Subpoenas and School Records: A School Employee's Guide

by John Rubin

PUBLIC SCHOOLS, like most public entities, accumulate a lot of personal information about the people they serve and employ. On the one hand, schools must hold in confidence information about their students and employees. On the other hand, such information may be relevant in a range of legal proceedings. In a criminal case, for example, the prosecutor may want to review the school records of a student charged with a crime. Or the defendant may want to review the school records of his or her accuser. Although the school would not have a direct interest in either proceeding (because it would not be a party to either), 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 form of court order, a subpoena directs the person named in it to appear at a designated time and place with certain records. In responding to a subpoena, a school must balance its duty to protect confidential information against its duty to respond to a court order.

Through questions and answers, this article 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.

The assumption throughout this article is that the school is *not* a party to the case. When a school *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 normally will contact the school's counsel first, who can then advise the school on how to proceed. In contrast, when a school is *not* a party to a case, the party seeking the records ordinarily will deliver a subpoena directly to the school employee thought to have the records, not to counsel for the school. This article is therefore aimed at the school employee who has received or may receive a subpoena and who must decide, at least initially, how to proceed.

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

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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 requires 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 requires the named person to appear and produce documents.

The subpoena that you as a school 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.

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 in either state or federal court;
- depositions in civil cases, which are proceedings before trial in which the parties to the case (the plaintiff and 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
- hearings before an administrative law judge or administrative agency.

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 article concentrates on trials and depositions in state court, the proceedings in which school employees are most likely to receive a subpoena. Rule 45 of the North Carolina Rules of Civil Procedure governs subpoenas for both civil and criminal trials.[1] Except for the payment of witness fees (discussed in Question 14, below), the rules on subpoenas are essentially the same for both types of trials. Rule 45 also applies to subpoenas for depositions. For purposes of this article, the most important difference between 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 records (see Question 25, below).

Question 3. Is a subpoena sufficient authorization for disclosure of confidential records?

Not necessarily. Most confidentiality laws—including those dealing with student and personnel records—contain some provision permitting disclosure of confidential records in legal proceedings. These provisions are not uniform, however. Some simply allow disclosure in response to a subpoena, whereas others impose stricter conditions on disclosure, 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 records and determine the conditions under which you may disclose the information. Questions 22 through 30 discuss those conditions.

Question 4. What happens if confidential information is disclosed without authorization?

Several adverse consequences may follow. Student records are protected by the Family Educational Rights and Privacy Act (FERPA), a federal law enforced by the Department of Education.[2] For violations of FERPA, the Department of Education may institute proceedings to compel compliance and, in extreme cases, may terminate the offending school's eligibility for federal funds.[3] Further, disclosure of confidential records—concerning students or employees—could result in civil liability for the school system or even for the school employee who disclosed the records.[4]

1. *See* Chapter 8, Sections 59 and 61, *and* Chapter 15A, Sections 801 and 802, of the North Carolina General Statutes (hereinafter G.S.).

2. *See* 20 U.S.C. § 1232g (1998); 34 C.F.R. pt. 99 (1998) (regulations under FERPA). *See also* G.S. 115C-402 (state statute specifying that student records are not subject to the public records law).

3. *See* 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67.

4. *See generally* 5 JAMES A. RAPP, EDUCATION LAW § 13.04[3][d], at 13-80 to 13-85 (1999) (although FERPA does not confer private cause of action, aggrieved student may have claim for damages under 42 U.S.C. § 1983 and other laws); STEPHEN ALLRED, EMPLOYMENT LAW: A GUIDE FOR NORTH CAROLINA PUBLIC EMPLOYERS 44–47 (3d ed. 1999) (discussing risks of releasing personnel information).

Failure to maintain the confidentiality of information could also result in disciplinary action. For example, a recently enacted state statute provides that juvenile court personnel must notify a student's school of delinquency proceedings when the student is under age sixteen and is alleged to have committed a felony. The statute provides further that school personnel must keep these notices confidential and that failure to do so may be grounds for dismissal.[5] Even when a statute does not specifically address the matter, failure to maintain the confidentiality of records may still be grounds for discipline.

Those working in some fields could even be subject to criminal prosecution for disclosing confidential information, although none of the statutes regulating schools provide for criminal penalties.[6]

Question 5. 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 is not sufficient authorization to permit you to disclose the confidential records it seeks. You have three basic options:

- you can "contest" a subpoena if it is objectionable;
- you can try to get the person who issued the subpoena to excuse you from its requirements; or
- you can "comply" with the subpoena.

As used in this article, to "contest" a subpoena means to formally challenge it. 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, you may submit written objections to the party who issued the subpoena in lieu of filing a motion with the court (see Question 20, 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 with the party who issued the subpoena, as he or she has the authority to excuse you from the subpoena's requirements. For example, a party may be willing to excuse you from appearing at the proceeding if you provide the requested records in advance. You may agree to such an arrangement if the records are not confidential, but ordinarily you may not if they are confidential (see Question 26, below).

Often the easiest course is to comply with the subpoena. It is important, however, to understand the limited meaning of "compliance." A subpoena is a way of summoning you to a legal proceeding. To comply with a subpoena to testify, you must show up at the designated time and place. To comply with a subpoena for documents, you must produce the requested documents at the designated time and place. But complying with a subpoena does not necessarily mean disclosing confidential information. In many instances you may comply with the subpoena but leave the question of disclosure to the judge. For example, if you receive a subpoena to produce confidential records at trial, you may appear at the proceeding with the records—thus complying with the subpoena—and then ask the judge to determine whether the records should be released (see Questions 25 and 28, below).

Question 6. 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. If you ignore it and a judge later finds that it was validly issued, you could be held in contempt.[7] Only in the rarest of circumstances would it be safe for you to disregard a subpoena (see Question 13, below, on subpoenas for out-of-state proceedings).

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

5. *See* G.S. 115C-404.

6. *See, e.g.,* G.S. 106-579.11 (unauthorized disclosure of formula for antifreeze is Class 2 misdemeanor); G.S. 122C-52 (unauthorized disclosure of mental health records is Class 3 misdemeanor, punishable by fine); G.S. 126-27 (unauthorized disclosure of confidential personnel files of state employee is Class 3 misdemeanor, punishable by fine).

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

Mechanics of Subpoenas

Question 7. Who can issue a subpoena?

Any judicial official may issue a subpoena for a trial or deposition. 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. A party to the case also may issue a subpoena, but only to require a person to testify, not to produce documents. For example, if John Smith is the plaintiff in a case, he could issue a subpoena to testify even though not represented by an attorney, but he would have to apply to a judicial official for a subpoena for documents.[8]

Question 8. 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 there is a threshold requirement: A case must be pending before an attorney may issue a subpoena.[9]

Question 9. 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 a court order no matter who issues it. If you fail to respond, you could be held in contempt of court.

Question 10. How are subpoenas served?

The law specifies both the persons 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 law enforcement personnel or by a coroner.[10]

If you are not properly served with a subpoena, you may not be obligated to respond.[11] Disregarding a subpoena is risky, however. If you are wrong about the sufficiency 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.

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

As a general rule, there are no formal time limits on service of a subpoena. You might receive it weeks before the date and 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 21, below).

8. *See* N.C. R. CIV. P. 45(a), (b).

9. *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 an attorney to issue a subpoena if no case is pending or, if a case is pending, for a time and place when no proceeding is scheduled). Under Rule 45(a)(1) of the Federal Rules of Civil Procedure, which regulates pretrial discovery in civil cases in federal court, an attorney may subpoena documents before trial even if no deposition or other proceeding is scheduled. As in state court proceedings, however, a case must be pending before an attorney may use this procedure.

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).

10. *See* N.C. R. CIV. P. 45(e); 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).

11. *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 cf.* 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 so long as it reasonably ensures the actual receipt of the subpoena by the witness).

Question 12. 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.

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.[12] If the subpoena directs you to attend a deposition outside these areas, you may object. If the issuing party is unwilling to change the site of the deposition, you should consult with an attorney about submitting written objections or making a motion to quash the subpoena.[13]

Question 13. 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.[14]

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 only if the proceeding is within one hundred miles of the place of service of the subpoena.[15]

Question 14. 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 responsible for paying the fees. Some parties will include a check for appearance and travel fees with the subpoena, but a party is not obligated to pay you in advance of the proceeding. If the party does not pay you once you have appeared at the proceeding, you have the right to sue. In light of the small 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.[16]

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.[17]

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12. 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).

13. 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).

14. *See* Minder v. Georgia, 183 U.S. 559, 22 S. Ct. 224, 46 L. Ed. 328 (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 an order entered by a 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 to give testimony). There is no procedure for compelling a person who is not a party to the case to attend a civil proceeding in the court of another state; however, a party may be able to require a person to submit to a deposition in North Carolina for use in a proceeding in another state. *See* N.C. R. CIV. P. 28(d).

15. *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).

16. *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.

17. *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 (Jan. 1995). In limited instances (in civil or criminal cases), the court may require payment of an

Public school employees remain at full salary for any time they are absent from work while complying with a subpoena. An employee may keep the travel expense reimbursement, but the appearance fee is to be turned over to the school administrative unit.[18]

Question 15. 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.[19]

Question 16. 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. In lieu of granting the motion, the judge may require the subpoenaing party to advance the reasonable cost of producing the records.[20]

You are not usually entitled to copying costs either. In most instances, you must produce the originals of the requested records, which you are entitled to get back (see Question 18, 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).

General Points to Consider in Responding to Subpoenas

Question 17. What should one do upon receiving a subpoena for documents?

You should first determine exactly what records the subpoena seeks, whether you indeed 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 article 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 what records it seeks. You must then determine whether you have "possession, custody, or control" of these records. *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 school's custodian of records and you receive a subpoena for all documents concerning a particular student. 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 found in the school's files (because they are within your custody or control). You would not necessarily have to produce materials kept by individual employees, such as notes made by a teacher for his or her own use. Whether you have custody or control of those records would depend on the school's policies on records maintained by individual employees.[21]

Question 18. How does one comply with a subpoena for documents?

To comply with a subpoena for documents, ordinarily you must appear at the proceeding with the requested records and remain there until the person who issued

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).

18. *See* 16 NCAC 6C.0404.

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

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

21. FERPA recognizes that some records kept by teachers may not be readily accessible to others. Excluded from FERPA's definition of "education records" are records of instructional and other personnel that are in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. *See* 20 U.S.C. § 1232g(a)(4)(B)(i). FERPA does not give parents or students a right to these records, but they still may be obtainable by a subpoena directed to the particular employee in possession of the records.

the subpoena, or the court, excuses you. You must produce the originals of the documents (or, if you do not have originals, copies of the documents) unless the court or the subpoenaing party excuses production of the originals. If you do not have any of the requested documents, you still must appear at the proceeding, unless you have been excused from appearing.

If you are subpoenaed to a proceeding in court, you should make copies of any documents before you appear because the court may retain the originals while the case is pending. If you are subpoenaed to a deposition, the party who issued the subpoena is responsible for having copies made; he or she does not have a right to retain the originals.

Rule 45 of the North Carolina Rules of Civil Procedure contains an alternative "mail-in" procedure, which is available in limited circumstances. In lieu of appearing and producing the original documents, the person subpoenaed may send certified copies of the records, along with an affidavit 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.

The mail-in procedure is available only if (1) the subpoena is directed to a custodian of public records (or to a custodian of hospital medical records) *and* (2) the subpoena does not require the custodian to appear in person and testify. Under what circumstances a subpoena to a public school records custodian would satisfy the first condition is not entirely clear because Rule 45 does not define "public record."[22] In any event, 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. Even in those instances in which a school may use the mail-in procedure, it ordinarily should not do so if the subpoenaed records are confidential (see Question 26, below).

Question 19. 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, however, you should not disclose them to the issuing party in advance of the proceeding without the consent of the individual who is the subject of the records (see Question 26, below).

If you do have to appear, you should telephone 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 call," 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 20. On what grounds can a subpoena for documents be contested?

Probably the most common complaint about subpoenas (other than that they call for confidential information) is that they are too broad and impose too heavy a burden on the person who must respond. In legal terms, such a subpoena is "unreasonable and oppressive."[23] For example, a court might consider unreasonable a subpoena for all records of a student, without any limitation as to time, date, or contents, when the proceeding concerns a narrow part of the student's life.[24]

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. The procedure for contesting subpoenas is briefly described here.

To contest a subpoena to produce documents in court, you must file a motion to quash or modify the subpoena. You must make the motion promptly after receiving the subpoena but in no event later than the time you are scheduled to appear.

22. One of the purposes of Rule 45 is to allow a party to introduce certified copies of certain records without further authentication at trial. Although Rule 45 appears to apply to public records without limitation, other evidence rules contain a more limited definition of what constitutes a public record. *See generally* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 174 & n.32 (5th ed. 1998) (noting that North Carolina Evidence Rule 902, which allows introduction of certain records without authentication, applies to limited kinds of public records).

23. *See* N.C. R. CIV. P. 45(c)(1) (stating grounds for quashing or modifying a subpoena).

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

To contest a subpoena directing you to produce documents at a deposition, you must 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 deposition, on or before the date of the deposition. Alternatively, you may contest a subpoena for a deposition by submitting written objections to the party who issued the subpoena. You must serve the objections on the issuing party within the same time frame allowed for motions to quash a deposition subpoena. It is then up to the issuing party to file a motion with the court to compel compliance.

Question 21. 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 if the subpoena is served so late and is so burdensome that it would be unreasonable to require compliance.[25]

The trickier situation occurs when you cannot attend the proceeding at all and do not have time to make any formal response. Rule 45 of the North Carolina Rules of Civil Procedure states that the failure to obey a subpoena may be treated as a contempt of court only if the failure is "without adequate cause." Courts have recognized that inability to comply with a subpoena is a defense to a charge of contempt.[26] 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.

Responding to Subpoenas for Confidential Records

Question 22. How does one respond to a subpoena for confidential records?

As with any document subpoena, you first must determine what documents the subpoena seeks (see Question 17, above, on determining the scope of a subpoena). If the subpoena calls for confidential records, you then must examine the particular statutes and regulations that apply to the records being sought. How you respond to the subpoena depends both on the rules governing subpoenas and the rules governing the particular records. The most important considerations are:

- whether you must notify the individual who is the subject of the records being subpoenaed; and
- whether the subpoena alone is sufficient authorization to disclose the records or whether more is needed.

The law is not uniform on the giving of notice. Some statutes require the issuing party to provide a copy of the subpoena to both the organization that has the records *and* the individual who is the subject of the records.[27] Other statutes (such as FERPA) require the organization that receives the subpoena to notify the individual. Many statutes are silent on the question of notice.

Statutes also vary on whether a subpoena alone is sufficient authority for disclosure of records. Some statutes allow disclosure in response to a "subpoena," others in response to a "court order," and still others only upon "order of a judge." The different terms may dictate different responses.

Question 23. Under what conditions may student records be disclosed?

The main limitations on disclosing student records are contained in FERPA. This federal law makes confidential all "education records," which with limited exceptions include all records related to a student. A school may disclose such records in response to a judicial order

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

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

27. *See* North Carolina Financial Privacy Act, G.S. 53B-5; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-3.1 commentary at 62 n.13 (3d ed. 1996) (finding that it would not be practicable for a party seeking records to serve interested third parties because it may not be evident who the interested parties are).

or a lawfully issued subpoena if, before complying with the order or subpoena, the school makes a reasonable effort to notify the student's parents (or the student if he or she is eighteen years of age or older or is attending a postsecondary institution). The school also must make a record of any education records it discloses.[28]

Question 24. Does FERPA's notice requirement apply even when the subpoena is from a public entity, such as the Department of Social Services?

Yes. Whether a subpoena is from a public entity or private person, schools ordinarily must give notice before complying. FERPA contains a limited exception to the notice requirement when the subpoena is for a law enforcement purpose. But this exception applies only if the party issuing the subpoena obtains an order prohibiting the school from notifying the person who is the subject of the records.[29]

Question 25. What are permissible responses to a subpoena for student records covered by FERPA?

Although its notice and record-keeping requirements are mandatory, FERPA gives schools some discretion in how to respond to a subpoena. First, you may contest the subpoena. FERPA allows you to disclose student records in response to a subpoena, but it does not require that you do so. If you believe, for example, that the subpoena seeks information unrelated to the proceeding, you may make a motion to quash or, if the subpoena is for a deposition, submit written objections.[30]

Second, you may comply with the subpoena. After giving the required notice, you may appear at the proceeding with the requested records and, unless the student or another person contests disclosure, release the records when called as a witness.

Third, even though FERPA does not require that you obtain a judge's approval before releasing student records, you may want the additional protection of a judge's order. A variation on complying with the subpoena is to appear at the proceeding with the requested records, advise the judge that the records contain information protected by FERPA, and ask the judge to determine whether the records should be disclosed. If the records contain sensitive information, the judge may decide to review the records *in camera*—that is, in private, in his or her chambers—before deciding whether to release them.[31] The judge also may require in the disclosure order that the parties who receive the records not reveal their contents except to those connected with the litigation.[32] You can advise the judge of these concerns about confidentiality when you appear at the proceeding, or your attorney can file a motion for a protective order ahead of time, asking the judge to review the records and enter appropriate orders to protect against undue disclosure.

The option of appearing at the proceeding and enlisting the judge's assistance in determining the extent and terms of disclosure is not feasible when you have been subpoenaed to a deposition because a judge is almost never present at a deposition. If you have concerns about disclosing the records (or the student or another person is contesting the subpoena and a judge has not yet ruled on the question of disclosure), you should contact your attorney about contesting the subpoena or moving for a protective order.

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28. *See* 20 U.S.C. §§ 1232g(a)(4) (definition of education records), 1232g(b)(2)(B) (notice requirement), *and* 1232g(b)(4)(A) (record-keeping requirement). The Individuals with Disabilities Education Act, which governs records of disabled students, contains similar limitations on disclosure. *See* 20 U.S.C. § 1417(c); 34 C.F.R. § 300.571.

29. *See* 20 U.S.C. § 1232g(b)(1)(J)(ii). In very limited circumstances, a school may release education records to a public entity without a court order or subpoena. For example, FERPA allows schools to release records in connection with an emergency, and although the school still must make a record of the disclosure, it is not required to give notice. *See* 20 U.S.C. § 1232g(b)(1)(I). When the justification for releasing student records is a court order or subpoena, however, the school must comply with the notice requirement.

FERPA also permits schools to disclose information to certain agencies if the disclosure is authorized by state law and concerns the juvenile justice system. *See* 20 U.S.C. § 1232g(b)(1)(E); *see also* G.S. 7B-3100 (effective July 1, 1999, this statute replaces G.S. 7A-675(h) and, subject to FERPA's restrictions, permits information sharing pursuant to rules to be adopted by the Office of Juvenile Justice). The extent to which these provisions permit information sharing without a court order or subpoena and without notice to the affected persons is beyond the scope of this article.

30. *See* Zaal v. State, 602 A.2d 1247 (Md. 1992) (on school board's motion for a protective order, court weighed student's privacy interest against need of party seeking information about the student); 5 JAMES A. RAPP, EDUCATION LAW § 13.04[8][b][xi][A], at 13-129 to 13-130 (1999).

31. *See, e.g., Zaal*, 602 A.2d 1247 (court may order *in camera* review of records with defense counsel present); People v. Manzanillo, 546 N.Y.S.2d 954 (Crim. Ct. 1989) (court directed defendant to draft subpoena for court's signature requiring production of documents for *in camera* review).

32. *See, e.g.,* Rios v. Reed, 73 F.R.D. 589 (E.D.N.Y. 1977). In some circumstances, a school may only transfer information to a third party on the condition that the party not disclose the information to others. *See* 20 U.S.C. § 1232g(b)(4)(B). When a school discloses student records pursuant to a court order or subpoena, it is not subject to this requirement. *See* 34 C.F.R. § 99.33(c).

Question 26. Can records covered by FERPA be disclosed in advance of the proceeding?

Ordinarily, no. FERPA is intended to give individuals an opportunity to oppose disclosure of confidential information.[33] Unless the parents or student consent, you should not release the records to the party who issued the subpoena in advance of the proceeding. Nor should you send the records to the court in lieu of appearing in person because the records could be disclosed without the individual having an opportunity to object.

Question 27. Are student records subject to disclosure restrictions in addition to those found in FERPA?

Yes. FERPA establishes the *minimum* protection for student records. Particular information within student records may be protected by other laws, which may impose greater or at least different restrictions on disclosure. For example, under state law, information obtained by a school counselor in providing counseling services to a student is privileged. A subpoena alone is not sufficient to authorize release of this information. A judge must find that disclosure is necessary to a proper administration of justice and must order that the information be disclosed.[34]

Information about a student that a school receives from other agencies may be protected by additional "redisclosure" rules. In other words, the school may have to follow the confidentiality laws governing the agency that provided the school with the information. For example, if a school receives information about a student's treatment at a federally assisted substance abuse program, the school, if called upon to release that information, would be subject to federal restrictions on disclosure. Under federal law, disclosure ordinarily is not permitted in response to a subpoena unless the patient receives notice of the request for records and a judge thereafter finds good cause for disclosure.[35]

In short, in responding to subpoenas for student records, you must be conscious of both FERPA's restrictions on disclosure and other laws regulating information within those records.

Question 28. How does one respond to a subpoena calling for records that may be disclosed only upon order of a judge, such as records subject to the counselor-student privilege?

Your options in this situation are similar to those available to you when the records are covered by FERPA alone. In most situations, you must still give notice of the subpoena to the parents or student because the records will meet FERPA's definition of education records. As with records covered solely by FERPA, you may contest the subpoena, although you are not required to do so. You may also comply with the subpoena by appearing at the proceeding with the requested records.

The principal difference here is that you *must* await an order of the judge before releasing the records. Thus if you receive a subpoena to appear in court and you intend to comply, you should go to the proceeding with the requested records, advise the judge that the records are subject to the counselor-student privilege or some other restriction on disclosure, and state that you cannot release them without an order from the judge. Only if the judge orders you to disclose the records (or the student consents to disclosure) may you safely do so.[36]

When the subpoena is for a deposition, you cannot appear at the proceeding and ask for a ruling by the judge because no judge will be present. Consequently, you should consult an attorney about contesting the subpoena.

Question 29. Under what conditions can personnel records be disclosed?

Disclosure of personnel records is governed primarily by state law, which with limited exceptions makes confidential all information in an employee's personnel file. Under G.S. 115C-321, a person may examine school

33. *See* 34 C.F.R. § 99.31(a)(9)(ii) (schools must give notice in advance of compliance "so that the parent or eligible student may seek protective action"). The parties to the proceedings and even the organizations that maintain the records may not have as strong an interest in protecting the information as does the individual who is the subject of the records. The parties to the case may not even have standing to object to production of the records if they do not have any proprietary or confidentiality interest in the records. *See* United States v. Tomison, 969 F. Supp. 587 (E.D. Cal. 1997); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE 102 (2d ed. 1995); *see also* New York v. Weiss, 671 N.Y.S.2d 604 (Sup. Ct. 1998) (although the prosecutor in the case did not have standing to object to a subpoena for a third party's records, the court had the inherent authority to limit the release of records that had no bearing on the trial).

34. *See* G.S. 8-53.4.

35. *See* 42 U.S.C. § 290dd-2; 42 C.F.R. §§ 2.64, 2.65.

36. G.S. 8-53.4 states that the *student* may waive the counselor-student privilege; unlike FERPA, it contains no provision on parental consent to disclosure. Whether parental consent is sufficient to authorize a school to disclose information protected by confidentiality laws other than FERPA, or whether the student's consent must be obtained, are questions beyond the scope of this article.

personnel information by authority of a subpoena or court order. As with student records, particular information within personnel files may be protected by other laws, which may impose greater restrictions on disclosure.[37]

Question 30. What is the proper response to a subpoena for personnel records?

Responding to a subpoena for personnel records is potentially simpler than responding to a subpoena for student records, but similar principles apply. G.S. 115C-321 does not require that you give notice to the employee before complying with a subpoena, although there is no bar to doing so. There also is no requirement that you keep a record of the information that you disclose, but it may be wise to do so.

A permissible response to a subpoena for personnel records is to appear at the proceeding with the requested records and, unless the employee or another person contests the subpoena, release them when called as a witness. Apparently, an order of a judge is not required before disclosure, although you may want the protection of one.[38] If you are subpoenaed to a proceeding in court, you may advise the judge that the records are confidential and ask the judge to rule on whether they should be disclosed. (See Question 25, above, for a further discussion of this option.) Alternatively, you may contest the subpoena.

As with other confidential records, you should not release the records to the issuing party before your scheduled appearance (unless the employee consents to release). Nor should you mail the records to the court.

If personnel records contain information subject to other disclosure restrictions, you may need to take additional steps. Consult the specific statute or regulation dealing with the information to determine the exact course to follow. ■

37. Of course, certain personnel information—such as the employee's name, age, job title, and salary—is public information, and no subpoena or court order is necessary to obtain it. *See* G.S. 115C-320.

38. In contrast, other state statutes on personnel records of public employees require a "court order," which probably would be interpreted as an order of a judge and not merely a subpoena. *See* G.S. 122C-158 (area mental health authority employees); G.S. 126-24 (state employees); G.S. 153A-98 (county employees); G.S. 160A-168 (municipal employees); G.S. 162A-6.1 (water and sewer authority employees). There is no evident reason for this difference.