authenticate records. Unless the party who issued the subpoena excuses you, you must appear.

25. What should I do if the patient has not consented to disclosure?

Initially you may want to contact the party who issued the subpoena and inform him or her that you are prohibited by law from disclosing confidential information in response to a subpoena—that in the absence of the patient's consent, you may disclose confidential information about him or her only in response to a court order. If the information is covered by federal substance abuse requirements, you also may want to advise the person that notice ordinarily must be given to the patient before a court may even consider ordering disclosure. Time permitting, you may want to write a letter to the issuing party, explaining the restrictions on disclosure. Your facility can develop and keep on file a form letter for this purpose. You must be careful that this communication does not confirm or reveal that the patient identified in the subpoena is receiving or has received mental health, developmental disabilities, or substance abuse services.

If you direct the party who issued the subpoena to the applicable confidentiality law, on reading it, he or she may be willing to withdraw the subpoena and apply for a court order. If the subpoena requires you to appear at a trial or other court proceeding, however, the party may be unwilling to do so. The practice in many places is to use a subpoena to bring records into court, where the judge then can examine them and determine whether to order disclosure.

26. What are permissible responses to a subpoena for confidential information if the subpoena is not withdrawn?

You have two basic options. First, you may contest the subpoena (see question 20).

Alternatively you may "comply" with the subpoena by appearing at the designated time and place with the requested records. However, you must await a court order before releasing the information. Thus, if you receive a subpoena to appear in court and you intend to comply, you should go to the proceeding with the requested documents, advise the judge that the information sought is confidential and that the law prohibits you from disclosing it without a court order, and ask the judge to rule on whether the records should be disclosed. Only if the judge orders you to disclose the information (or the subject of the records consents to disclosure) may you lawfully do so.

The second option—that of appearing at the proceeding and enlisting the judge's assistance in determining whether the records should be disclosed—is not feasible when you have been subpoenaed to a deposition, for a judge is almost never present at a deposition. If a subpoena requires that you produce confidential mental health or substance abuse records at a deposition, and if the issuing party is unwilling to withdraw the subpoena or seek a court order in accordance with the applicable confidentiality laws, you should contact an attorney about contesting the subpoena. You may have to move to quash the subpoena or submit written objections in advance of the deposition.

27. Is it really my job to tell the court that the information is confidential?

Yes. Facilities providing mental health, developmental disabilities, and substance abuse services have a duty to safeguard confidential information and, except as authorized by law, to prevent its disclosure.[37] Further, mental health professionals have an ethical and legal duty to protect a patient's secrets and not divulge patient information in legal proceedings unless the patient waives confidentiality or a court determines that the public interest in disclosure outweighs the patient's privacy interest.[38] Assuming that the patient does not consent to disclosure, and unless the patient or one of the parties to the proceeding raises the issue of confidentiality, you have a duty to apprise the judge that the subpoena seeks confidential information and to request that the court rule on whether the information should be disclosed. You also may have to identify the relevant confidentiality law and explain the requirements for court-ordered disclosure. When the federal law governing substance abuse records applies, you should take a copy of the federal regulations with you, for all judges are not familiar with the special procedures and criteria for ordering disclosure under these regulations.

Judicial oversight of disclosure is not a mere technicality; it is an integral part of the protections for confidential information. Once a judge learns that the information sought in the subpoena is confidential, he or she may decide to review the documents *in camera*—that is, in private in his or her chambers.[39] If the records are not relevant to the proceeding, the judge may refuse to allow disclosure or may narrow the information that must be disclosed.[40] If the judge orders disclosure of all or part of the subpoenaed records, he or she may require as part of the disclosure order that those who receive the records not reveal their contents except to persons connected with the litigation.[41]

Once you appear at the court hearing and ask the court to rule on disclosure, you have satisfied your obligations under both the confidentiality and the subpoena laws. If the court issues an order requiring disclosure—either in writing or orally—you may safely turn over the records. You are not required to appeal the court's ruling, even if it appears to be wrong.[42]

28. Is there any way that I may comply with a subpoena for confidential documents without appearing at the proceeding?

Ordinarily, no. Unless the patient consents to disclosure, you should not release confidential records in advance of the proceeding to the party who issued the subpoena. Nor should you use the mail-in procedure to send the records to the court instead of appearing in person (see question 19) because that procedure may result in the unauthorized disclosure of confidential information. Under Rule 45 of the North Carolina Rules of Civil Procedure, which authorizes the mail-in procedure, the parties to the proceeding and their attorneys may have access to the records before the court orders disclosure.[43] Use of this procedure therefore could lead to disclosures not authorized by the applicable confidentiality law. On the other hand, when the patient whose records are sought by the subpoena consents to disclosure, Rule 45 provides a convenient mechanism for a custodian of records to comply with a subpoena.

29. Do I have to await an order of the judge before disclosing confidential records, even when the subpoena is from a public entity, such as a local department of social services?

Yes. Whether a subpoena is from a public entity or a private person, mental health facilities ordinarily must await the order of a judge before disclosing confidential information.

Most confidentiality laws recognize circumstances in which disclosure of confidential information is permissible or even required when necessary to serve some overriding public interest. For example, to the extent required by North Carolina's child abuse reporting law, a mental health facility must report otherwise confidential information to a local department of social services.[44] Unless a legally recognized exception to confidentiality exists, however, confidential information may not be disclosed even if the party seeking the information is a public entity.

30. Should I keep a record of any disclosure I make of confidential information?

Facilities operated by or under contract with area authorities or the North Carolina Division of Mental Health, Developmental Disabilities, and Substance Abuse Services must document disclosures in the client's record.[45] Although mental health professionals not employed by these facilities may not be required to document disclosures, they nevertheless should do so in case the propriety of the disclosure is later questioned.

CONSIDERATIONS IN RESPONDING TO SUBPOENAS TO TESTIFY

31. How should I respond to a subpoena to testify?

The rules for responding to a subpoena to testify are essentially the same as those for responding to a subpoena to produce documents. To comply, the person named in the subpoena must appear at the proceeding and remain until the court or the party who issued the subpoena excuses him or her. As with a subpoena to produce documents, before the proceeding you may contact the party who issued the subpoena and ask to be placed "on call" so that you can reduce the amount of time you will spend in court waiting to be called as a witness. You also may want to advise the issuing party of the applicable confidentiality laws and the limitations on disclosure.

Once you are at the proceeding, it is important to remember that a subpoena—whether it is for testimony or for documents—does not authorize you to disclose confidential information. You may do so only if the court orders, or the patient consents to, disclosure (see questions 22–27). If you are subpoenaed to testify in court, a judge will be present to rule on whether you must answer questions about confidential information. If you are subpoenaed to attend a deposition, no judge will be present. Consequently, if you are questioned at a deposition about information subject to the confidentiality laws discussed in this guide, and the patient has not consented to disclosure of the information, you must decline to answer. The party seeking the information then bears the responsibility of seeking a court order requiring disclosure.

You also have the option before the proceeding of contesting a subpoena to testify, according to the same procedures for contesting a subpoena to produce documents (see question 20).[46] The principal ground for contesting a subpoena to testify is that you cannot be present at the proceeding. Before contesting the subpoena, however, you should contact the party who issued it and seek to work out an alternative time for your appearance.

Before the proceeding takes place, you may be able to contest a subpoena to testify if you believe that you will be asked about confidential information. Ordinarily, however, you are not required to contest a subpoena to testify before your appearance. You may wait until you are called as a witness and when asked about confidential information, decline to answer until the court requires you to do so or the patient consents to disclosure. If you expect to be questioned about confidential information, you may want to consult an attorney about your options.

32. How should I prepare for my testimony?

Mental health professionals may be called on to testify in a variety of civil, criminal, juvenile, or family law cases, and on many issues, ranging from whether involuntary commitment is necessary to whether a patient suffered psychological harm as a result of personal injury. A clinician may be called as a fact witness, to testify to what he or she observed, or as an expert witness, to offer an opinion that is not within the knowledge of the average person. Because mental health professionals become involved as witnesses in numerous ways, specific advice on dealing with attorneys and preparing for testimony is beyond the scope of this guide. You should consult other materials for this purpose.[47]

NOTES

1. *See* G.S. 8-59, -61; 15A-801, -802.

2. *See* 42 U.S.C. § 290dd-2; 42 C.F.R. pt. 2 (regulations implementing the federal statute). The regulations apply to federally assisted organizations and individual practitioners that specialize in providing, in whole or in part, individualized alcohol or drug abuse diagnosis, treatment, or referral for treatment. The regulations govern any information revealing that a person is receiving, has received, or has applied for such services. *See* 42 C.F.R. § 2.11.

3. *See* 42 C.F.R. § 2.4. Violations may be reported to the local U.S. Attorney. Violations by methadone programs may be reported to the regional offices of the Food and Drug Administration. *See* 42 C.F.R. § 2.5. In addition to the restrictions on disclosure, federal law restricts the *use* of information obtained by a substance abuse program. *See* 42 C.F.R. § 2.12(a)(2). Evidence used or obtained in violation of the regulations may be excluded in both civil and criminal cases in some circumstances. *See* United States v. Eide, 875 F.2d 1429 (9th Cir. 1989) (excluding records in criminal prosecution that were seized in violation of federal confidentiality laws); Jeanette "A" v. Condon, 728 F. Supp. 204 (S.D.N.Y. 1989) (prohibiting employer from terminating employee on basis of improperly disclosed urinalysis result).

4. *See* G.S. 122C-52. Any information, whether recorded or not, relating to a person served by a facility and received in connection with the performance of any function of the facility is confidential. *See* G.S. 122C-3(9). The law applies to any individual, partnership, corporation, association, company, or agency whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of persons who are mentally ill, developmentally disabled, or substance abusers. Those covered by the law include facilities operated by the North Carolina Department of Health and Human Services, Veterans Administration facilities, facilities

(including private facilities) licensed under G.S. 122C, facilities operated by or under contract with area authorities, residential facilities, special units of general hospitals, and twenty-four-hour facilities. *See* G.S. 122C-3(14).

5. *See* G.S. 122C-52(e). State law also contains several privileges that may shield information maintained by mental health facilities. *See* G.S. 8-53 (doctor-patient privilege), -53.3 (psychologist-client privilege), -53.7 (social worker privilege), -53.8 (counselor privilege).

6. *See* 10 N.C. ADMIN. CODE 18D.0120, .0118.

7. *See, e.g.,* 21 N.C. ADMIN. CODE 63.0507 (ethical guidelines for the practice of social work); American Association for Marriage and Family Therapy, *AAMFT Code of Ethics* (Washington, D.C.: AAMFT, 1991), Ethics Rule 2.1; American Counseling Association, *Code of Ethics & Standards of Practice* (Alexandria, Va.: ACA, 1997), sec. B; *Code of Ethics of the Clinical Social Work Federation* (Arlington, Va.: CSWF, 1997), Ethical Principle III; *Code of Ethics of the National Association of Social Workers* (Washington, D.C.: NASW, effective Jan. 1997), Ethical Standard 1.07.

8. The unauthorized disclosure of a patient's confidences by a physician, a psychiatrist, a psychologist, a marital and family therapist, or another health care provider constitutes medical malpractice. *See* Watts v. Cumberland County Hosp. System, 75 N.C. App. 1, 9–11, 330 S.E.2d 242, 248–50 (1985) (holding that malpractice consists of any professional misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev'd in part on other grounds,* 317 N.C. 321, 345 S.E.2d 201 (1986).

In some circumstances an attorney who reviews confidential records without authorization may be subject to liability. *See* Bass v. Sides, 120 N.C. App. 485, 462 S.E.2d 838 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had mailed to clerk; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using records at trial); Susan S. v. Israels, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility had mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy); *see also* North Carolina State Bar Ethics Comm., Ethics Op. 252 (July 1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party).

9. *See* N.C. R. Civ. P. 45(f); *see also* G.S. 8-63 (providing for monetary penalties for violation of subpoena).

10. *See* N.C. R. Civ. P. 45(a), (b).

11. *See* North Carolina State Bar Ethics Comm., Ethics Op. 236 (Jan. 1997) (it is improper for attorney to issue subpoena if no case is pending or, if case is pending, for time and place when no proceeding is scheduled). Under Rule 45(a)(1) of the Federal Rules of Civil Procedure, which regulates pretrial discovery in civil cases in federal court, an attorney may subpoena documents before trial even if no deposition or other proceeding is scheduled. As in state court proceedings, however, before an attorney may use this procedure, a case must be pending.

In limited circumstances a party may obtain a subpoena or its equivalent before a case is filed. Thus some agencies are authorized to issue subpoenas for information necessary to their investigations. *See, e.g.,* G.S. 15A-298 (authorizing State Bureau of Investigation to issue administrative subpoenas to compel carriers to produce telephone records if they are material to active criminal investigation). In the absence of a statute authorizing issuance of a subpoena before a case is filed, a party must ask a judge to issue an order for the production of records. *See, e.g., In re* Superior Court Order, 315 N.C. 378, 338 S.E.2d 307 (1986) (holding that court has inherent authority in some circumstances to issue order compelling production of records).

12. *See* N.C. R. Civ. P. 45(e); G.S. 8-59 (providing that witness served by telephone who fails to appear may not be held in contempt until he or she has been served personally).

13. *See, e.g.,* Smith v. Midland Brake, 162 F.R.D. 683 (D. Kan. 1995) (refusing to enforce subpoena when service was defective). *But cf.* King v. Crown Plastering Corp., 170 F.R.D. 355 (E.D.N.Y. 1997) (compelling witness to comply with subpoena although it was not served by hand and holding that service is sufficient when it reasonably ensures actual receipt of subpoena by witness).

14. Ordinarily a person who is not a resident of North Carolina may be required to attend a deposition only in the North Carolina county where he or she is staying or within fifty miles of the place of service of the subpoena. *See* N.C. R. Civ. P. 30(b).

15. For cases in federal court, the rules differ on how far a person may be required to travel within North Carolina. *See* Fed. R. Civ. P. 45(b)(2).

16. *See* Minder v. Georgia, 183 U.S. 559, 22 S. Ct. 224, 46 L. Ed. 328 (1902) (establishing that subpoena is ineffective beyond state lines); *see also* Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996) (holding that it is not contempt to disobey order entered by court without jurisdiction). Other devices may be used to direct a witness to attend an out-of-state proceeding or at least to obtain a witness's testimony. A party may use the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings (G.S. 15A-811 through -816) to compel a witness to attend a criminal proceeding in the court of another state. The party must apply for an order from both the state court in which the criminal proceeding is pending and the state court of the witness's home state. *See also* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceeding of Subpoena* Duces Tecum, 7 A.L.R.4th 836 (1981) (under uniform act, out-of-state witness may be required to produce documents as well as to give testimony). There is no procedure for compelling a person who is not a party to the case to attend a civil proceeding in the court of another state. However, a party may be able to require a person to submit to a deposition in North Carolina for use in a proceeding in another state. *See* N.C. R. Civ. P. 28(d).

17. *See* Fed. R. Crim. P. 17(e) (stating rule in criminal cases); Fed. R. Civ. P. 45(b)(2) (stating general rule for subpoenas in civil cases and noting possible exceptions). In cases in federal court, a party also may compel a nonparty to submit to a deposition in North Carolina for use in a proceeding in another state. *See* Fed. R. Civ. P. 45(a)(2).

18. *See* G.S. 6-51, -53; 7A-314 (witness fees in civil cases). A person subpoenaed in a civil case has an additional remedy if he or she has to appear for more than one day. Under G.S. 6-51, if the subpoenaing party does not pay the appearance and travel fees due after the first day, the party may not compel the witness to remain. This provision does not apply if the subpoenaing party is the state of North Carolina or a municipality.

19. *See* G.S. 6-51, -53; 7A-314 through -316 (witness fees in criminal cases). A form application for witness fees is available from the clerk of court. *See* Administrative Office of the Courts, *North Carolina Judicial Department Forms Manual* (Raleigh, N.C.: AOC), AOC-CR-235 (Jan. 1995).

20. *See* G.S. 7A-314(d); N.C. R. Civ. P. 26(b)(4)(B).

21. *See* G.S. 7A-314(b).

22. *See* N.C. R. Civ. P. 45(c)(2).

23. There are limits on the copying fees that mental health facilities may charge. State facilities must charge uniform fees ($5.00 for up to three pages, $.15 for each additional page) for the reproduction of client records, which may not exceed the cost of reproduction, postage, and handling. *See* 10 N.C. ADMIN. CODE 18D.0121. State facilities may not, however, charge the Attorney General's Office, special counsel at state facilities, or indigent clients who request records to establish their eligibility for Supplemental Security Income, Social Security Disability Benefits, Medicaid, or other legitimate aid. With respect to facilities operated by or under contract with area authorities, the regulation is silent, except for stating that these facilities must develop written policies and procedures regarding fees for reproduction of client records.

24. The federal confidentiality law governing substance abuse services and the state law applicable to mental health, developmental disabilities, and substance abuse services require facilities to develop written policies and procedures controlling access to and use of records covered by those laws. *See* 42 C.F.R. § 2.16 (federal law), 10 N.C. ADMIN. CODE 18D.0123 (state law). Staff members' notes or files containing information that identifies clients either directly or by reference to publicly known or available information fall within the scope of these laws and therefore should be addressed in facility policies regarding the security of confidential information.

25. State law allows removal of original client records from an area or state facility in response to a subpoena to produce documents, or a court order, or when necessary for civil commitment proceedings. *See* 10 N.C. ADMIN. CODE 18D.0121.

26. Assuming that disclosure of the documents subpoenaed for a deposition is permissible, various arrangements can be made for copying them. There is no set rule. For example, the subpoenaing party may decide to photocopy particular documents during the deposition; or you and the subpoenaing party may agree that you will photocopy all the documents (before or after the deposition) and that the subpoenaing party will pay your costs.

27. *See* N.C. R. Civ. P. 45(c); G.S. 8-44.1. The term "public record" is not defined in Rule 45. Although the rule may apply to public records without limitation, other rules contain a more limited definition of "public record." *See generally* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* 174 & n.32 (5th ed. 1998) (N.C. Evid. R. 902, which allows introduction of certain records without authentication, applies to limited kinds of public records).

28. *See* N.C. R. Civ. P. 45(c)(1) (stating grounds for quashing or modifying subpoena).

29. *See generally* State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990) (quashing subpoena), *vacated sub nom.* Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) (ruling that trial court erred in quashing subpoena without first reviewing requested records to determine their relevance).

30. *See* Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984) (quashing subpoena).

31. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 70 S. Ct. 724, 94 L. Ed. 884 (1950); Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970).

32. For example, the federal law governing education records permits disclosure of student records in response to a lawfully issued subpoena if certain requirements are met. *See* John Rubin, "Subpoenas and School Records: A School Employee's Guide," *School Law Bulletin* 30 (Spring 1999): 1; 20 U.S.C. § 1232g; 34 C.F.R. pt. 99 (implementing regulations).

33. *See* 42 C.F.R. § 2.61(b) ("The person [who receives a subpoena for substance abuse records] may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under these regulations"); G.S. 122C-52 ("except as authorized by G.S. 122C-53 through -56, no individual having access to confidential information may disclose this information"). G.S. Chapter 122C requires disclosure when a court of competent jurisdiction issues "an order compelling disclosure" but does not authorize disclosure of confidential information in response to a subpoena. *See* G.S. 122C-54(a). Although these federal and state laws do not permit disclosure in response to a subpoena alone, they authorize disclosure in a number of situations whether or not the disclosure is authorized by the patient's consent or a court order. For example, results of examinations of clients facing district court hearings for involuntary commitment must be furnished to the client's counsel, the attorney representing the state's interest, and the court. *See* G.S. 122C-54(c). Therefore, on receiving a subpoena for confidential information, you should consult the applicable confidentiality law to determine whether some circumstance other than the subpoena authorizes disclosure.

34. *See* 42 C.F.R. § 2.64. In limited circumstances involving a criminal investigation or prosecution, notice to the patient may not be required. Notice to the holder of the records is still required, however. *See* 42 C.F.R. § 2.65.

In contrast to 42 C.F.R. pt. 2, the federal law governing student records requires that the school in possession of the records being sought make a reasonable effort to notify the affected person before disclosing the records. *See* Rubin, "Subpoenas and School Records," 8–10; 20 U.S.C. § 1232g(b)(2)(B). Commentators differ on the best method of ensuring that notice is given to the subject of confidential records. *See ABA Standards for Criminal Justice: Discovery and Trial by Jury* § 11-3.1 commentary at 62 n.13 (3d ed. 1996) (taking position that it is not practicable for party seeking records to notify interested third parties because it may not be evident who interested parties are).

35. The parties to the proceedings and even the organizations that maintain the records may not have as strong an interest in protecting the information as the subject of the records does. The parties to the case may not even have standing to object to production of the records if they do not have any proprietary or confidentiality interest in the records. *See* United States v. Tomison, 969 F. Supp. 587 (E.D. Cal. 1997); 2 G. Gray Wilson, *North Carolina Civil Procedure* 102 (2d ed. 1995); *see also* New York v. Weiss, 671 N.Y.S.2d 604 (Sup. Ct. 1998) (holding that prosecutor did not have standing to object to subpoena for third party's records but court had inherent authority to limit release of records that had no bearing on trial).

36. In limited circumstances, confidential information should not be disclosed in response to a subpoena even with the patient's consent. Under 42 C.F.R. pt. 2, records of substance abuse patients may not be used to initiate or substantiate criminal charges against them without a court order compelling disclosure. *See* 42 U.S.C. § 290dd-2(c); 42 C.F.R. §§ 2.12(a)(1), 2.12(d), 2.65. Even if the patient signs a consent form authorizing disclosure, no information released by the facility may be used in a criminal investigation or prosecution of a patient unless a court order has been issued under the special circumstances set forth in the federal regulations.

37. *See* G.S. 122C-52; 10 N.C. ADMIN. CODE 18D.0118(a).

38. *See* Sultan v. State Board of Examiners of Practicing Psychologists, 121 N.C. App. 739, 745–46, 468 S.E.2d 443, 446–47 (1996); McGinnis v. McGinnis, 66 N.C. App. 676, 311 S.E.2d 669 (1984).

39. Any review of information that is protected by the federal confidentiality law governing substance abuse patients must be held in the judge's chambers or in some manner that ensures that patient-identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the records, unless the patient requests an open hearing. *See* 42 C.F.R. § 2.64(c); *see generally* Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (holding that defendant in criminal case may obtain *in camera* review of confidential records in possession of third party); Zaal v. State, 602 A.2d 1247 (Md. 1992) (holding that court may conduct review of records in presence of counsel or permit review by counsel alone, as officer of court, subject to restrictions protecting confidentiality).

40. *See* State v. Adams, 103 N.C. App. 158, 161, 404 S.E.2d 708, 710 (1991) (upholding trial court's order prohibiting party from examining medical records of Forsyth-Stokes Mental Health Center or cross-examining custodian of those records). *See also* 42 C.F.R. § 2.64, which sets forth specific criteria for determining whether good cause exists to disclose the records of a substance abuse patient.

41. A court order authorizing disclosure of the records of a substance abuse patient must limit disclosure to the parts of the patient's record that are essential to fulfill the order and to the recipients whose need for information is the basis of the order. *See* 42 C.F.R. § 2.64(e).

42. The right to appeal an order requiring compliance with a subpoena is beyond the scope of this guide. *See generally* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure Civ.* § 2466 (2d ed. 1995). If you want to contest a court's ruling requiring disclosure, you should consult an attorney.

43. *See* N.C. R. Civ. P. 45(c) ("The copies of the medical records so tendered shall not be open to inspection or copy by any persons, except to the parties to the case or proceeding and their attorneys in depositions. . . ."). *But cf.* Bass v. Sides, 120 N.C. App. 485, 462 S.E.2d 838 (1995) (sanctioning attorney who, without judge's permission, reviewed confidential medical records that records custodian had mailed to clerk of court).

44. *See* G.S. 122C-54(h); G.S. 7A-543; 42 C.F.R. § 2.12(c)(6). For a further discussion of the child abuse reporting law, *see* Janet Mason, *Reporting Child Abuse and Neglect in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1996).

45. *See* 10 N.C. ADMIN. CODE 18D.0324, .0213.

46. Rule 45 of the North Carolina Rules of Civil Procedure describes only the procedure for contesting subpoenas to produce documents; it does not describe the procedure for contesting subpoenas to testify. Presumably, however, a subpoena either to produce documents or to testify may be contested according to the procedures set forth for subpoenas to produce documents. *See* Wilson, *North Carolina Civil Procedure*, at 97.

47. *See, e.g.,* Barbara A. Weiner and Robert M. Wettstein, *Legal Issues in Mental Health Care* (New York: Plenum Press, 1993), chap. 11; S. L. Brodsky, *Testifying in Court: Guidelines and Maxims for the Expert Witness* (Washington, D.C.: American Psychological Association, 1991).