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RESPONDING TO SUBPOENAS FOR HEALTH DEPARTMENT RECORDS

■ John Rubin and Aimee Wall

Local health departments, like most public entities, accumulate a lot of personal information about the people that they serve. Often, the information relates to a person's health condition or medical care. On the one hand, health departments must hold in confidence information protected by law. On the other hand, such information may be relevant in a range of legal proceedings. In a criminal case, for example, the health department may have important information about the victim of the crime or the defendant. Although the health department, not being a party to the case, would not have a direct interest in the outcome of the case, it would nonetheless be drawn in because it has 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 subpoena directs the person named in it to appear at a designated time and place, often with certain records. In responding, a health department and its employees must balance their duty to protect confidential information against their duty to respond to the subpoena's commands.

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

John Rubin specializes in criminal law and procedure; Aimee Wall specializes in public health law, including medical confidentiality law. Both are Institute of Government faculty members.

UNC SCHOOL OF GOVERNMENT

The University of North Carolina at Chapel Hill
Institute of Government
Master of Public Administration Program

The assumption throughout this bulletin is that the health department is *not* a party to the case. When it *is* a party to a case, the opposing party will usually use devices other than a subpoena to obtain information, such as interrogatories or requests to produce documents, and the opposing party will normally contact the department's counsel first, who can then advise the department how to proceed. In contrast, when a health department is *not* a party to a case, the party seeking the records ordinarily will deliver a subpoena directly to the department employee thought to have the records, not to the department's counsel. This bulletin is therefore aimed at the health department employee who has received or may receive a subpoena and who must decide, at least initially, how to proceed.[1]

Readers should keep in mind that this bulletin offers general guidance only. It merely sketches out some of the records that health departments must hold in confidence; it does not attempt to specify the various kinds of records within each category. Further, health departments should decide on a procedure for responding to subpoenas that meets their own needs. Some may want to alert their counsel whenever they receive a subpoena. Others may decide to adopt a protocol for department personnel to follow, consulting with counsel as questions arise. Readers should feel free to incorporate any of the information in this bulletin in developing their own procedure for responding to subpoenas.

1. Other articles are available on the responsibilities of mental health facilities and schools in responding to subpoenas. *See* John Rubin and Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Professionals,* POPULAR GOVERNMENT, Summer 1999, at 27–38 (posted at www.sog.unc.edu/pubs/electronicversions/pg/botts.pdf); John Rubin, *Subpoenas and School Records: A School Employee's Guide,* SCHOOL LAW BULLETIN, Spring 1999, at 1–11 (posted at www.sog.unc.edu/pubs/electronicversions/slb/sp990111.pdf). Those articles were written before the 2003 changes to Rule 45 of the North Carolina Rules of Civil Procedure, the general rule governing subpoenas. Those changes are identified where relevant in this bulletin, but they do not affect the basic approach recommended in the previous articles on how to balance the obligations to respond to a subpoena and protect confidential information.

General Principles

Question 1. Are there different types of subpoenas?

Yes. There are two basic types:

- a subpoena to testify (also called a witness subpoena), which directs the person named in the subpoena to appear for the purpose of giving testimony; and
- a subpoena to produce documents (also called a document subpoena or subpoena *duces tecum*), which directs the named person to appear and produce documents.

The subpoena that you as a health department employee receive may not be specifically labeled as a witness subpoena or document subpoena, but it will state whether you are being called to testify, produce documents, or both. The attached form subpoena, issued by the North Carolina Administrative Office of the Courts, contains boxes that the subpoenaing party checks off (in the section entitled "YOU ARE COMMANDED TO"), which indicate the purpose for which you are being subpoenaed.[2] The form is typically used in state court proceedings, but it is not required and the subpoena you receive may be formatted differently.

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

A subpoena can be used to summon its recipient to a wide range of proceedings, including:

- civil and criminal trials and hearings (including juvenile court proceedings) in state or federal court;
- 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;
- 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

2. *See* ADMINISTRATIVE OFFICE OF THE COURTS, NORTH CAROLINA JUDICIAL DEPARTMENT FORMS MANUAL, AOC-G-100 (Oct. 2003) (posted at www.nccourts.org/Forms/Documents/556.pdf).

- hearings before an administrative law judge, administrative agency, or professional licensing board.

In all of these proceedings, the general principles governing subpoenas are the same. There are some differences, however, in the procedural details, such as how a subpoena is issued or how far a person can be compelled to travel.

This bulletin concentrates on trials, other in-court hearings, and depositions in state court, the proceedings for which health department employees are most likely to receive a subpoena. Rule 45 of the North Carolina Rules of Civil Procedure, a set of procedures followed in state court, governs subpoenas for in-court proceedings (trials and hearings) in both civil and criminal cases.[3] With minor differences, the rules on subpoenas are essentially the same for both types of cases. Rule 45 also applies to subpoenas for depositions, which are used primarily in civil cases. For purposes of this bulletin, the most important difference between an in-court proceeding, such as a trial, and a deposition is that at a deposition, no judge is present to rule on whether a subpoena is proper. This difference may affect the way you respond to a subpoena, particularly one that calls for the production of confidential information (see Question 29, below).

Question 3. Does a case have to be pending before a subpoena may be used?

Generally, yes. 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, and so on). It is generally improper for a party to issue a subpoena when no case is pending.[4]

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.[5]

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

4. *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; 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 bulletin); *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).

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. *See, e.g., In re* Superior Court Order, 315 N.C. 378, 338 S.E.2d 307 (1986) (court has inherent authority in some circumstances to issue order compelling production of records).

5. The change in Rule 45 authorizing this procedure may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, *or any subpoena may be issued separately.*" *See* Bill Analysis, S.L. 2003-276, prepared by Trina Griffin, North Carolina General Assembly Research Division (June 27, 2003) (so interpreting quoted language); Memorandum to Court Officials Re: S.L. 2003-276, prepared by Pamela Weaver Best, Administrative Office of the Courts Division of Legal & Legislative Services (Sept. 29, 2003) (so interpreting quoted language). These memos are available from the authors. The revised language is comparable to Rule 45(a)(1) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02, at 16–17 (3d ed. 2005).

Question 4. May I disclose confidential information in response to a subpoena alone?

Unless other conditions are satisfied, a subpoena is usually not sufficient to authorize disclosure of confidential information. Most confidentiality laws—including those dealing with medical information—contain some provision permitting disclosure of confidential information in legal proceedings. Some allow disclosure in response to a subpoena, but most impose stricter conditions, such as entry of an order by a judge or prior notification of the individual who is the subject of the records. If you receive a subpoena for confidential information, you must consider the particular statute or regulation governing the information and determine the conditions under which you may disclose it. Questions 26 through 32 discuss those conditions.

An attorney who issues a subpoena should likewise be wary of examining confidential information on the strength of the subpoena alone. In some circumstances, an attorney who reviews confidential information without appropriate authorization may be subject to sanctions or even civil liability.[6] For this reason, if they anticipate that records contain confidential information, some attorneys (particularly in criminal cases) prefer to apply directly to a judge for an order for production of records rather than issue a subpoena themselves.[7] Responding to such an order is discussed further in Question 25, below.

Question 5. What happens if I disclose confidential information when not permissible?

Several adverse consequences may follow. You or your health department could be subject to a federal investigation and possibly civil penalties or criminal prosecution, depending on the circumstances surrounding the disclosure.[8] You could be subject to criminal prosecution under state law for disclosing confidential information. For example, improper disclosure of information identifying a person with certain communicable diseases is a misdemeanor.[9] As an employee of the health department, you could also be subject to discipline (including discharge) for failing to comply with confidentiality laws or health department confidentiality policies. In rare cases, the person whose privacy has been compromised may bring a private lawsuit requesting money damages or

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6. *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 sealed and mailed to clerk of court in response to subpoena; 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); North Carolina Rules of Professional Conduct, Ethics Op. 252 (North Carolina State Bar Ethics Comm., July 1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party).

7. In criminal cases, such an application by a criminal defendant has come to be known as a *Ritchie* motion, named after a U.S. Supreme Court decision authorizing criminal defendants to obtain access to potentially exculpatory information, even if confidential, in the hands of a third person. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987); 1 JOHN RUBIN, THOMASIN HUGHES & JANINE FODOR, NORTH CAROLINA DEFENDER MANUAL § 4.7A, at 35–38 (May 1998) (describing procedure to obtain court order for production of records); *see also In re* Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979) (in certain circumstances, prosecutor may obtain court order for production of records held by custodian of records).

8. 42 U.S.C. §§ 1320(d)(5), (6) (outlining civil and criminal penalties for violations of the administrative simplification provisions of the Health Insurance Portability and Accountability Act of 1996 [HIPAA]); 70 Fed. Reg. 20,224 (April 18, 2005) (interim final regulation governing imposition of civil monetary penalties for violations of the HIPAA Privacy Rule); *Scope of Criminal Enforcement Under 42 U.S.C 1320d-6*, Mem. Op. for General Counsel, U.S. Dept. of Health and Human Services and Senior Counsel to the Deputy Attorney General, U.S. Dept. of Justice (available at www.usdoj.gov/olc/2005opinions.htm) (interpreting scope of HIPAA's criminal penalties).

9. *See* G.S. 130A-143 (establishing permissible disclosures of information identifying persons with certain communicable diseases); 130A-25 (making violations of Chapter 130A a misdemeanor); 14-3(a) (classifying any unclassified misdemeanors as Class 1 misdemeanors).

other relief against you, the health department, or the county.[10]

Question 6. What are permissible responses to a subpoena?

Ordinarily, you must respond to a subpoena in some fashion even if you believe that the subpoena alone does not permit you to disclose the confidential information it seeks. You have several possible options.

Before the proceeding commences, you may contest the subpoena—that is, you may challenge it—if you believe it is objectionable. You may do this by making a motion to quash or modify, which asks the court to invalidate or at least limit the subpoena. In the case of a subpoena to attend a deposition (or to produce records when no proceeding is scheduled), you may submit written objections to the party who issued the subpoena in lieu of filing a motion with the court (see Question 23, below). To contest a subpoena, ordinarily you will need to consult with an attorney.

In some circumstances, you may be able to make alternate arrangements before the proceeding commences with the party who issued the subpoena, as he or she has the authority to excuse you from the subpoena's requirements.[11] For example, a party may be willing to excuse you from appearing 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 if they are confidential (see Question 21, below). If you receive a subpoena for documents, you also may be able to mail the records to the court ahead of time and avoid appearing; but, if the records are confidential, you may be unable to use this procedure (see Questions 20 and 30, below).

Often the easiest course is to appear at the proceeding as directed by the subpoena. It is important, however, to understand the limits on your actions when the subpoena seeks confidential information, either through your testimony or from records. If the patient or other subject of confidential information has not given you proper authorization to disclose the information, you may appear at the proceeding but ordinarily may not disclose the information without an order from the judge. The option of appearing at the proceeding and awaiting further direction by the judge is discussed in Question 29, below.

Question 7. Are there any circumstances in which one does not have to respond to a subpoena?

Very few. A subpoena is a form of court order, commanding you to appear at the time and place indicated with the requested materials. If you ignore a subpoena and a judge later finds that it was validly issued, you could be held in contempt.[12] In essence, a finding of "contempt" signifies that you purposely disobeyed a court order, such as a subpoena, exposing you to a fine or, in extreme cases, imprisonment. Only in the rarest of circumstances would it be safe for you to disregard a subpoena (see Question 14, below, on subpoenas for out-of-state proceedings).

Mechanics of Subpoenas

Question 8. Who can issue a subpoena?

Any North Carolina judicial official may issue a subpoena for a case in state court. Judges, magistrates, and clerks of court all are judicial officials. An attorney for a party to the case also may issue a subpoena, and often the subpoena you receive will be from an attorney. Under the 2003 changes to Rule 45 of the North Carolina Rules of Civil Procedure, a party to a case who is not represented by counsel may no longer issue a subpoena; he or she must apply to a judicial official, such as the clerk of court.[13]

Question 9. Does a judicial official have to review a subpoena before it is issued by an attorney?

No. An attorney may issue a subpoena without obtaining permission from a judicial official. But, as

10. *See, e.g.*, Jennings v. Univ. of North Carolina at Chapel Hill, 340 F. Supp. 2d 666, 678 (M.D.N.C. 2004) (summarizing North Carolina law related to the common law tort of invasion of privacy).

11. *See generally* G.S. 8-63 (witness summoned to appear in court may be excused by party at whose instance witness was summoned).

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

13. *See* N.C. R. Civ. P. 45(a)(4).

discussed in Question 3, above, there is a threshold requirement: A case must be pending before an attorney may issue a subpoena.

Question 10. Is a subpoena issued by an attorney considered a court order even if it has not been reviewed by a judicial official?

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

Question 11. How are subpoenas served?

The law specifies both who may serve a subpoena and the procedure they must follow. A subpoena can be served by a sheriff, a sheriff's deputy, a coroner, or any other person who is eighteen years of age or older, but the person serving the subpoena cannot be a party to the case.

Ordinarily, service must be made by delivering a copy of the subpoena by hand to the person named in the subpoena (called personal delivery) 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, and not to produce documents, it may be served by a telephone call to that person by the sheriff, a person designated by the sheriff, or a coroner.[14] The rules do not authorize anyone else to serve a subpoena by telephone. Nor do they authorize service of a subpoena by fax or e-mail. It is permissible, however, for you to accept service of a subpoena by a method not specified in the rules. For example, the subpoenaing party may ask you if you would be willing to accept service of a subpoena by fax, and you may (but are not obligated to) agree to that method of service.

If you are not properly served with a subpoena (and you have not agreed to accept service by a method not specified in the rules), you may not be obligated to respond.[15] Disregarding a subpoena is risky, however. If you are wrong about the adequacy of service, you could be found in contempt; even if you are right, defending against a motion to compel compliance or 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.[16]

Question 12. 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 time when you are supposed to appear or right before your scheduled appearance. There are some steps that you can take, however, if you cannot appear or do not have enough time to assemble the documents requested in the subpoena (see Question 24, below).

Question 13. Can the recipient be required to appear anywhere within North Carolina?

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

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14. *See* N.C. R. CIV. P. 45(b)(1); G.S. 8-59 (noting that a witness served by telephone who fails to appear may not be held in contempt until he or she has been served personally).

15. *See, e.g.*, Smith v. Midland Brake, Inc., 162 F.R.D. 683 (D. Kan. 1995) (court refused to enforce subpoena where service was defective); *but see* Vaughn Furniture Co. v. Featureline Mfg., Inc., 156 F.R.D. 123 (M.D.N.C. 1994) (subpoena directed to custodian of records of corporation was properly served even though not served on actual custodian; subpoena was served on another employee of corporation, who was agent of corporation); King v. Crown Plastering Corp., 170 F.R.D. 355 (E.D.N.Y. 1997) (court compelled witness to comply with subpoena although it was not served by hand, finding that service is sufficient as long as it reasonably ensures actual receipt of subpoena by witness).

16. The 2003 revisions to Rule 45 of the North Carolina Rules of Civil Procedure also require in civil cases that a copy of the subpoena be served on all parties to the case, not just on the person named in the subpoena. This requirement does not apply to service of subpoenas in criminal cases. *See* N.C. R. CIV. P. 45(b)(2) (service on other parties to case must be made in manner prescribed by Rule 5(b) of Rules of Civil Procedure); G.S. 15A-801, -802 (stating that service requirements in Rule 45 apply to criminal cases except for requirement of service of copy of subpoena on other parties).

A subpoena to appear at a deposition is more limited. For cases in state court, a North Carolina resident is required to attend a deposition only in the county where he or she lives, is employed, or conducts business in person.[17] If the subpoena directs you to attend a deposition outside these areas, you may contact the issuing party and request that the site be changed. If the issuing party is unwilling to change the site of the deposition, you should consult with an attorney about submitting written objections or making a motion to quash the subpoena.

Revised Rule 45 of the North Carolina Rules of Civil Procedure does not contain geographic limits for subpoenas to produce records at a person's office when no deposition is scheduled; however, the same geographic limits may apply as with subpoenas for depositions.[18]

Question 14. Can the recipient be required 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 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.[19]

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 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.[20]

Question 15. Is the recipient 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 the next question). 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

17. *See* N.C. R. CIV. P. 30(b)(1); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996) (person who lived, was employed, and transacted all business in Guilford County could not be held in contempt for failing to comply with subpoena for deposition in Forsyth County). Ordinarily, a person who is not a resident of North Carolina may be required to attend a deposition only in the North Carolina county in which 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)(1). 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).

18. Revised Rule 45(c)(4) and (5) do specify where a motion to quash or compel compliance must be filed—namely, in the court of the county in which the documents are to be produced. But, those provisions do not specifically address where the document production may be scheduled.

19. *See* Minder v. Georgia, 183 U.S. 559 (1902) (establishing that a subpoena is ineffective beyond state lines); *see also* Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996) (disobeying order entered by court that lacks jurisdiction does not amount to contempt). 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 15A-816) to compel a witness to attend a criminal proceeding in the court of another state. The party seeking the witness's attendance must apply for an order from both the state court in which the criminal proceeding is pending and the home state of the witness. *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 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).

20. *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).

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, you have the right to sue. In light of the small potential recovery, however, a lawsuit rarely would be worth the time or expense. The clerk of court will certify your attendance and travel expenses should you need proof that you appeared at a proceeding.[21]

In criminal cases, appearance and travel fees are paid from state funds if you apply for payment within the statutory time limits. If you wish to be paid, apply to the clerk of court immediately after your appearance.[22]

Health department employees should remain at full salary for any time they are absent from work while complying with a subpoena for department records or other information relating to their official duties. Employees should consult departmental or county policies when deciding whether to retain the travel reimbursement or the appearance fee.

Question 16. What travel expenses can be recovered?

If you reside within the county where you are required to appear, you are not entitled to receive 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; 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) in lieu of daily mileage.[23]

Question 17. Is the recipient entitled to reimbursement for time spent in compiling records?

In most cases, no. Although often burdensome, responding to subpoenas is considered a civic obligation, and normally neither you nor your employer is entitled to be reimbursed for time spent doing so. If a subpoena is unduly burdensome, however, you may move to quash it (or submit written objections for certain subpoenas). In ruling on the motion (or objections), the judge may require the subpoenaing party to pay the reasonable cost of producing the records.[24]

You are not usually entitled to copying costs either if you produce copies instead of the original records (see Question 19, below, on complying with a subpoena for documents). 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, it is permissible for you to release the records).[25]

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21. *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 cannot compel the witness to remain. This provision does not apply if the subpoenaing party is the state of North Carolina or a municipality.

22. *See* G.S. 6-51, -53; 7A-314 through 7A-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, AOC-CR-235 (Apr. 2000) (posted at www.nccourts.org/Forms/Documents/76.pdf). 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. *See* G.S. 7A-314(d); N.C. R. CIV. P. 26(b)(4)(B).

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

24. *See* N.C. R. CIV. P. 45(c)(5), (6).

25. *See* note 29 below and accompanying text (discussing depositions and document productions). In those instances in which a health department may charge copying costs, what should the department charge? State and federal law provide little guidance. The HIPAA Privacy Rule allows providers to charge patients and their representatives a "reasonable, cost-based fee" if the patient requests a copy of his or her health information. 45 C.F.R. 164.524(c)(4). The charges must be limited to the cost of "copying, including the cost of supplies for and labor of copying" and postage. *Id*. Although the Privacy Rule provision does not authorize the charging of copying costs for responding to subpoenas generally, the fee guidelines set in the rule could be used as a benchmark for those instances in which a health department is permitted to charge copying costs. North Carolina has one statute that addresses fees a provider may charge when a patient or the patient's representative requests copies of records for personal injury cases. G.S. 90-411. That law might also

General Points to Consider in Responding to Subpoenas

Question 18. What should one do upon receiving a subpoena for documents?

You should first determine exactly which 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 part of the bulletin reviews the general rules for responding to subpoenas and leaves to the concluding part the more specialized rules on subpoenas for confidential information.

The wording of the subpoena itself will tell you just which records it seeks. The records being sought will be described in the subpoena itself or in an attached list. Unless otherwise specified, you should consider the record description as including both paper and electronically-stored records.[26] For most document subpoenas, particularly those directing you to produce documents at a trial or other in-court hearing, you should produce printouts of electronic records. If you believe that retrieving or printing electronic records would be unduly burdensome, contact your attorney.[27]

Once you determine the records sought by the subpoena, you must determine whether you have "possession, custody, or control" of them. *Possession* means actual, physical possession; *custody* and *control* mean that you have the right to obtain the records upon request. To comply with a subpoena, the person named in it must produce all of the requested records that are within his or her possession, custody, or control.

For example, assume you are the health department's custodian of records and you receive a subpoena for all documents concerning a particular patient. If you intend to comply, you would have to produce those records located in your own office (because they are within your actual possession) as well as those in your department's files (because they are within your custody or control). You may not have to produce materials kept by individual department employees, such as private notes made by a child services coordinator for his or her own use. Whether you, as the department's record custodian, have custody or control of such notes would depend on the department's policies on records maintained by individual employees.

Question 19. How does one comply with a subpoena for documents?

To comply with a subpoena for documents, ordinarily you must appear at the indicated time and place with the requested records and remain there until the person who issued the subpoena, or the court, excuses you. If you do not have any of the requested documents, you still must appear at the proceeding unless you have been excused from appearing.

Many health departments 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.[28] If you do

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provide some guidance to providers. The fees authorized in that law, however, are quite high (up to $.75 per page) and the law allows a minimum fee of $10.00. *Id*. Note that it is possible that those fees may not be considered "reasonable, cost-based fees" and therefore would be preempted by the HIPAA Privacy Rule when a patient is requesting copies of his or her records. *See* 45 C.F.R. 160.203(b) (providing that a state law that is contrary to HIPAA is preempted unless it is "more stringent" than the Privacy Rule); 45 C.F.R. 160.202 (definition of more stringent encompasses laws that permit "greater rights of access").

26. *See generally* N.C. R. CIV. P. 34 & Comment (rule allowing party to request documents from another party to case provides that "documents" include "data compilations from which information can be obtained . . . through detection devices"; comment states that rule applies to electronic data compilations and that in many instances responding party will have to supply printout of electronic information).

27. For a comprehensive discussion of the issues involved in discovery of computer-based information, *see* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 37.01 *et seq.* (3d ed. 2005).

28. Earlier articles recommended that original records be produced in response to a subpoena. *See* Rubin and Botts, *Responding to Subpoenas: A Guide for Mental Health Professionals, supra* note 1, at 31–32 (questions 16, 18); Rubin, *Subpoenas and School Records: A School Employee's Guide, supra* note 1, at 6–7 (questions 16, 18). This advice has been reconsidered in light of the widespread practice of producing copies and the adequacy of copies in most instances. *See also* N.C. EVID. R. 1003 ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."); N.C. R. CIV.

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. 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.[29]

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. See Question 29, below.

Question 20. Can I mail copies to the court instead of producing them in person?

Perhaps. There are two considerations. The first is whether the subpoena rules permit the mailing in of records. Rule 45(c)(2) of the North Carolina Rules of Civil Procedure contains a "mail-in" procedure for certain types of records only. In lieu of appearing and producing the requested documents, the person subpoenaed may send certified copies of the records, along with an affidavit (a sworn statement) of authenticity, to the judge presiding over the case (or the judge's designee, such as the court clerk). If the person subpoenaed does not have any of the requested documents, he or she may send an affidavit so stating.[30]

The mail-in procedure is available only if (1) the subpoena is directed to a custodian of hospital medical records or public records *and* (2) the subpoena requires the custodian to appear for the sole purpose of producing those records. The definition of "hospital medical records" is broad enough to cover many of the types of medical records maintained by health departments, and most other health department records are public records (such as most environmental health records).[31] However, the second condition allows the party who issues the subpoena to eliminate the mail-in option by indicating in the subpoena that the custodian must appear and testify as well as produce documents. On the subpoena form attached to this bulletin, the issuing party would check two boxes—one requiring the custodian to appear and testify and another requiring the custodian to produce documents. Some attorneys will check both boxes even though they just need the custodian to produce the records and attest to their authenticity. If that is the sole reason you are being asked to appear, you may be able to use the mail-in procedure assuming that the procedure is otherwise permissible. If you are unsure of why you are being subpoenaed, contact the issuing attorney to clarify.

Assuming Rule 45 authorizes use of the mail-in procedure, a second consideration is whether the confidentiality laws governing the particular

P. 45(c)(2) (when mailing-in of records is permissible, it is sufficient to mail true and correct copies).

29. 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 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.

30. Sample affidavits will be available on www.medicalprivacy.unc.edu.

31. Rule 45(c)(2) states that hospital medical records are as defined in G.S. 8-44.1. That section states that hospital medical records are "records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1 [now, G.S. 122C-52], G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes."

Rule 45(c)(2) does not define "public record." However, since one of the purposes of the mail-in procedure in Rule 45(c)(2) is to allow a party to introduce certified copies of certain records without having to call a witness at trial to authenticate the records, the pertinent rules in the North Carolina Rules of Evidence on authentication of public records may supply the appropriate definition. *See* NORTH CAROLINA EVIDENCE RULE 902(4) (for purposes of admission of certified copies of public records without the testimony of an authenticating witness, "public record" means "[a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with . . . any law of the United States or of this State"); *see also* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 243, at 264–65 & n.32 (6th ed. 2004) (discussing Rule 902 of the North Carolina Rules of Evidence and Rule 45(c) of the North Carolina Rules of Civil Procedure).

documents allow release of the records by mail. This consideration is discussed in Question 30, below.

Question 21. Is there any other way to 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 can agree to such an arrangement as long as the documents are not confidential. If the records are confidential, you should not disclose them to the issuing party in advance of the proceeding without appropriate permission by the individual who is the subject of the records (see Question 28, below, on HIPAA-compliant authorization forms).

If you do have to appear, you should contact the party who issued the subpoena. He or she may be able to give you a more specific time to appear, cutting down on your waiting time in court, or may be able to put you on "telephone standby," allowing you to remain at work or home until needed. When possible, have the issuing party put in writing any change in the time of your appearance.

Question 22. On what grounds can a subpoena for documents be contested?

Rule 45 lists various grounds for contesting a subpoena.[32] Probably the most common complaint about subpoenas (other than that they call for confidential information, discussed in the next section) is that they are too broad and impose too heavy of a burden on the person who must respond. In legal terms, the subpoena is unduly burdensome, unreasonable, or oppressive. For example, a subpoena might be considered unreasonable if it called for all medical records of a patient without any limitation as to time, date, or contents, when the proceeding concerns a narrow part of the patient's life.[33]

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 decide to contest the subpoena, you almost certainly will need the assistance of an attorney.

Question 23. What is the procedure for contesting a subpoena for documents?

To contest a subpoena to produce documents in court, you must file a motion to quash or modify the subpoena. 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.

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 physician-patient privilege. 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.[34] It is then up to the issuing party to file a motion with the court to compel compliance. Until the court rules

32. *See* N.C. R. CIV. P. 45(c)(3), (5) (grounds include that subpoena fails to allow reasonable time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection, subjects a person to an undue burden, is otherwise unreasonable or oppressive, or is procedurally defective).

33. *See generally* State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990) (quashing subpoena), *remanded to federal district court for further proceedings,* Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) (state court erred in quashing subpoena without first reviewing requested records to determine their relevancy, and federal district court erred in dismissing habeas corpus petition).

34. *See* N.C. R. CIV. P. 5(b).

on your objections, you are not required to appear at the deposition or turn over the requested documents.[35]

Question 24. What if a subpoena arrives so late that it is impossible to compile the documents in time or 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 alternate arrangement. If you cannot reach a satisfactory arrangement, your best course is to go to the proceeding and explain why you could not assemble the documents. Alternatively, you may make a motion to quash (or submit written objections for certain subpoenas) if the subpoena is served so late and is so burdensome that it would be unreasonable to require compliance.[36]

The trickier situation occurs when you cannot attend the proceeding at all and do not have time to make any formal response. Rule 45(e)(1) of the North Carolina Rules of Civil Procedure states that the failure to obey a subpoena may be treated as a contempt of court only if the failure is "without adequate excuse." Courts have recognized that inability to comply with a subpoena is a defense to a charge of contempt.[37] Thus if you truly cannot be present, you should be protected from a contempt charge. You should try to let the subpoenaing party know that you cannot attend and, if the subpoena is for a proceeding in court, let the clerk of court know as well.

Question 25. You mentioned in Question 4 that attorneys sometimes will obtain an order directly from a judge requiring the production of records. What are my options if I receive that kind of order rather than a subpoena?

Although Rule 45 does not govern such orders, your options in responding are similar. You may respond by producing the records at the designated time and place. Further, because an order for production is signed by a judge, you may be authorized to disclose the records without further order of the court. In contrast, a subpoena is usually issued by an attorney so, although you may produce the records at the designated time and place, confidentiality rules may forbid you from disclosing the records until a judge orders disclosure.[38] Typically, an order for production directs that you provide the records to the court, so if you have concerns about disclosing the records without a further court order, you may bring your concerns to the judge. See Question 29, below, on obtaining a ruling from a judge on a subpoena for confidential records.

You also may be able to contest an order for production by filing a motion with the court. As with subpoenas, you may not know ahead of time that an order for production is being sought. Therefore, although Rule 45 does not specifically apply to orders for production, the grounds listed in that rule for contesting subpoenas may likewise apply to orders for production—for example, the order might be contested as unduly burdensome or calling for confidential information not relevant to the

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35. Revised Rule 45(c)(4) clarifies that you are not required to appear at the scheduled deposition or document production until the court has ruled on your objections. Previously, if you submitted objections, you were not required to produce the records but still had to go to the deposition.

36. *See* N.C. R. CIV. P. 45(c)(3)a. (failure to allow reasonable time for compliance is ground for contesting subpoena); *see also* Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984) (quashing subpoena).

37. *See, e.g.,* United States v. Bryan, 339 U.S. 323 (1950); Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970); *see also* Icehour v. Martin, 44 N.C. 478 (1853) (witness was subpoenaed to two different proceedings in two different places on same day; witness could not be penalized for complying with one subpoena and not the other).

38. You should probably respond to a subpoena signed by a judge in the same way that you would respond to a subpoena signed by an attorney—that is, you should not disclose confidential records without a further order by the judge. When a judge or other judicial official signs and issues a subpoena on request of an attorney or party, the subpoena is typically issued in blank, and the attorney or party fills it out. The issuing official does not review or approve the contents of the subpoena. In contrast, a person seeking an order for production must identify the documents being sought and the reasons for producing them; and in issuing the order the judge balances the need for the documents against the interest in confidentiality. *See* 1 JOHN RUBIN, THOMASIN HUGHES & JANINE FODOR, NORTH CAROLINA DEFENDER MANUAL § 4.7A, at 35–38 (May 1998) (describing procedure to obtain court order for production of records).

proceeding.[39] If you wish to contest an order for production, you should consult an attorney.

Responding to Subpoenas for Confidential Medical Information

Question 26. How should I respond to a subpoena for confidential medical information?

How you respond depends on the particular confidentiality laws that apply to the information being sought. Most personal medical information held by local health departments is protected by state and federal confidentiality laws. In addition to medical information, other types of information may also be confidential under state or federal law, such as public benefits information. Depending on the type of information requested, multiple confidentiality laws might apply. Some confidentiality laws allow health departments to disclose information in response to a subpoena but most do not.

Health departments must evaluate and comply with all applicable confidentiality laws when deciding whether and how to disclose records containing medical information. This bulletin is not intended to provide a comprehensive review of the medical confidentiality laws that apply to health department records. Every local health department in North Carolina is required to have a privacy official. That official should be aware of the relevant laws that apply to information maintained by the department.[40]

Question 27. What steps should I should take in deciding whether to disclose medical information in response to a subpoena?

In general, you should evaluate the information being requested to determine (a) whether any state and federal confidentiality laws apply to that information and, if so, (b) whether those laws place any limitations on your ability to disclose the information in response to a subpoena. If more than one law applies to the information, you will then have to determine how the laws work together. Specifically, if one of the laws requires a court order and the others do not, you should await a court order before disclosing the information. The following example illustrates the process for evaluating the applicable confidentiality laws and deciding whether those laws permit disclosure in response to a subpoena.

A health department receives a subpoena for a patient's medical record. The subpoena is not accompanied by a written authorization signed by the patient or the patient's representative. The department identifies three confidentiality laws that apply to the information.

- The information is subject to the state confidentiality law governing local health departments.[41] This law allows health departments to disclose information in response to a subpoena if the disclosure is otherwise authorized or required by law.
- The information is subject to the federal HIPAA Privacy Rule.[42] The Privacy Rule allows disclosure in response to a subpoena if certain conditions are satisfied.
- The information is subject to the state law establishing a physician-patient privilege.[43] This law does not allow disclosures in response to a subpoena. It requires either the

39. The American Bar Association's standards on discovery from third parties in criminal cases recognize that if a third party does not have notice when a court issues an order for production of records, the party should be able to move to quash the order on grounds similar to the grounds for moving to quash a subpoena (undue burden, privilege, or order otherwise unreasonable). AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY, STANDARD 11.3.1(c) & commentary (3d ed. 1996).

40. For more information on state and federal medical confidentiality laws, *see* www.medicalprivacy.unc.edu.

41. G.S. 130A-12.

42. 45 C.F.R. § 164.512(e). HIPAA refers to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d-1320d(8). HIPAA directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information. *See* 45 C.F.R. Parts 160 and 164 (hereinafter "Privacy Rule").

43. G.S. 8-53 (physician-patient privilege); *see also* G.S. 8-53.13 (nurse privilege).

patient's permission or an order issued by a judge or the Industrial Commission.

The department must review and comply with all of these laws. While the first two laws identified above would likely allow disclosure of information in response to a subpoena (as long as HIPAA's conditions are satisfied), the third law would not. Therefore, the department must await a court order before disclosing the information requested in the subpoena.

This example highlights an important and highly restrictive state law—the physician-patient privilege. It is important for health departments to remember that information subject to this privilege (or other privileges such as the nurse privilege[44]) must not be disclosed in response to a subpoena. Either a court order or the patient's permission is required by state law.

Once the health department has evaluated the confidentiality laws that apply to the requested records, it must decide how to respond. The response will depend on whether the subpoena is accompanied by an authorization from the patient.

Question 28. How should I respond if the subpoena for confidential medical records is accompanied by an authorization form signed by the patient?

Occasionally an attorney will send an authorization form with a subpoena. In such cases, if the accompanying authorization form is valid (see discussion below), you should disclose the records as directed in the subpoena or authorization form. For example, if an assistant district attorney is gathering evidence for a domestic violence prosecution and is seeking copies of the victim's medical records from the health department, the attorney may be able to obtain the victim's authorization to obtain copies of the records.[45]

When presented with a subpoena and an authorization form (or an authorization form by itself), a health department should review the authorization form to determine whether it complies with all applicable legal requirements. One of the most specific laws in this regard is the HIPAA Privacy Rule. For medical information subject to that law, an authorization form must include the following core elements to be valid:

- A specific description of the information to be disclosed
- The name of the person or organization authorized to disclose the information
- The name of the person or organization authorized to receive the information
- A description of the purpose of the disclosure[46]
- An expiration date or event[47]
- The signature of the patient or the patient's representative[48]
- A statement explaining the patient's right to revoke the authorization
- A statement explaining the department's ability or inability to place conditions upon a patient's decision to sign the authorization[49]

In addition to specifying these core elements, the HIPAA Privacy Rule imposes additional requirements and restrictions on authorization forms.[50] Because of these strict requirements, health departments should either insist upon using their own HIPAA-compliant authorization forms or carefully review authorization forms from other sources to ensure that they meet all of HIPAA's requirements.

If the form complies with all applicable laws, the health department should disclose the records to the person specified in the authorization. For example, the authorization form may request that copies of the records be sent directly to the requesting attorney.

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44. G.S. 8-53.13.

45. Note that, unless a specific law provides otherwise, district attorneys and other lawyers with public agencies are subject to the same limitations on their authority to obtain information as private attorneys. Their status as public officials or public servants does not establish additional rights of access to information.

46. If the patient initiates the authorization and does not wish to describe the purpose of the disclosure, the form may state "at the request of the individual." 45 C.F.R. 164.508(c)(1)(iv).

47. The expiration date or event must relate either to the individual or to the purpose of the disclosure. 45 C.F.R. 164.508(c)(1)(v).

48. If it is signed by a patient's representative, the form must also describe the representative's authority to act for the individual (such as "parent," "guardian," or "power of attorney"). 45 C.F.R. 164.508(c)(1)(vi).

49. The HIPAA Privacy Rule limits a provider's ability to condition treatment, payment, or enrollment or eligibility for benefits on the authorization. 45 C.F.R. 164.508(b)(4).

50. 45 C.F.R. 164.508(b).

If an attorney sends the health department a valid authorization form but *no* subpoena, the department may still disclose the records. A subpoena is technically not necessary. The authorization form alone provides sufficient authority for the health department to disclose confidential information to an attorney or the court.

Question 29. How should I respond if the subpoena for confidential medical records is *not* accompanied by an authorization form?

If the subpoena requests information that is subject to a confidentiality law that requires a court order or patient permission, such as the physician-patient privilege, the health department should not automatically disclose the information. It must, however, respond to the subpoena. As a first step, the department (or the department's attorney) may contact the attorney requesting the records and explain that they are confidential. The requesting attorney may choose to withdraw the subpoena or may take the necessary steps to authorize disclosure (such as obtaining a court order or permission from the person who is the subject of the records). If that does not happen, the health department should either contest the subpoena (discussed in Question 23, above) or appear at the proceeding with the records and await further direction from the court (discussed below). You may follow either approach when subpoenaed to a proceeding in court.[51]

If you appear at the proceeding with the requested records, you should not immediately turn them over to the subpoenaing attorney or the court. Because the records are confidential, the health department has a duty to take affirmative steps to ensure that the records are only disclosed as permitted by law. The exact way to handle each situation will depend on the confidentiality laws that apply, but the approach will be similar in most instances. For example, a health department may receive a subpoena directing the records custodian to appear in court with certain patient records that are protected by the physician-patient privilege. The physician-patient privilege law allows a district or superior court judge to order disclosure of records if he or she finds that disclosure is "necessary to the proper administration of justice."[52] In this situation, the custodian may appear in court with the requested records on the date and at the time specified in the subpoena. The custodian should not release the records ahead of time to the party who issued the subpoena.

Once the proceeding begins and the custodian is asked for the records, the custodian should explain to the judge that the records are protected by the physician-patient privilege and that a court order is required to disclose them. If the records contain sensitive information, 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.[53] If the records are not

51. Revised Rule 45(c)(5) establishes a time limit for moving to quash or modify a subpoena that is served more than ten days before the proceeding—namely, such a motion must be made within ten days of service. (The rule was not materially revised for subpoenas served less than ten days before the proceeding—the responding party may still raise challenges at the time of the proceeding.) In our view, if a subpoena for confidential records is served more than ten days before a court proceeding, a custodian may but is not required to make a motion to quash. A custodian still may bring the records to the proceeding, as directed by the subpoena, and await further direction from the court before disclosing them. We believe this to be so for two reasons. First, a custodian who produces records in this manner is not seeking to quash or modify the subpoena. Nor is the custodian disregarding the subpoena. Rather, the custodian is seeking to comply with the subpoena's commands without violating confidentiality laws. Second, confidentiality laws are not personal rights of the custodian, which the custodian may waive by not making a motion to quash. Rather, they establish the conditions under which disclosure may be ordered by a court (or would be permissible without a court order, as when the subject of the records properly consents to disclosure). In contrast, other grounds for withholding documents in response to a subpoena, such as undue burden, are personal to the records custodian and may be waived if not timely asserted.

52. G.S. 8-53.

53. *See, e.g.,* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (discussing procedure); Zaal v. State, 602 A.2d 1247 (Md. 1992) (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); *see also* Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977) (judge may require in disclosure order that parties who receive records not reveal their contents except to those connected with litigation). In the context of information related to communicable diseases, state confidentiality law authorizes *in camera* review if it is requested by the subject of the information. *See* G.S. 130A-143(6).

relevant to the proceeding, the judge may refuse to allow disclosure or may narrow the information that must be disclosed.[54] Once the judge orders disclosure of the records, the custodian may safely do so.[55] The custodian should consider bringing a copy of any applicable laws to court to assist the attorneys and court officials.

The option of appearing at the proceeding and enlisting the judge's assistance in determining the extent of disclosure 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 be present. If you believe the records are confidential and cannot be disclosed without the order of a judge, contact your attorney about contesting the subpoena. See Question 23, above, for contesting a subpoena for a deposition or to produce records.

Question 30. Is there any way that I can comply with a subpoena for confidential records without appearing at the proceeding?

As mentioned above in Question 20, there is a "mail-in" procedure available for "hospital medical records." Many health departments have relied on this procedure to avoid the time and expense associated with appearing at court proceedings. For records subject to the physician-patient privilege, health departments must proceed carefully to ensure that the records are not disclosed without the court order required by that law.

The mail-in procedure followed by most health departments is:

- seal the records in an envelope,
- include an affidavit stating that the copies are true and correct copies and that the records were made and kept in the regular course of business,
- include a letter or memo *outside the sealed envelope* indicating the case for which the documents have been requested, and stating clearly that the documents are privileged and should not be disclosed without a court order, and
- deliver the records to the clerk of court (and obtain a receipt) or send them by registered mail or certified mail (return receipt requested).

This mail-in procedure is still allowed under state law but, if the requested records are subject to the HIPAA Privacy Rule, the health department must now comply with additional administrative requirements before mailing the records to the court.[56]

The Privacy Rule requires either (a) a good faith attempt to notify the patient or (b) a qualified protective order issued or approved by a court.[57] In

54. *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 or cross-examining custodian of those records about their content).

55. The custodian is not required to appeal the judge's ruling, even if it appears to be wrong. The right to appeal an order requiring compliance with a subpoena is beyond the scope of this bulletin. *See generally* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2466, at 87–91 (2d ed. 1995). If you want to contest a judge's ruling requiring disclosure, consult an attorney.

56. The HIPAA Privacy Rule applies to uses and disclosures of identifiable health information. The mail-in procedure authorized in North Carolina's law implicates two possible "disclosures" under the Privacy Rule. First, sending the records to the clerk of court—*even in a sealed envelope*—may fit within HIPAA's broad definition of disclosure. *See* 45 C.F.R. 160.103 (defining the term "disclosure" as the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information). Second, North Carolina law may allow the parties to the case to review the records sent to the clerk *before* the court has ordered disclosure. *See* N.C. R. CIV. P. 45(c)(2) (rule states that hospital medical records mailed to the court are not open to inspection except to parties to case); *but 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 sealed and mailed to court clerk in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using records at trial); 1 JOAN G. BRANNON & JAN S. SIMMONS, NORTH CAROLINA CLERK OF SUPERIOR COURT PROCEDURES MANUAL 52.7–52.8 (Sept. 2003) (cautioning clerks about releasing sealed evidence without further order of a judge). Because of these potential disclosures, the health department must also comply with the subpoena procedures in the HIPAA Privacy Rule, discussed above, before following this "mail-in" procedure.

57. *See* 45 C.F.R. § 164.512(e).

most cases, the health department will not be responsible for notifying the patient or moving for the protective order.[58] Rather, the department will be relying on written documentation from the subpoenaing party demonstrating that he or she has complied with the HIPAA procedures.

The types of documentation the health department should look for will vary depending on whether the subpoenaing party complied with the notice provisions or the qualified protective order provisions. If the subpoenaing party complied with the notice requirements, the health department should expect a written statement explaining that the subpoenaing party has made an attempt to provide written notice to the patient (which may be by mailing the notice to the patient's last known address) and "accompanying documentation" demonstrating that fact. While the Privacy Rule does not define the term "accompanying documentation," in this context it could mean (a) a copy of the notice and (b) a copy of any official court record indicating how objections to the subpoena (if any) were resolved by the court or the parties. It must be clear from the statement and/or the accompanying documentation that the patient had an opportunity to object to the disclosure and the patient either did not object or objected and the objection was resolved.

If the subpoenaing party complied with the qualified protective order requirements, the health department should expect a written statement explaining that the subpoenaing party has either requested a qualified protective order from the court or the parties to the dispute have agreed in advance to a qualified protective order and have presented the order to the court. The term "qualified protective order" has a particular meaning in this context.[59] In short, it is an order that limits the use and disclosure of the information and requires that the information (including any copies made) be returned or destroyed. The "accompanying documentation" in this context would likely be a copy of the motion for a protective order and possibly any court records demonstrating that the motion has been submitted (which may simply be a stamp on the face of the order itself).

In the absence of documentation related to either patient notice or a qualified protective order, the health department should *not* follow the mail-in procedure. Rather, it should appear in court at the designated time. Remember that the mail-in procedure is optional; a health department could elect to establish a policy of always appearing in person to obtain a court order. While such a policy could mean more administrative burdens for the department, it would ensure that confidential records are protected until the court issues its order. When records are mailed in, the health department has no way of knowing whether they remained under seal until the court ordered disclosure.

Question 31. How should I respond if the subpoena directs me to testify in court or at a deposition and I anticipate that the questions will solicit confidential information?

A subpoena directing you to testify will specify a time and place for you to appear. If the subpoena requires you to come to court to testify, you should make every effort to appear at the designated time and place. When asked to disclose information that is confidential under state or federal law, you should briefly explain the legal restrictions to the presiding judge. If the judge orders you to disclose the information, then you may do so. Disclosing confidential information when ordered to do so by a judge is allowed under state and federal law.[60] The court's order is not required to be in writing.

58. The Privacy Rule does allow the health department to take the initiative to provide notice to the patient or seek a qualified protective order. 45 C.F.R. 164.512(e)(vi). While a department may wish to pursue one of these options, it must balance the administrative burdens of these efforts against the burdens associated with complying with the subpoena without using the mail-in procedure. It may be that written notice to the patient would be relatively simple, but the notice must meet all of the criteria in HIPAA. Specifically, the notice must identify the litigation and offer the individual an opportunity to raise an objection to the court. After giving notice, the health department must refrain from disclosing any information until the time period in which the individual may object has elapsed and either no objections were filed or all the individual's objections were resolved in a manner that permits the disclosure. If the department elects to follow these procedures, it should have clear, written policies and procedures for staff members to follow and require staff members to carefully document their efforts.

59. 45 C.F.R. 164.512(e)(1)(v) (outlining the requirements of a qualified protective order).

60. *See* 45 C.F.R. 154.512(a) (HIPAA Privacy Rule provision authorizing disclosures required by law, including court ordered disclosures); G.S. 8-53 (state physician-patient privilege law authorizing disclosure when ordered to do so by a district or superior court judge upon a

If the subpoena directs you to appear and testify at a deposition, a judge will not be present to issue an order on the spot. Therefore, you should contact the subpoenaing party in advance and explain that you will need a court order to disclose confidential information in the course of the deposition. With enough advance notice, the subpoenaing party may be able to secure a court order before the deposition or may withdraw the subpoena. If the subpoenaing party does not respond accordingly, you should appear at the deposition and decline to answer questions that call for confidential information until the subpoenaing party obtains a court order authorizing you to disclose the information. Your attorney can go with you to the deposition to assist you in responding appropriately.

Revised Rule 45 permits a witness to file a motion to quash a subpoena to testify at a court proceeding (or submit written objections or a motion to quash for a subpoena to testify at a deposition) even if the subpoena is unaccompanied by a request for documents.[61] But, such a challenge may not be successful. Until the questioning of the witness actually begins, a court may be reluctant to quash a subpoena for the simple reason that it cannot be certain of all the questions that will be asked.

If it is impossible for you to appear at the time or place directed in the subpoena, you should not ignore the subpoena. You should contact the subpoenaing party and possibly the clerk of court as discussed in Question 24, above.

Question 32. What should I do if a law enforcement officer comes to the office with a search warrant for confidential records?

A search warrant alone may not be sufficient to override protections for confidential information, and you can so advise the officer.[62] But, if the officer wants to go ahead and obtain the records pursuant to the warrant, you should comply. Refusing to do so may constitute the crime of resisting, delaying, and obstructing an officer.[63] Nevertheless, law-enforcement officers should be wary of using search warrants to obtain confidential information. While the officer may succeed in seizing the records with the warrant, the warrant may not provide the officer with the legal authority to read the records or reveal them to others, such as the district attorney's office.[64]

Question 33. Should I keep a record of information I disclose in response to a subpoena, court order, or warrant?

If the records are subject to the HIPAA Privacy Rule, the health department is required to document the disclosure in an accounting of disclosures unless the subpoena, court order, or warrant was accompanied by the patient's authorization.[65] The accounting requirement applies to disclosures of both written records and oral testimony. The accounting must specify:

- the date of the disclosure,
- who received the information (e.g., name of

finding that disclosure is necessary to the proper administration of justice); G.S. 8-53.13 (state nurse-patient privilege also authorizing disclosure in response to an order from a district or superior court judge).

61. *See* N.C. R. CIV. P. 45(c) (3), (5).

62. The HIPAA Privacy Rule would likely allow disclosure in response to a search warrant without any additional process. The Privacy Rule allows disclosures that are "required by law," and that term is defined to include "court-ordered warrants." *See* 45 C.F.R. 164.512(a) (authorizing disclosures required by law); 164.512(f)(1)(ii)(A) (authorizing disclosures to law enforcement officials pursuant to a warrant); 164.103 (defining "required by law" to include court-ordered warrants). State privilege laws, however, require a district or superior court judge (rather than a magistrate) to order disclosure based on a finding that disclosure is necessary to the proper administration of justice. G.S. 8-53 *et seq.*

63. *See* G.S. 14-223; *see also* Grateful Dead, *Truckin', on* AMERICAN BEAUTY (Warner Bros. Records 1970) ("if you got a warrant, I guess you're gonna come in").

64. Search warrants are often issued by magistrates, who are not authorized to override the privilege for confidential medical information in G.S. 8-53 *et seq.*; only a district or superior court judge may override the privilege. *See also* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 78–79, 107 n.133 (3d ed. 2003) (court may preclude use of information obtained in violation of federal law protecting records of federally-assisted alcohol or substance abuse program); Doe v. Broderick, 225 F.3d 440 (4th Cir. 2000) (discussing circumstances in which law-enforcement officer may be found civilly liable for obtaining confidential records with search warrant).

65. 45 C.F.R. 164.528. A series of frequently asked questions related to the accounting of disclosures is available at www.medicalprivacy.unc.edu.

court and case number would suffice if records were delivered to a clerk of court or "Mr. Jones, attorney for Ms. Smith" in the case of testimony in a deposition),
- a brief description of the information disclosed, and
- a brief statement of the purpose of the disclosure, which may simply be a copy of the subpoena, court order, and/or warrant.

If the information is not subject to the Privacy Rule, the accounting of disclosures is not legally required. The health department may, however, wish to establish a uniform policy for tracking such disclosures. For example, it would be relatively simple to maintain a copy of the subpoena with the original record as part of the standard recordkeeping procedures.

Question 34. What should I do if I have additional questions about subpoenas?

You should feel free to contact the authors with questions about subpoenas. John Rubin may be reached at (919) 962-2498 or rubin@iogmail.iog.unc.edu, and Aimee Wall may be reached at (919) 843-4957 or aimee_wall@unc.edu. You should also consider contacting your department's attorney because your local policies for responding to subpoenas may differ from the general guidance offered in this bulletin.

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STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

Additional File Numbers

VERSUS

SUBPOENA

G.S. 1A-1, Rule 45

Party Requesting Subpoena
☐ State/Plaintiff ☐ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: *Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.*

TO

Name And Address Of Person Subpoenaed

Telephone No.

Alternate Address

Telephone No.

YOU ARE COMMANDED TO: *(check all that apply):*

☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
☐ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
☐ See attached list. *(List here if space sufficient)*

Name And Location Of Court/Place Of Deposition/Place To Produce

Date To Appear/Produce

Time To Appear/Produce
☐ AM ☐ PM

Name And Address Of Applicant Or Applicant's Attorney

Date

Signature

Telephone No.

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Superior Court Judge
☐ Magistrate ☐ Attorney/DA ☐ District Court Judge

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

By ☐ personal delivery.
☐ registered or certified mail, receipt requested and attached.
☐ telephone communication *(For use only by the sheriff's office for witness subpoenaed to appear and testify.)*
☐ I was unable to serve this subpoena.

Service Fee	Date Served	Signature of Authorized Server	Title
$ ☐ Paid ☐ Due			

NOTE TO PERSON REQUESTING SUBPOENA: *A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.*

(Please See Reverse Side)

AOC-G-100, Rev. 10/03

NOTE: Rule 45, North Carolina Rules of Civil Procedure, Parts (c) and (d).

(c) Protection Of Persons Subject To Subpoena

(1) Avoid undue burden or expense. - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoena. - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.
b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue burden.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.

(4) Order of court required to override objection. - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. - When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets, confidential information. - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding To Subpoena

(1) Form of response. - A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. - When information subject to a subpoena is withheld on the objection that is is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

NOTE: *If you have any questions about being subpoenaed as a witness, you should contact the person named on the other side of this Subpoena in the box labeled "Name And Address Of Applicant Or Applicant's Attorney.*

DUTIES OF A WITNESS

- Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- In answering questions, speak clearly and loudly enough to be heard.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court or to the deposition.
- You must continue to attend court until released by the court. You must continue to attend a deposition until the deposition is completed.

BRIBING OR THREATENING A WITNESS

It is a violation of State law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

WITNESS FEE

A witness under subpoena and that appears in court to testify, is entitled to a small daily fee, and to travel expense reimbursement, if it is necessary to travel outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify to your attendance as a witness so that you will be paid any amount due you.

AOC-G-100, Side Two, Rev. 10/03