Confidentiality of MH/DD/SA Service Records: Subpoenas and Court Orders

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Note: This document was originally prepared for providers of mental health, developmental disabilities, and substance abuse services. Therefore, the term "you" in this document, and any other references to the reader, refer to the treatment professional or service provider who may use this handout as a guide for responding to subpoenas and court orders for client information.

Section One: Responding to Subpoenas

I. Introduction. 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. When responding to a subpoena, providers of mental health, developmental disabilities, and substance abuse (MH/DD/SA) services must balance their duty to protect confidential information with their duty to respond to a court order.

A. Scope of outline. The assumption throughout this outline is that the MH/DD/SA 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, when the facility is a party to the case 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 outline 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.[1]

B. Confidentiality obligations. Generally, the disclosure of records relating to MH/DD/SA services is not permitted unless a court specifically orders disclosure, the person who is the subject of the records consents to the disclosure, or the applicable confidentiality law makes a specific exception to confidentiality under the particular circumstances. A court is not entitled to a patient's treatment information merely because the court ordered the patient into treatment.

1. State confidentiality law.

a. Subpoena. GS 122C does not permit the disclosure of confidential information in response to a subpoena alone. A subpoena compels disclosure of confidential information only if it is accompanied by the client's authorization to disclose or a

[1] MH/DD/SA 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.

court order to disclose (or some other legal mandate, such as a statute or regulation that requires disclosure under the circumstances).

b. Court order. A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure. GS 122C-54(a).

2. HIPAA privacy rule

a. Subpoena. The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 CFR 164.512(e). However, because HIPAA does not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone.

b. Court order. A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 CFR 164.512(e).

3. Federal substance abuse confidentiality law.

a. Subpoena. A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing order under Subpart E of 42 CFR Part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances).

b. Court order. Under Subpart E, a federal, state, or local court may authorize a substance abuse program to make a disclosure that would otherwise be prohibited under the regulations. See Section Two of this outline.

C. Subpoena obligation. A subpoena is a form of court order. If you ignore it, and a judge later finds that it was validly issued, you could be held in contempt.[2] Only in the rarest circumstances would it be safe for you to disregard a subpoena.

1. Out of state proceedings in state court: A subpoena issued under the authority of a court of another state and served on a person in North Carolina is ineffective. For example, a subpoena issued under the authority of a Georgia state court would be ineffective to require a Raleigh resident to attend a proceeding in this state or in Georgia. (The caption 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 here, however, you probably should consult with an attorney before deciding how to proceed.

2. Out of state proceedings in federal court: Federal courts have greater authority to compel witnesses to travel outside their home states. In a criminal case in federal court, a subpoena potentially could direct a witness to attend a trial anywhere in the

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

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 if the proceeding is within one hundred miles of the place of service of the subpoena.

II. General Principles.

A. Types of subpoenas. There are two basic types of subpoenas:

1. a subpoena to testify (also called a witness subpoena), which requires the person named in the subpoena to appear and give testimony; and
2. a subpoena to produce documents (also called a document subpoena or subpoena *duces tecum*), which requires the named in the subpoena to appear and produce documents.

Note: The subpoena you receive may not be specifically labeled as a witness subpoena or document subpoena, but it will state whether you are being called to testify, to produce documents, or do both. This outline focuses on how to respond to *subpoenas to produce documents*. Responding to *subpoenas to testify* involves similar considerations, which are discussed in a Health Law Bulletin by Aimee Wall, cited more fully in Section III, below.

B. Kinds of proceedings where a subpoena can be used. A subpoena can be used to summon you to a wide range of proceedings, including

1. civil and criminal trials and hearings (including juvenile court proceedings) in either state or federal court;
2. depositions in civil cases, which are proceedings before trial in which the parties to the case (the plaintiff and defendant) have the opportunity to question witnesses and examine documents;
3. arbitrations, which are like trials except that the "judge" who hears the evidence and decides the case is often a private attorney selected by the parties; and
4. hearings before an administrative law judge, administrative agency, or professional licensing board.

Note: For all of 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 or how far a person may be compelled to travel (Section III below). This outline addresses trials, hearings, and depositions in state court (nos. 1 and 2, above), the proceedings for which treatment professionals are most likely to receive a subpoena.

C. General rule: a case must be pending. For a party to obtain a subpoena, a case must have been initiated and must be pending in the particular forum (civil court, criminal court, administrative agency, etc.). It is generally improper for a party to issue a subpoena when no case is pending.[3]

[3] See North Carolina Rules of Professional Conduct, Ethics Op. 236 (North Carolina State Bar Ethics Comm., Jan. 1997) (State Bar finds that it would be improper for attorney to issue subpoena if no case is pending. The opinion also states that it would be improper for attorney to issue subpoena for time and place when no proceeding is scheduled, but revised Rule 45 now authorizes such a subpoena in the circumstances described in this outline); In re Superior Court Order, 70 N.C. App. 63, 318 S.E.2d 843 (1984) (Rule 45 does not authorize issuance of subpoena before action has commenced), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

1. Exception: In limited circumstances, a party may obtain a subpoena or its equivalent before a case is filed. Thus, some North Carolina agencies are authorized to issue subpoenas for information necessary to the agency's investigation. See, e.g., G.S. 15A-298 (authorizing State Bureau of Investigation to issue administrative subpoenas to compel carriers to produce telephone records that are material to active criminal investigation). In the absence of a statute authorizing the issuance of a subpoena before a case is filed, a party must ask a judge to issue an order for production of records rather than seek the production of records through a subpoena alone.

D. A proceeding need not be scheduled. Before the 2003 changes to Rule 45 of the North Carolina Rules of Civil Procedure, there also had to be some sort of proceeding *scheduled* to which the recipient was being subpoenaed. The 2003 changes modified this requirement for subpoenas for documents (but not subpoenas to testify). For example, under the former rule, a party in a civil case would have to schedule a deposition, to which the party would then subpoena the custodian, even if the party merely wanted to inspect documents in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may obtain a subpoena in a pending case directing the recipient to produce documents at a designated time and place, such as the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place.

III. Mechanics of Subpoenas: For answers to questions about the mechanics of subpoenas, see Questions 8 through 17 of the Health Law Bulletin (No. 82, Sept. 2005) entitled "Responding to Subpoenas for Health Department Records," by School of Government faculty member Aimee Wall. Available online at the School of Government's medical privacy website http://www.medicalprivacy.unc.edu/ or at http://www.sog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf Questions addressed in the Bulletin include:

- Who may issue a subpoena?
- Does a judicial official have to review a subpoena before it is issued?
- Is a subpoena issued by an attorney considered a court order?
- How are subpoenas served?
- How long in advance of the proceeding must a subpoena be served?
- Can a subpoena require the recipient to go anywhere in North Carolina?
- Can a subpoena require the recipient to go out of state?
- Are you entitled to any fees when responding to a subpoena?
- Can you recover travel expenses?
- Can you obtain reimbursement for time spent in compiling records?

IV. Responding to the subpoena

A. First step: 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.

1. The wording of the subpoena itself will tell you the records it seeks.

2. Then, you must determine whether you have either "possession, custody, or control" of the records. "Possession" means actual possession; "custody" and "control" mean that you have the right to obtain the records on request. To comply with a subpoena, the person named in the subpoena must produce all of the requested records within his or her possession, custody, and control.

   For example, assume you are the custodian of records for the treatment facility and you receive a subpoena for all documents concerning a particular client of the facility. If you intend to comply, you would have to produce any client records pertaining to the named individual that are located in your own office (because they are within your actual possession) and any documents pertaining to the individual 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 other individual employees, such as notes made by a clinical staff member for his or her own use. Whether you have custody or control of those records would depend on the facility's policies regarding clinical staff member notes and, in particular, the policies and procedures regarding access to and use of those records.[4]

B. 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 asks for. You have four options:

1. You can contact the client to determine whether the patient has an interest in waiving confidentiality (and, if so, you must then exercise option 4, below);
2. You can contact the person who issued the subpoena to request that he or she excuse you from its requirements or seek a court order first;
3. You can "contest" a subpoena if it is objectionable; or
4. You can "comply" with the subpoena.

Note: Options 1 through 4 are not mutually exclusive. For example, you may want to exercise both option 1 and 2, and even then you still may be required to proceed with option 4.

C. Contacting the client. Confidentiality law does not require the treatment facility to notify the person who is the subject of the records being subpoenaed. Although the treatment facility is not legally required to notify the patient, there are at least two good reasons for the facility to do so:

1. 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.
2. Second, the patient may have an interest in waiving confidentiality. GS 122C, the HIPAA privacy rule, and the federal confidentiality law governing substance abuse records each

[4]. 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. 42 C.F.R. 2.16 (federal law), 10 NCAC 26B .0107(a) (state law). Staff member 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.

permit disclosure of confidential information if the patient consents in writing to release of the information. With the exception of part c., below, if you obtain proper written authorization, you may lawfully disclose the information without further judicial action. The party who issued the subpoena may be willing to excuse you from appearing at the proceeding if you provide the requested records in advance.

a. Check the patient's medical file for a current consent form authorizing the disclosure sought by the subpoena.
b. Any written authorization to disclose confidential information must comply with the requirements for consent set forth in the applicable confidentiality law. 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.
c. Caution: Substance abuse records, in some circumstances, should not be disclosed in response to a subpoena even with the patient's consent. 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)(2), 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.

2. Although the patient's consent allows you to disclose confidential information in advance of, or at, the legal proceeding, 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.

D. **Contacting the party who issued the subpoena.** 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.

1. Until and unless the client consents to, or a court orders, disclosure, a request for disclosure that is not permitted by the federal regulations must be answered in a way that does not reveal that an identified individual has been diagnosed or treated for substance abuse.
    a. E.g., you can say that "federal law restricts the disclosure of alcohol or drug abuse patient records."
    b. Do not tell the inquiring party that the regulations restrict the disclosure of the records of an identified patient.
2. Similarly, a request for disclosure that is not permitted by the state confidentiality law must be answered in a way that does not reveal that an identified individual is a client of mental health, developmental disabilities, or substance abuse services.

3. 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.
    a. Sample letter in response to subpoena issued in a civil case http://lac.org/doc_library/lac/publications/Sample%20lrt%20civil%20subpoena%20form.pdf
    b. Sample letter in response to subpoena in a criminal case http://lac.org/doc_library/lac/publications/HIPAA%20Form%203.pdf
4. 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 withdraw the subpoena. The party may wish to use the subpoena to require you to bring records to court, where the judge then can examine them and determine whether to order disclosure. [See, "Complying with the subpoena," Part F, below.] If the subpoena directs you to produce records at a deposition (or at a person's office without a deposition) see first Part E.

E. Contesting the subpoena. "Contest" means formally challenging the subpoena. To contest a subpoena, you ordinarily will need to consult with an attorney.

1. Grounds for contesting:
    a. The information sought is confidential.
    b. The subpoena fails to allow reasonable time for compliance.
    c. The subpoena is too broad or imposes too heavy of a burden on the recipient (in legal terms the subpoena is unduly burdensome, unreasonable or oppressive")[5] 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. 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.
2. Procedures for contesting. If you believe that a subpoena is too broad or burdensome, contact the party who issued the subpoena, or have your attorney contact the party, to determine whether he or she would be willing to narrow it. If you cannot compile the documents in time, you or your attorney should contact the party who issued the subpoena and try to work out an alternative. If you cannot reach a satisfactory agreement on time, you could go to the proceeding and explain why you could not assemble the documents. 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:
    a. *To contest a subpoena directing you to produce documents in court*, you must file a motion to quash or modify the subpoena, which asks the court to

[5] See N.C. R. Civ. P. 45(c)(3),(5) (stating grounds for quashing or modifying subpoena).

invalidate or at least limit the subpoena, or a motion for a protective order, which asks for similar relief. Under revised Rule 45(c)(5), you must make the motion within ten days after receiving the subpoena or, if you receive the subpoena less than ten days before the scheduled production date, on or before that date. Previously, the rule did not set a specific time limit on such a motion other than that it be filed promptly and no later than the time of the scheduled appearance.

b. *To contest a subpoena directing you to produce documents at a deposition (or at a person's office without a deposition*),
    - You likewise may file a motion to quash or modify within ten days after receiving the subpoena or, if you receive the subpoena less than ten days before the scheduled production date, on or before that date.
    - Alternatively, you may contest a subpoena for a deposition (or production of records at a person's office) by submitting written objections to the party who issued the subpoena. You must specify why you are unwilling to produce the records—for example, the records contain information protected by the confidentiality provisions of G.S 122C. You must serve the objections on the issuing party within the same time frame allowed for motions to quash a subpoena. In this context, service may be accomplished by regular mail to the party who issued the subpoena or to the party's attorney, by fax to the party's attorney, or by hand-delivery to the party or party's attorney.[6] It is then up to the issuing party to file a motion with the court to compel compliance. Until the court rules on your objections, you are not required to appear at the deposition or turn over the requested documents.[7]

F. Complying with the subpoena. Often the easiest course is to comply with the subpoena, but it is important to understand the limited meaning of "compliance." 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 prepared to testify. To comply with a subpoena for documents, you must produce the requested documents at the designated time and place. Compliance 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.

1. **Court proceedings.** If you receive a subpoena to appear in court and you intend to comply, you should go to the proceeding with the requested documents or prepared to testify. You should explain to the judge that the information sought is protected by confidentiality law and that a court order is required to disclose the information. Only if the judge orders you to disclose the information (or the subject of the records consents to disclosure) may you lawfully do so.
    a. The custodian should consider bringing a copy of any applicable laws to court to assist the attorneys and court officials.

[6] See N.C. R. Civ. P. 5(b).
[7] See N.C. R. Civ. P. 45(c)(4).

b. The records should not be handed over to an attorney or party to the litigation until and unless the judge has addressed the issue of confidentiality and ordered that the records be disclosed.
c. When the subpoena seeks MH/DD/SA records, the custodian (or an attorney representing the custodian) may request that the judge review the records in camera—that is, in private, in his or her chambers—before deciding whether to release them. 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. Once the judge orders disclosure of the records, the custodian may safely do so.

2. **Depositions or person's office.** The option of appearing at the proceeding and enlisting the judge's assistance in determining whether the records should be disclose (number 1, above) is not feasible when you have been subpoenaed to a deposition (or to produce records at a person's office) because a judge will almost never present. If a subpoena requires that you produce confidential MH/DD/SA records, and if the issuing party is unwilling to withdraw the subpoena or seek a court order in accordance with the applicable confidentiality laws, then you should contest the subpoena by either moving to quash the subpoena or submitting written objections in advance of the date for producing records. (See IV, E, 2, b, above). Unless you have the client's consent to disclosure or a court order prior to the date specified in the subpoena, contact your attorney about contesting the subpoena.
3. **On call.** 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 until needed. When possible, you should have the issuing party put in writing any change in the time of your appearance.
4. **Appearance requirements.**
   a. 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.
   b. If you do not have any of the requested documents, you still must appear at the proceeding unless you have been excused.
5. **Copies or originals?** Many MH/DD/SA facilities and other custodians of medical records are wary of releasing original records and so will produce copies instead. If the copies are legible and accurate reproductions of the originals, this practice is likely unobjectionable.
   a. If you do produce originals in response to a subpoena for a proceeding in court, you should make copies for yourself ahead of time because the court may retain the originals while the case is pending.
   b. If you are subpoenaed to a deposition (or to produce records at a person's office), the party who issued the subpoena is responsible for having copies made; he or she does not have a right to retain the originals.[8]

[8] Various arrangements can be made for copying records subpoenaed to a deposition or document production, assuming it is permissible to disclose them. There is no set rule. For example, if you produce the originals, the subpoenaing party may decide to photocopy particular

Remember that producing the records is not the same thing as disclosing them. If the records contain confidential information, you may not be authorized to disclose them until ordered to do so by a judge.

Section Two: Court Orders to Disclose Confidential Information

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I. Introduction. A mental health or substance abuse service provider may respond to a valid court order to disclose records—or an order for production of records at a designated time and place—by disclosing or producing the records in accordance with the court order.[9] Disclosure must be in accordance with the terms of the order (e.g., only those persons, and only that information, required by the order).

A. A court order issued by a judge at a court proceeding (a hearing or trial) can be issued from the bench orally. It does not have to be written to be valid.
B. The court must be a court of "competent jurisdiction." As with subpoenas, generally a state court of another state does not have jurisdiction over North Carolina residents. However, there are procedures that may be followed under North Carolina law or using North Carolina's courts to require a North Carolina resident to comply with another state's court order. If you are unsure whether a court has jurisdiction, you should consult with an attorney.
C. If you receive a court order to produce documents, and you did not have prior notice of the application for the court order (you did not know ahead of time that the order for production was being sought), you may be able to move to quash the order on grounds similar to the grounds for moving to quash a subpoena (undue burden, privilege, confidentiality, or otherwise unreasonable). However, if the order is issued by a court of competent jurisdiction, you are *not required* to contest (seek to quash or modify) the order, *except* in the case of number 4, below.
    1. If you wish to contest an order for production of records, you should consult an attorney.
    2. If the order for production of records directs you to provide records to the court and you have confidentiality concerns about disclosing the records without a further court order, you may bring your concerns to the judge.
D. Some confidentiality laws, like the federal law governing substance abuse patient records, provide that a court may issue an order authorizing disclosure only after it follows certain procedures and makes particular findings. If you receive an order purporting to authorize disclosure of SA records but the order was not issued in compliance with 42 C.F.R Part 2, you should follow either 3 a. or b. above.

II. State confidentiality law. A facility must disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure. GS 122C-54(a).

A. Standard: GS 122C-54(a) provides no guidance to the court for determining whether to order disclosure, nor is there any case law interpreting the provision.

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documents; or you and the subpoenaing party may agree that you will photocopy all of the documents (before or after your appearance date) and that the subpoenaing party will pay the costs.

[9] Remember, a subpoena, alone, does not permit disclosure of confidential information, even when signed by a judge.

B. The evidentiary privilege statutes for psychologists and other mental health professionals, however, provide that a judge may order disclosure of privileged information when "necessary to the proper administration of justice."[10] See 8-53.3 (psychologists), 8-53.5 (marital and family therapists), and 8-54.7 (social workers) and case annotations.

III. HIPAA privacy rule: A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 CFR 164.512(e). However, records that are governed the federal substance abuse confidentiality law (42 CFR Part 2) should not be disclosed pursuant to court order unless the court order complies with Subpart E of 42 CFR Part 2 (outlined below).

IV. Federal substance abuse records law. Under Subpart E of the federal regulation, a federal, state, or local court may issue an order requiring an alcohol or drug treatment program to disclose patient-identifying information only after following certain procedures and making particular findings. See 42 C.F.R. §§ 2.63-2.67.

A. Application. An application may be filed separately or as part of a pending action and must use a fictitious name, such as John Doe, to refer to any patient and may not contain or disclose any patient identifying information unless the court orders the record of the proceeding sealed from public scrutiny. [11] Where an application is deficient because it contains the patient's name or other patient-identifying information the deficiency may be cured by the court ordering the record to be sealed. See unpublished opinion, *S M. K v. J F*, 2005 WL 4674284 (Del.Fam.Ct).

1. Non-criminal purposes. An order authorizing disclosure for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure.
2. Criminal investigation/prosecution of patient. An order authorizing disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by the person holding the records or by any person conducting investigative or prosecutorial activities related to criminal law enforcement.

3. Criminal investigation/prosecution of program. An order authorizing disclosure or use of patient records to criminally or administratively investigate or prosecute a program or person holding the records may be applied for by any administrative, regulatory, supervisory,

[10] Judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. Flora v. Hamilton, 81 F.R.D 576 (M.D.N.C 1978). The statute affords the trial judge wide discretion in determining what is necessary for the proper administration of justice. State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983) (interpreting the analogous physician-patient privilege statute, GS 8-53).

[11] When applying for disclosure for non-criminal purposes, the patient's name or other patient-identifying information may be disclosed if the patient is the applicant or has given written consent to the disclosure. 42 C.F.R. § 2.64(a). When applying for disclosure to investigate or prosecute a program or person holding the records, the patient's name or other patient-identifying information may be disclosed if the patient has given written consent to the disclosure. 42 C.F.R. § 2.66(a).

investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

B. Notice and opportunity to respond.

1. Non-criminal purposes. When the information is sought for non-criminal purposes, the patient and person holding the records must be given (a) adequate notice in a manner that will not disclose patient identifying information to other persons, and (b) an opportunity to file a written response to the application or to appear in person must be notified and given an opportunity to file a written response, or appear in person, for the limited purpose of providing evidence on the legal criteria for issuance of the court order. 42 C.F.R. § 2.64.

2. Criminal investigation/prosecution of patient. When the records are sought for the purpose of criminally investigating or prosecuting a patient and the application is made by a person performing a law enforcement function, the person holding the record must be given (a) adequate notice, (b) an opportunity to appear and be heard for the limited purpose of providing evidence on the criteria for issuance of the court order, and (c) an opportunity to be represented by counsel independent of the counsel for the applicant. 42 C.F.R. § 2.65.

3. Criminal investigation/prosecution of program. When the records are sought for the purpose of investigating or prosecuting a program or person holding the records, no notice is required to the program, to the person holding the records, or to any patient whose records are to be disclosed. 42 C.F.R. § 2.66.

C. *In camera* review. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record. The judge may examine the records before making a decision.

D. Criteria. To order disclosure, the court must determine that "*good cause*" exists for the disclosure.

1. Non-criminal purposes. For an order authorizing disclosure for purposes other than criminal investigation or prosecution, the court must find that:

a. Other ways of obtaining the information are not available or would not be effective, and
b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient-program relationship, and the program's ongoing treatment services. 42 C.F.R. § 2.64.

2. Criminal investigation/prosecution of patient. To authorize disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient, the court must find that:

a. The crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect;

b. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
c. Other ways of obtaining the information are not available or would not be effective;
d. The potential injury to the patient, the physician-patient relationship, and the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
e. If the applicant is a person performing a law enforcement function, that (i) the person holding the records has been afforded an opportunity to be represented by independent counsel independent; and (ii) any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant. 42 C.F.R. § 2.65.

3. **Criminal investigation/prosecution of program.** For orders authorizing use and disclosure of records to investigate or prosecute a program or the person holding the records, the court must find that:
    a. Other ways of obtaining the information are not available or would not be effective, and
    b. The public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. 42 C.F.R. § 2.66.

E. Limiting disclosure.

1. **Non-criminal**. Any order authorizing disclosure must (i) limit disclosure to those parts of the patient record that are essential to fulfill the objective of the order (ii) limit disclosure to persons whose need for the information forms the basis for the order, and (iii) include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship, and the treatment services (e.g., sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has be ordered).

2. **Criminal investigation/prosecution of patient.** An order authorizing disclosure to criminally investigate or prosecute a patient must (i) limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, (ii) limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime as specified in D. 2, above, and (iii) include such other measures as are necessary to limit disclosure and use to only that public interest and need found by the court. 42 C.F.R. § 2.65(e)(2).

3. **Criminal investigation/prosecution of program.** An order authorizing disclosure to investigate or prosecute a program or person holding the records must limit disclosures in the same manner as orders authorizing disclosure for non-criminal purposes (no. 1, above) and require the deletion of patient identifying information from any documentation made available to the public. No information obtained pursuant to the court order may be used to investigate or prosecute the patient or be used as the basis for an application for an order to disclose information for the purpose of investigating or prosecuting a patient. 42 C.F.R. § 2.66(c),(d).

F. Confidential communications. A court may order disclosure of "confidential communications" made by a patient to a program in the course of diagnosis, treatment, or referral to treatment only if the disclosure is

1. Necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties; or
2. Necessary to the investigation or prosecution of an extremely serious crime, such as one that causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect; or
3. The disclosure is in connection with litigation or an administrative hearing in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. 42 C.F.R. § 2.63.