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POPULAR GOVERNMENT

INSTITUTE of GOVERNMENT
The University of North Carolina at Chapel Hill

The Art of Public Art

Also Courthouse Security • Giving Job References without Fear
Subpoenas and Mental Health Records • How After-School Programs Help Students

POPULAR GOVERNMENT

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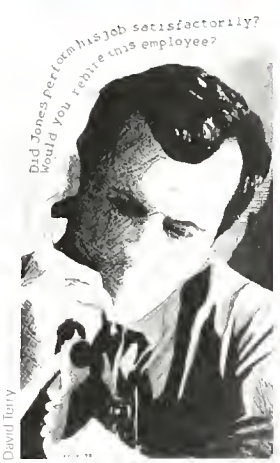

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On the Cover: *More and more, public art like* The Cyrillic Projector *is gracing the everyday environment in North Carolina. Illuminated at night, this perforated-bronze sculpture by Jim Sanborn enlivens the plaza between the Ida and William Friday Building and the E. K. and Dorne Fretwell Building on the campus of The University of North Carolina at Charlotte. The photo is from the North Carolina Arts Council. The image is of original work owned by the North Carolina Department of Cultural Resources.*

The Art of Public Art

IN THE LOBBY OF THE NATIONAL GUARD MILITARY CENTER ON THE western edge of Raleigh hangs a haunting portrait of a young citizen soldier preparing for active duty. Wearing a casual shirt and a baseball cap, he faces a mirror, his back to the viewer. A newspaper lies open on the bureau below the mirror. "Guard Mobilized!" its headline shouts. In the mirror the man's image wears fatigues and a flak helmet. For Major Danny W. Hassell, this work made from hundreds of tiny pieces of wood "goes to the very heart of what the National Guard is all about; I think you can imagine the thoughts that are going through this man's mind."[1]

Untitled marquetry (hand-cut wood panels), by Silas Kopf, 1992, at the National Guard Military Center, Raleigh.

WHEN THE SUN BEGINS TO SET OVER THE campus of East Carolina University in Greenville, the broad, brick-lined plaza in front of Joyner Library comes alive with sound and lights. Keeping time to a recorded drumbeat, water dances across the surface of a high wall adjacent to a clock tower. Below the tower rises a wispy fog, illuminated by subterranean lights. As the sun's last rays strike the tower, a set of doors opens, a small pirate cannon rolls out and—boom!—salutes the evening. For library director Carol Varner, this interactive entryway "pulls people in and makes them want to experience the library and the rest of the campus in a different way."[2]

IN WEST JEFFERSON A LARGE PAINTING OF MOUNT JEFFERSON SURROUNDED by rhododendron, columbine, trillium, and other native plants and trees has transformed a once-drab wall facing a parking lot on the main street. Local arts council administrator Jane Lonon says the mural "is absolutely the most beautiful, classy work of art to hit Ashe County ever! Local folks are seeing firsthand what a difference using the arts as a vehicle for downtown revitalization can make."[3]

The author is a free-lance writer who specializes in politics and government.

Right: Sonic Plaza *(interactive sound-and-electronics sculpture), by Christopher Janney, 1998, at East Carolina University. Photo © 1998 by PhenomenArts, Inc.*

Below: Chalice *(concrete and salvaged-stainless-steel sculpture), by Al Frega, 1996, at Moore Hall, Western Carolina University.*

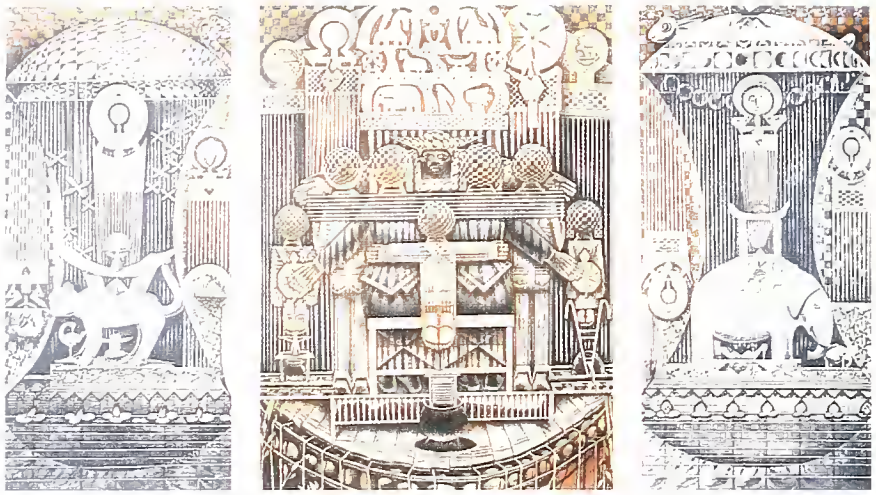
All photos accompanying this article, except that of *Sonic Plaza*, are from the North Carolina Arts Council
All images are of original works owned by the North Carolina Department of Cultural Resources

Throughout North Carolina, public art is transforming the built environment. No longer limited to oil paintings in lobbies or granite sculptures in gardens, public art today may be landscaping that incorporates words formed by artfully arranged plants, or a "waterwall" of hand-carved tiles made by clients of a mental health, developmental disabilities, and substance abuse center. More and more, public art in North Carolina is site-specific, with artists working alongside architects from the start of the design process in order to incorporate art into the finished project. And whereas public art once was mainly reserved for grand government structures like the capitol and the legislative buildings, it now graces locations as varied as they are commonplace—a small-town rose garden or cemetery, a police station, even a farmers' market.

Just as varied are the mechanisms for funding public art, from state programs to city set-asides to all-volunteer efforts. This article looks at the range of public art in North Carolina by focusing on two state programs and four municipal approaches. A sidebar (see page 7) presents recommendations for initiating projects and pursuing funding.

WHAT IS PUBLIC ART?

Jean McLaughlin, director of North Carolina's Penland School of Crafts, defines "public art" as art that is "in your everyday environment; it's not part of a museum collection."[4] For sixteen years, McLaughlin headed the Artworks for State Buildings program, North Carolina's major avenue for placing art in the public environment.[5] She continues to be a leading



Family Arc *(original color lithograph), by John Biggers, 1994, at the Student Services Building, North Carolina Central University.*

proponent of public art; this summer on Penland's campus in the Blue Ridge Mountains, the school is sponsoring a two-week session on public art, at which architects, landscape architects, and urban planners in the state will meet with artists, craftspeople, and artisans.

Public art is necessary, McLaughlin believes, because as we alter the physical environment, we need to be careful how we create space for people. "I see public art as one way to make sure there's attention to people, to human scale, to creativity and imagination," McLaughlin explains. "When public art succeeds, it challenges us to think, it sparks our imagination and stimulates our senses and our mental faculties. It is 'provocative' in the best sense of that word."[6]

STATE-FUNDED PROGRAMS

Artworks for State Buildings

In this country, programs that set aside "a percent for art" have been around since the 1940s, when Philadelphia launched the original one. By 1982, when North Carolina's General Assembly approved this state's first program, similar ones existed in nearly thirty other jurisdictions (states and cities).[7] Rather than designating a percentage of construction funds for art, as other programs did, North Carolina's Art Works in State Buildings Act[8] set aside a flat amount of $5,000 for the first fiscal year, which it increased to $10,000 for the second year. In 1987 the act was amended, and 0.5 percent of the amount spent for the construction, the remodeling, or the renovation of each state building with a budget of more than $500,000 was set aside for art associated with the building. Responsibility for the program was given to the North Carolina Arts Council, a division of the Department of Cultural Resources.[9]

The act was repealed four years ago during budget negotiations and without debate.[10] Even now, the circumstances of its quick demise are a mystery. North Carolina Arts Council director Mary Regan remembers that "the legislature was looking for a lot of things to eliminate. [The program] was in the budget one day, and then the next day, when the budget was reported out, it wasn't. No one really led a charge against it; it happened quietly."[11]

Although the set-aside died quietly, it generated

ASL [American Sign Language]: Past, Present, and Future *(neon sculpture), by Betty Miller, 1996, at the Eastern North Carolina School for the Deaf, Wilson.*

much discussion in its short life, not all positive. Two projects in particular, *The Education Wall* at the state Education Building and *Spiraling Sound Axis* at the state Revenue Building, both on North Wilmington Street in Raleigh, raised the ire of some lawmakers and their constituents. Critics complained that the 30-by-90-foot granite wall sandblasted with education images, including a child's drawing of a schoolhouse, a line of poetry, and Cherokee symbols, was questionable art and, with a price tag of $110,000, a waste of taxpayers' money.[12] They expressed similar objections to the even more expensive ($130,000) "sound sculpture," which featured recordings of horses on cobblestones, tobacco auctioneers, bullfrogs, geese, and thunderstorms.[13] Even State Senator Howard Lee, a strong supporter of the program, believes that, for those two projects at least, the funds might have been better used. "Art is in the eyes of the beholder," he says, adding that most people find traditional paintings and sculpture more acceptable.[14]

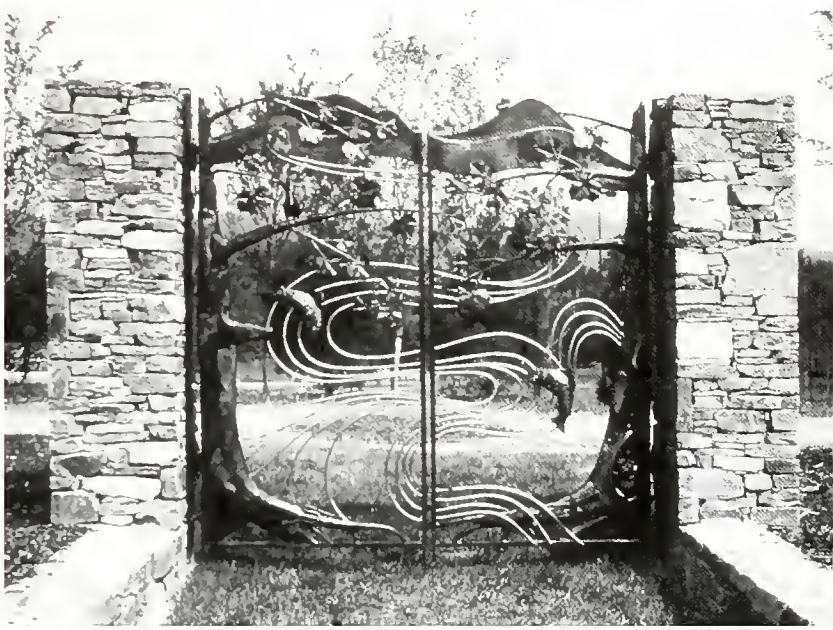
Scope of Projects

When the legislature eliminated the 0.5 percent set-aside, a number of projects had been funded but not completed. "The funding was cut off before there was a lot of evidence of the kinds of art that would be in the program, before there were lots of things around the state," Regan says, lamenting that the program was killed "before it had a chance to show what it could do."[15] The last of the sixty projects funded by the program will be completed this year. There is a wide variety in their location, cost, size, and medium.

The projects include a $10,000 neon sculpture, *ASL: Past, Present, and Future* (ASL standing for American Sign Language), at the Eastern North Carolina School for the Deaf, in Wilson; a $27,000 landscape of formal and natural plantings at the Agronomics Laboratory in Raleigh; and $16,000 forged-steel gates for the North Carolina Arboretum in Asheville, with images of a stream surrounded by sycamore trees and of paths bordered by rhododendron and pitcher plants. More than half of the installations are at state schools and universities, but there also are works at Dorothea Dix Hospital in Raleigh, the Murdoch Center (a long-term care and treatment facility for persons with mental retardation) in Butner, the North Carolina Zoo in Asheboro, the Piedmont Triad Farmers Market in Greensboro, and the Thomas Wolfe Memorial Visitor Center in Asheville. Although three projects—*The Education Wall, Sonic Plaza* (at East Carolina University), and *Spiraling Sound Axis*—cost more than $100,000 each, fifteen installations, including the hand-cut wood panel at the National Guard Military Center, cost $10,000 or less.[16]

Future of the Program

As its reach and scope expanded, the program gained more supporters, even among people who were initially skeptical. Donald W. Eaddy, director of Agronomic Services (housed in the Agronomic Laboratory), was a member of the selection panel for the landscape project, *Nature/Nurture*, at the building that now carries his name. "I was very concerned in the beginning," he remembers. "I was not sure we would come out with something that would be acceptable to the agricultural community. But the development really describes our mission here, taking our natural resources and using them for the benefit of man, . . . at the same time protecting them for future generations. So I am very pleased."[17]



Stream Garden Gate *(forged- and stainless-steel gate), by David Brewin and Joseph Miller, 1996, at the North Carolina Arboretum, Asheville.*

Senator Lee believes that "there are enough successes now that we shouldn't abandon the program." During the last legislative session, at the request of Betty McCain, secretary of the Department of Cultural Resources, he introduced a bill to reinstate the program. The bill never made it out of committee, however. "At the last minute, the appropriations chairs

Clockwise from top left: Nature/Nurture *(environmental sculpture), by Page Laughlin, Christine Hilt, and James G. Davis, 1994, at the Agronomics Building, Raleigh.* Font (Lumbee River) *(terrazzo-and-bronze sculpture), by Kenneth Matsumoto, 1995, at The University of North Carolina at Pembroke. Children viewing detail of* North Carolina Belongs to the Children *(acrylic on canvas), by James Biggers, 1994, at the State Legislative Building, Raleigh.*

just didn't feel like we could make this kind of commitment," he recalls. "I think it was a question of money more than anything else. There are people who feel that making that level of commitment for art in public buildings is hard to justify when you need things like public schools."[18]

Regan is optimistic that the program will be revived "when the time is right." In the meantime, Arts Council staff will maintain the sixty projects that were accomplished under the program, develop education resources related to the projects, and respond to calls from municipalities around the state interested in developing public art in their communities.[19] Meanwhile also, private organizations or individuals may fund public art on state property—as has already happened in a few cases, most notably at the North Carolina Zoo.

New Works

Another avenue for channeling state funds into public art projects is New Works, a dollar-for-dollar matching-grant program that also is administered by the North Carolina Arts Council. Begun in the late 1980s to encourage organizations to commission new works, the program "really opened up possibilities for organizations that weren't arts organizations but . . . wanted to commission art for public spaces," says Jeff Pettis, New Works' visual arts director. Unlike the Artworks for State Buildings program, the New Works program has been free of criticism. "When public money is involved, you could run into controversy," Pettis acknowledges, "but the positive benefits of a program like this so far outweigh any potential risks that people have really embraced it."[20]

A Sample of Projects

A New Works grant covered almost half the cost of the Ashe County mural, which was sponsored by the local arts council and the county Revitalization Committee in a partnership that has been described as "positive, active, and supportive." Lonon, the arts council administrator, says that the 12-by-29-foot mural on a West Jefferson bank building "is just the start of a major downtown . . . 'sprucing up.'"[21]

On Mother's Day last year, the Wilson Rose Garden opened on city land after six years of hard work by a dedicated group of volunteers. The 140 varieties of historical and modern roses—a total of a thousand plants—were in full bloom and "made quite a splash," says Rufus Swain, chair of the rose garden committee. By next Mother's Day, the committee hopes to have a work of art on a circle at the midpoint of the main walk into the garden. "We always anticipated we would need some kind of focal point for the garden, and we went to the state Arts Council to get assistance with what we'd need and how we'd go about it," Swain explains. The committee received a $1,500 planning grant from the North Carolina Arts Council as well as help putting together a request for proposals and a list of sculptors to whom the request should be mailed. Three finalists have been chosen from among the twelve proposals the committee received. Once the final selection is made, the committee will seek private funds to commission the artwork, budgeted at $20,000.[22]

The Cleveland Center in Shelby houses mental health, developmental disabilities, and substance abuse programs for Cleveland County. Six years ago, with the help of a $4,500 New Works grant, the center began developing *Restoration Garden*, a therapeutic natural environment. Completed in 1997 at a cost of $35,500, the garden features a 4-by-8-foot waterwall made of 224 hand-carved, glazed ceramic tiles in shades of bronze, blue, green, and burgundy. According to a newsletter on gardening as therapy, the waterwall "transforms unused space into a beautiful and functional environment."[23] To fund its "building blocks," the Cleveland Center sponsored two workshops in which more than 200 clients, staff members, and community volunteers paid $25 each to create a tile in honor or in memory of someone. "One of the most interesting results of this project," said Anne L. Short, project director, "was our ability to use the workshops to tell the stories of the mentally ill and developmentally disabled individuals we serve."[24]

MUNICIPAL EFFORTS

Cary

With a local nonprofit group raising money for public art, the Cary Town Council decided it needed "a sound public process" for accepting and developing projects, so last year it set up a cultural arts committee to review all proposals for art on town property.[25] The first piece accepted under the new policy was a stainless steel sculpture at a major gateway to town near the SAS Institute. The sculpture was commissioned and paid for by Cary Visual Arts, a nonprofit group whose 120

APPLYING FOR FUNDS

Paying for public art sometimes requires as much creativity as the art itself, and the result may not be universally well received by taxpayers. Following are some suggestions for developing public art and ensuring taxpayers' satisfaction, offered by those who have successfully negotiated the process:

- Start with a small group.
- Don't be afraid to ask for help.
- Draw on the expertise of the North Carolina Arts Council. The staff can be called on for advice and maintains a voluminous resource file of visual artists.
- When applying for competitive grants, do your homework ahead of time and make sure the proposal is well developed.
- Keep the process as broad-based as possible. Open it to the public, and make it a venue for community participation.
- Have the artists participate in grassroots workshops with the community.

Municipalities or 501(c)(3) (nonprofit) organizations interested in applying for a New Works matching grant from the North Carolina Arts Council should request a copy of the grant guidelines well in advance of the yearly March 1 application deadline. The grants are competitive, and only twelve to fifteen are awarded each year. Because the total yearly grant budget is around $40,000, the council may fund projects for less than the amount requested.

Among the criteria New Works staff look for is breadth of effect. "These are statewide grants, so we're looking at whether a project will have a wider potential reach than a specific local interest," Jeff Pettis, director of visual arts for New Works, explains. "It's always a good idea for applicants to call us in January or February to talk about their projects before applying, because we can help them put together applications."[1]

NOTES

1. Jeff Pettis, visual arts director, N.C. Arts Council New Works grant program, telephone interview, Jan. 6, 1999.

Untitled glass wall, by David Wilson, 1997, at the Kenan-Flagler Business School, The University of North Carolina at Chapel Hill.

members pay dues of $30 to $50 a year and sponsor the annual Cary Art Ball. For each of the past two years, the ball has raised more than $150,000 after expenses for commissioning public art. Its first project, already installed on the grounds of town hall, was a series of six cast-bronze sculptures. Victoria Castor, executive director of the arts group, explains that Cary Visual Arts started with "a group of private citizens who mostly had lived in Cary all their lives and really felt strongly about art as a way to beautify the town."[26]

Charlotte

Charlotte is unique in the state in being the only municipality with a percent-for-art program. A 1988 ordinance sets aside up to 1 percent of the construction or renovation funds for all public buildings for art. The program, which is under the local arts and science council, has a full-time director as well as two full-time and one part-time staff members. A public art commission of twelve members, half of them appointed by the city and half by Mecklenburg County, works with the director and the staff. In the last five years, more than fifty projects have been completed at sites as varied as libraries, community centers, a police station, a social services building, and a ballpark. The staff also works in partnership with businesses to develop privately funded public art, including an interactive sound-and-light installation for NationsBank on top of a parking garage. So far, says program director Jennifer Murphy, "everybody has appreciated every piece we have done."[27]

Raleigh

Five years ago, under the leadership of its arts commission, Raleigh embarked on a public art plan. With city money the commission erected the *Light + Time Tower*, a 40-foot-tall structure of galvanized steel with twenty panels of clear glass that act as prisms, catching sunlight and fracturing it into wavelengths so that the glass appears colored. The industrial-looking tower, part of a plan to beautify Capital Boulevard, was immediately criticized by many residents who felt it was unsightly. Arts commission director Martha Shannon says the commission thereafter changed its focus somewhat, away from applied art and toward art education. With grants from the A. J. Fletcher Foundation and the North Carolina Arts Council, the commission developed a teacher's guide to public art complemented by thirty-three slides, and distributed sets to public schools throughout Wake County, as well as to others in the state. Shannon says the response from teachers has been "tremendous." The commission now is updating its five-year plan and is looking for grants to begin another public art project.[28]

Salisbury

With guidance from the Waterworks Visual Arts Center, the nonprofit arts center for Rowan County, Salisbury is planning the Freedmen's Cemetery Memorial Project. When completed, the memorial will stand on an open grassy knoll between the predominantly African-American Soldier's Memorial AME Zion Church and the predominantly white, walled cemetery in the center of town. Research indicates that about 120 people are buried in unmarked graves on the site. According to Denny Mecham, Waterworks' director, historically those in power have defined art because "they create it and they commission

the artists." One of the critical issues in the Salisbury project, Mecham says, is that "the contributions of 30 percent of the population have never been acknowledged. This project is an acknowledgment of the contributions of a whole culture to Salisbury's history." Waterworks' funding comes from memberships, foundation grants, and the North Carolina Arts Council. The projected budget for the memorial project is $30,000.[29]

CONCLUSION

Inspired by varied impulses and taking many forms, public art has, throughout time, helped define a special place, commemorate a critical event, or express an idea. It is, in the words of the Raleigh Arts Commission, "for everyone to see, enjoy, and learn from."[30] It may even provoke, especially when public funds are used. If money is tight and a project is over budget, the temptation may be to cut back on art, but "over time," Charlotte's Jennifer Murphy thinks, "people see that the value of what's created is far greater than the cost."[31]

NOTES

1. Major Danny W. Hassell, facilities engineering supervisor, N.C. National Guard, telephone interview, Jan. 6, 1999. Artist Silas Kopf's untitled marquetry (hand-cut wood veneer) panel, completed in August 1992, cost $7,106. The work, made of thirty species of wood, was funded by the Artworks for State Buildings program.

2. Carol Varner, director, Joyner Library, East Carolina University, telephone interview, Jan. 5, 1999. *Sonic Plaza*, by artist Christopher Janney, was completed in November 1998. Funding for the $106,936 installation came from the Artworks for State Buildings program.

3. Jane Lonon, executive director, Ashe County Arts Council, in *Final Report, North Carolina Arts Council New Works Grant* #9800768 (West Jefferson: July 15, 1998), p. 1. *Spring Flowers on Mount Jefferson*, by Burnsville artist Robert Johnson, was completed in June 1998. The North Carolina Arts Council New Works grant provided $2,500 of the total cost of $5,900, with remaining funds coming from the Ashe County Revitalization Committee and the Ashe County Arts Council.

4. Jean McLaughlin, director, Penland School of Crafts, telephone interview, Jan. 12, 1999.

5. McLaughlin, who joined the staff of the North Carolina Arts Council in 1975, researched and wrote the legislation for the Artworks for State Buildings program in the 1970s. When the program was approved in 1982, she was named director. She resigned in May 1998 to become director of Penland School of Crafts.

6. McLaughlin interview, Jan. 12, 1999.

7. Beverly Ayscue, public art administrator, Artworks for State Buildings program, interview, Dec. 15, 1998. Also N.C. Arts Council, *A Guide to North Carolina's Artworks for State Buildings* (Raleigh: N.C. Department of Cultural Resources, April 1996).

8. The 1982 legislation that created the state program, N.C. Gen. Stat. Art. 47A, Ch. 143 (hereinafter G.S.), used the name Art Works in State Buildings. The 1987 amendment described later in the same text paragraph referred to it as Art Works for State Buildings. The North Carolina Arts Council, which runs the program, refers to it as Artworks (one word) for State Buildings.

9. G.S. Art. 47A, Ch. 143.

10. 1995 N.C. Sess. Laws ch. 324, § 12.2, effective July 1, 1995.

11. Mary Regan, director, N.C. Arts Council, telephone interview, Jan. 5, 1999.

12. North Carolina Arts Council, "*North Carolina Artworks for State Buildings*" *Project Update* (Raleigh: N.C. Department of Cultural Resources, Aug. 1, 1998). Also Geoff Edgers, "Artful Departure," *Raleigh News & Observer*, May 7, 1998, available at http://search.news-observer.com/plweb-cgi/nao_search.cgi.

13. N. C. Arts Council, *Project Update*; Edgers, "Artful Departure."

14. Howard Lee, North Carolina senator, telephone interview, Jan. 8, 1999.

15. Regan interview, Jan. 5, 1999.

16. N.C. Arts Council, *Project Update*. A description and a photograph of each project, its location, its cost, and the name of the artist can be found at the N.C. Artworks for State Buildings Web site, www.ncarts.org/artists.

17. Donald W. Eaddy, director, Agronomic Services, telephone interview, Jan. 7, 1999.

18. Lee interview, Jan. 8, 1999.

19. Regan interview, Jan. 5, 1999.

20. Jeff Pettis, visual arts director, N.C. Arts Council New Works grant program, telephone interview, Jan. 6, 1999.

21. Lonon, in *Final Report*, p. 1.

22. Rufus Swain, chair, Wilson Rose Garden committee, telephone interview, Jan. 5, 1999.

23. *Carolina News* (newsletter of the American Horticultural Therapy Association, Carolina Chapter) (June 1997).

24. Anne L. Short, project director, Cleveland Center, in *Final Report, North Carolina Arts Council New Works Grant* #9700494 (Shelby: July 14, 1997), p. 1.

25. Town of Cary, *Policy Statement 116: Art in Public Places* (Cary: adopted Jan. 8, 1998).

26. Victoria Castor, executive director, Cary Visual Arts, telephone interview, Jan. 13, 1999.

27. Jennifer Murphy, director, Charlotte Public Art Program, telephone interview, Jan. 5, 1999.

28. Martha Shannon, director, City of Raleigh Arts Commission, telephone interview, Jan. 6, 1999.

29. Denny Mecham, director, Waterworks Visual Arts Center, telephone interview, Jan. 4, 1999.

30. City of Raleigh Arts Commission, "*Light + Time Tower,*" *An Artwork Based on Physics* (Raleigh: n.d.).

31. Murphy interview, Jan. 5, 1999.

Responsibility for the Security of North Carolina's Courts

JAMES C. DRENNAN

"I don't feel safe at all. There's not very much security around here. I think there should be deputies patrolling the hallway, or officers—whatever they decided to put. And there should be metal detectors at the doors. It's just not a very safe place anymore."

—An assistant clerk of court in Orange County, after a woman was attacked in a courthouse restroom in September 1998

Court proceedings have some common features conducive to violence. They all involve conflict, often the kind that arouses deep emotions in those affected. They also entail coercion, for most people attending to business at a courthouse have no choice about being there. Finally, they often involve people who have been unable to conform to society's norms or control their impulses. Yet citizens reasonably expect courthouses and courtrooms to be among the safest places in the community. So security measures often are necessary to prevent incidents and to handle those that occur.

Court security has received new attention in the last few years for a variety of reasons. High-profile and extreme cases like the bombing of the federal courthouse in Oklahoma City certainly contribute to the increased concern. But less dramatic incidents like the one in Orange County are more typical and more likely to heighten the sense of many court officials and citizens that the courthouse is not a safe place. In surveys conducted by the North Carolina Administrative Office of the Courts, inadequate security and a fear of violence consistently rate among court officials' most pressing concerns. That has prompted the Administrative Office of the Courts (AOC) to issue guidelines for court security (see story, page 13).

The author is an Institute of Government faculty member who specializes in court administration.

The issue is difficult because the incidents are still rare. But they can occur anywhere—in rural areas as well as metropolitan ones, in appellate courts and trial courts, and, as shown by the Orange County attack, in common areas used by the public. And when they happen, inevitably questions are asked about how and why they were not prevented.

The new guidelines offer help to those involved in providing security. This article discusses the roles of the governmental entities that are responsible for court operations.

GOVERNMENTAL RESPONSIBILITY FOR SECURITY

An examination of the government's duty to provide effective court security offers an excellent case study in intergovernmental relations. The issues involve multiple actors in both state and local government. Many of the legal issues are not yet clearly answered by case law or statutes.

At the state level, the legislative and judicial branches are involved. The legislature may decide the policy issues, including the scope and the allocation of responsibilities, and it provides some funding for security and related needs. Within the judicial branch, state-level administrators (the Administrative Office of the Courts) and local trial courts play a role in providing court security. In the trial courts, some responsibility lies with the senior resident superior court and chief district court judges, who have continuing administrative authority. Some responsibility also lies with the judges assigned to preside over specific cases.

At the local level, responsibility for court security rests with both the county commissioners (and the county's chief executive, the county manager) and the sheriff.

This complex array of governmental intersections presents three basic questions and related legal issues:

- Who has the duty to provide security for court operations or to ensure that security is provided?
- If an issue arises about whether those responsible for security are meeting their duty, who has the authority and the power to direct the responsible entities to take specific measures or to make general improvements?
- If disagreement occurs between an official with authority to request or order new security measures and the official responsible for taking the measures, how is that disagreement resolved?

Governmental Entities Responsible for Court Security

As with most issues relating to court administration, the starting point for determining who is responsible for court security is the structure put in place in 1962 when the General Assembly and the people of the state established the current uniform court system in the state constitution. In simple terms their decision was to make the courts a state function. The offices and the positions then supported by local funds (clerks, justices of the peace, and lower court judges) were replaced by new state offices and positions. The facilities in which those people worked, however, remained the county's responsibility. Thus counties were relieved of nearly all funding responsibility for the court system, with the major exception of providing the facility. The fundamental decision was that the county would provide the space and the state would provide the operating costs. This principle does not answer all the questions that arise, but it is the starting point for most of them.

The principle is important in determining the allocation of duties for court security because a facility's design is an important variable in an effective security program. But specific offices in both the courts and local government have operating responsibilities for security, as follows.

Administrative Office of the Courts. By constitutional mandate the state provides operating funds for the court system.[1] The state agency responsible for administering the funds and providing other administrative support is the AOC.[2] The AOC submits and administers the court system's budget;[3] provides equipment for the trial courts with state funds;[4] and investigates, recommends, and helps obtain adequate physical facilities for the courts.[5] The AOC's responsibilities over facilities and court operations in general extend to analyses and recommendations, but it has no direct authority to order local governments to act in any specific way, such as to take specific security measures.

Judges presiding over trials. Trial judges make decisions about the conduct of trials and the security measures to be taken in response, either in the context of a specific case or as part of their administrative duty. It is fairly clear that, when a factual basis has been established, judges have the power to order the measures necessary to administer justice within the scope of their jurisdiction.[6] Those measures may include actions to provide adequate security and to control

behavior that is disruptive to the court, and any related measures, and any judge conducting a proceeding may exercise them." In *State v. Lemons*,[8] the North Carolina Supreme Court upheld a trial court judge's order in a capital case that a sign be posted on the courtroom entrance advising the public not to enter unless they had business in the courtroom and warning that all persons entering would be searched for weapons. The court rejected the argument on appeal that this security measure violated the defendant's constitutional right to an open trial, noting that the case dealt with a sign, not outright closure of the courtroom, and that defense counsel supported posting the sign. The court relied on G.S. 15A-1034(a), which gives the presiding judge authority to "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings."[9] Judges commonly order special security measures when, for example, witnesses, jurors, or court officials have been threatened; when weapons or other dangerous items have previously been found in the vicinity of the courthouse; or when they have reasonable grounds to believe that public interest in a case will run so high that security controls will be necessary to maintain order and provide a fair trial.

Judges with administrative responsibilities. In each judicial district, two judges have administrative responsibility for the court's operations: for superior courts, the senior resident superior court judge; and for district courts, the chief district court judge. Their authority, which is not tied to any specific case, derives in part from statutes and in part from rules adopted by the supreme court to govern trial proceedings. G.S. 7A-41.1 provides that "all duties place[d] by the Constitution or statutes on the resident judge of a superior court district, . . . which are not related to a case or controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged . . . by the senior resident superior court judge. . . ." G.S. 7A-146 provides that "[t]he Chief District Judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the District Courts and magistrates in his district." Rule 2 of the Rules of Practice for the Superior and District Courts gives both the superior court and the district court the power to promulgate local rules for managing cases on the civil dockets. Other statutes and rules confer similar authority on these officials to issue bail or fingerprint policies and to perform many similar administrative tasks. When circumstances threaten safety or challenge the ability of the court to maintain order and decorum, these judges often negotiate with those who are responsible for providing security. Sometimes, relying on their inherent authority as judges, they direct that specific actions be taken.

The county. The county is responsible for providing "courtrooms and related judicial facilities."[10] Those facilities must be "adequate" to meet the needs of the courts.[11] G.S. 153A-169 gives the county the authority to make decisions about the property in its control and to designate the uses to which county property may be put. It specifically authorizes the county to determine the location of the county courthouse. A county's decisions about the location, the size, and the design of court facilities and related spaces (like parking lots) have a significant effect on the extent to which a facility is secure. In addition, the location and the design of related county facilities like jails can have a significant effect on court security issues.

The sheriff. The constitution establishes a sheriff's office in each county, the holder of that office to be elected by the voters every four years.[12] The sheriff has a variety of statutory duties. He or she must run the county jail, if there is one, and serve civil papers in lawsuits. In most counties the sheriff also provides law enforcement. Finally, G.S. 17E-1 provides that the sheriff is "the only officer who is responsible for the courts of the state, and acting as their bailiff and marshal." That provision codifies a common-law understanding of the duties of the sheriff. The sheriff therefore must provide court security services. The sheriff obtains funds to operate his or her office from the county. On operating matters, however, because he or she is elected, the sheriff has the discretion to manage the office consistently with the responsibilities assigned to it.

Specific Security Issues

Within the framework of responsibilities just described, specific issues arise concerning facilities, equipment, and personnel.

STATE PROJECT ON COURT SECURITY

In recent years, anecdotally and in formal surveys, judges and other court officials have cited violence and the threat of it as among the most serious concerns facing the administration of justice in North Carolina. Virtually every county has had incidents, from fights or bomb threats to shootings or rapes. In response to the refrain that "something needs to be done," the Administrative Office of the Courts (AOC) obtained a grant from the Governor's Crime Commission to address the issue. The goal was to inform county and court officials about what can be done, and how.

The AOC formed an advisory committee of court and county officials from all the interested offices and retained an expert in security. The resulting study included a statewide survey to assess present needs and priorities in court security, and inspection of five county courthouses to gain practical knowledge about the issues in and the obstacles to improving security.

The product, *North Carolina Court Security Guidelines*, was distributed in September 1998 to court and county officials statewide—judges, county commissioners, county managers, sheriffs, clerks of superior court, and others. The guidelines detail an approach for court and county officials to work together in evaluating security needs, developing policies and procedures, implementing improvements, and providing continuing review and enhancement. The guidelines also set out specific measures for screening for weapons, controlling access to buildings and grounds, securing courtrooms, stationing and training court security officers, designing courthouses, and conducting high-profile trials.

Cooperation, not funding, can be the biggest obstacle to making North Carolina courts safer. Some of the most urgent and effective ways to improve security cost next to nothing—for example, locking all outside doors except one. However, duties and authorities for the courthouse environment, for security in particular, are divided among judges, county commissioners, and the sheriff (hence the makeup of the advisory committee). The guidelines contain not only recommendations that fall within the purview of each of these officials but approaches that all of them can take together.

Court and county officials did work together in generating the guidelines, identifying such problems as overlapping or ambiguous authorities, and developing sound, practical, unanimous recommendations. In this important way, the guidelines offer proof that North Carolina can achieve adequate security through successful negotiation and cooperation toward a common goal—safety for court employees and the public.—*Rick Kane*

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Copies of the guidelines are available free of charge from Rick Kane, Administrative Office of the Courts, P.O. Box 2448, Raleigh, NC 27602, phone (919) 733-7107, e-mail rick.kane@aoc.state.nc.us.

Facilities

With regard to facilities, the issue that arises is whether the facility in which court operations are conducted is adequate to provide a reasonable degree of security. The law is clear that the facility must be adequate. What if there is a disagreement about adequacy, for lack of security or some other reason?

In 1991 the North Carolina Supreme Court held in the *Alamance County Court Facilities* case that "when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient administration of justice."[13] This holding established clearly for the first time that judges have the power to order another branch of government (the county in this case) to provide adequate court facilities. Their doing so would be an extraordinary action, and the supreme court was careful to emphasize that. Guided by the principle of separation of powers, the court specifically held that the remedy chosen must minimize the intrusion on the other branch and that the procedures followed in deciding to order the other branch to act must be consistent with established procedures and due process. One important effect of those limitations is that, although the court may order the county to act, the county retains the discretion to determine how it will provide the adequate facility.

The *Alamance County* case is important because it establishes a remedy by litigation that had previously eluded those who had tried to fix what they thought to be inadequate court facilities. The case dealt with one kind of inadequacy, lack of space. It did not specifically address security issues. However, extending the ruling in *Alamance County* to facilities that are inadequate

because they do not provide adequate security would be consistent with the logic employed by the court. Other state supreme courts have approved local court orders requiring local governments to spend money for ongoing court operations when the necessary factual basis has been established.[14] One case out of Indiana, *Carlson v. State*, dealt with issues that might reasonably be construed to involve security. In that instance the court upheld a local judge's order directing that the local government make funds available to hire bailiffs to provide adequate security (among other responsibilities).[15] The *Carlson* case involved security personnel, not facilities, but together the two holdings suggest that, in a proper case, a facility that is inadequate because it does not provide adequate security could be the subject of an inherent-powers lawsuit.

Security Equipment

Another issue that arises is identifying who is responsible for supplying the physical items (metal detectors, bulletproof benches for judges, and so forth) needed to provide adequate security. There are two subissues. First, are these physical items needed as part of the court's operations, or are they more appropriately considered to be part of the facility? Second, even if they are not part of the facility, is a duty to furnish them imposed on the sheriff by virtue of his or her responsibility to provide security?

The law provides no clear answers to the first question. As a result, court officials and local governments often have disagreed on items. In general, if the item sought is equipment to be used for court operations, purchase of it is an operational expense, and the duty to provide it falls on the state and the AOC. If the item sought is part of the facility, the duty to provide it falls on the county.

Some items are easily assigned to one or the other category. Furniture is an integral part of providing a facility, so it is the county's responsibility.[16] The computers and related equipment needed to provide information to and about the courts are essential to judicial operations but not a necessary part of a facility. Therefore they are the state's responsibility.[17]

But many items are not as easily assigned to either the state or the local government. Clearly the state has the duty to provide basic computer equipment (terminals, hardware, software, and printers), but questions frequently arise about some of the component parts of an effective computer system, including the cabling inside courthouses and related court facilities that links them to the state's computer. Is the cabling part of the facility, or is it operating equipment? How one answers that question determines who must pay for its purchase and installation. Although computer cabling does not concern security, the handling of it illustrates how these issues are addressed. Further, because cabling purchases and installations are common, some precedents make the issue useful as a guide for the resolution of other issues.

Although cases and statutes provide no definitive answer, they suggest some factors that may bear on the question:

1. If the item is permanently affixed to a structure (for example, if it is a fixture or a part of the structure, like a built-in bookshelf), that suggests it is part of the facility.
2. If the item is used with persons other than court officials and patrons (for example, a permanent metal detector at a common entrance), that suggests it is not integral to court operations.
3. If the item would commonly be included in the construction costs of a new facility (for example, a sound system for a courtroom), that suggests it is a facility cost, even if it is being added to an existing facility.
4. If the item is unique to court operations (for example, transcribing equipment or special filing equipment), that suggests it is an operating expense. Conversely, if an item is not unique to court operations and not operated or controlled by court personnel (such as a portable metal detector used by sheriffs' deputies), that suggests the equipment is not an aspect of court operations per se.
5. If the General Assembly, which established the operations/facility dichotomy, allocates state funds to pay for the activity, that suggests it views the activity as an operating expense. If, on the other hand, the legislature has not provided funds for the activity, that implies it does not consider the cost to be a court operating expense.

Using factors such as these, parties generally have resolved the issue of computer cabling by negotiation. The typical result has been that the cost of providing cabling within the courthouse itself is considered a facility expense.

A similar analysis would apply to security equipment. Typically, permanent metal-detection equipment is installed to provide security and to deter persons who might bring weapons to court. This equip-

ment often is used in common areas that provide access to county operations as well as court operations. Both the fact that it is permanently installed and the fact that it serves county and court officials suggest that it is a county responsibility. Either fact is probably sufficient to make it a county responsibility using the traditional analysis.

Therefore some equipment needed for security probably falls clearly in the facility category. Sometimes, though, equipment is needed for a single, high-profile trial, and its use may be limited to a single courtroom. If in that situation officials use a hand-held metal detector at the courtroom door, it is hard to argue that the device is part of the facility.

But it does not follow that the responsibility is the state's. The sheriff's longstanding common-law duty to provide court security, now also an explicit statutory duty, suggests that responsibility for providing such equipment lies with that office and not with the AOC or the state.

The county's discretion. The existence of a duty does not determine the manner in which the duty is met. *Alamance County* makes it clear that, even when ordered to provide adequate facilities, the county retains the discretion to decide how to meet that responsibility. In the *Alamance County* controversy, the court community wanted a single new judicial center that would combine all court operations under one roof. It did not get its wish. The county opted to build a new, special-purpose facility and retain the old courthouse. To extend that principle to issues affecting security equipment, the sheriff or the county retains discretion to determine how best to provide adequate court security. Either may opt to use bailiffs or other personnel instead of providing screening devices like metal detectors. Only if the appropriate court officials determine that the decisions about security do not provide adequate protection may the court order that more be done, whether that involves equipment, facility changes, or added personnel. In specific, high-risk cases, judges sometimes do enter orders limiting access to the courtroom, mandating searches of spectators, or calling for other measures.[18]

Voluntary actions by the AOC. In some instances the sheriff and the judge presiding over a trial or another proceeding may disagree over the need for security equipment and other security measures. In such cases the AOC may elect to provide supplemental equipment, and it has done so on a temporary basis. This is apparently a valid use of state funds and an action within the AOC's statutory mandate. In some high-profile trials, when there has not been enough time to resolve the issue before the court proceeding begins, or when the local government has been unable or unwilling to do so, the AOC has provided equipment that it thought should have been included in the facility's infrastructure or provided by the sheriff as part of his or her duty.

H. Lee Willoughby-Harris

A hand-held metal detector

Security Personnel

Security issues do not always involve equipment. Instead they may be raised by the quantity or the quality of the security personnel provided by the sheriff. In that case, may a court order the sheriff to provide additional personnel or improve the training of existing personnel? May it order the county to provide funds to the sheriff?

No statutes or cases in North Carolina speak to this issue. Courts in other jurisdictions have approved orders for expenditures to provide additional court employees.[19] Also, they have upheld orders that clerks be hired, reassigned, or otherwise directed to perform specified activities, even though they did not work directly for the courts and even when the orders forced reallocation of personnel from another county function to the work of the courts.[20] The precise holding of *Alamance County* and the rationale of the cited cases could easily be read to support court-ordered local expenditures. Until such a case is decided, however, the question will be open.

If the courts are found to have this inherent power, that will raise another issue. If a court finds that the number of security personnel is inadequate, what is the remedy, and against whom is it to be directed? The sheriff almost certainly has personnel other than the bailiffs and the deputies assigned to work on court security. Should the sheriff be directed to reassign those employees? Should the county be directed to provide additional staff to the sheriff? Or should the court simply direct the county and the sheriff to

provide adequate security and leave the manner of compliance to their discretion? These are difficult questions, but, given the deference shown to the county in *Alamance County*, the third question represents the probable choice.

Responsibility for operations and facilities, the scope of the court's inherent power, the county's and the sheriff's discretion in determining how to provide security, and similar issues share a characteristic. Almost none of them are clearly answered by current cases and statutes. The resulting uncertainty usually contributes to a commonly perceived need to resolve matters through negotiation rather than resort to legislation or litigation.

Judges' Authority to Order Security Measures

The discussion to this point has dealt with who has responsibility to provide secure facilities, special security equipment, and personnel. But who has the authority to decide that improved security measures are needed?

A county may unilaterally decide to upgrade security arrangements for a courthouse.[21] A sheriff may unilaterally decide to add bailiffs, improve bailiffs' training, or install metal detectors (if he or she can make an adequate showing of the need for them). That is not always how the issues arise, however.

A trial judge may determine that improvements in security measures are necessary to ensure a safe environment for court proceedings. G.S. 15A-1034 authorizes a presiding judge to limit access to persons who have been searched for weapons and to impose reasonable limitations on access. As explained earlier, in *State v. Lemons*, the court relied on this statute in upholding the posting of a warning sign on the courtroom entrance. G.S. 15A-1035 authorizes the presiding judge to take any other measures necessary to maintain courtroom order, through use of the inherent powers of the court.[22] Measures that have been ordered in some cases include adding security personnel, requiring spectators to sign in, requiring all persons entering the courtroom to pass through metal detectors, and providing secure transportation for jurors. In one extreme case, the security for the jury's transportation included helicopter surveillance, a police convoy, and armed guards on the street when the jury's vans passed by.[23]

But the issue may come up another way, or it may not be limited to a specific case. General security concerns are more appropriate for the chief district and senior resident superior court judges. They have the general duty of administrative oversight of the courts in their district on matters unrelated to hearing or disposing of a specific case. Pursuant to that duty, when circumstances pose a threat to safety or challenge judges' ability to maintain order and decorum, they often engage in negotiations with those who are responsible for providing security. Also, as noted earlier, sometimes they enter orders directing specific actions, relying on their inherent authority as judges.[24] In these instances the judge is acting in an administrative capacity, and not in the context of a specific case, in which more urgency might be involved.

Resolution of Security Issues

If a judge enters an order in a specific case or pursuant to his or her administrative authority, it is an order of the court, and the sheriff or other officials affected by the order are expected to comply with it. If there is a question, typically all those affected discuss the issues before the order is entered. Unfortunately, though, sometimes judges enter orders without consultation. Other times there is consultation but no agreement.

In either instance, if there is resistance and if the need to provide orderly proceedings is clearly demonstrated, the court may consider using its contempt power to enforce the order. G.S. 15A-1035 clearly authorizes a judge to use contempt proceedings to maintain courtroom order, and G.S. 5A-11(a)(6) establishes as one ground for contempt the "willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction." Cases commonly cite the principle that courts possess the contempt power because, to administer justice, they must be able to enforce their mandates. Among those mandates are that the courts be open and that trials be fair. Lack of security can threaten both.

But contempt is an extraordinary remedy, especially when used against a government employee acting in his or her official capacity. North Carolina cases suggest that, although a contempt citation may be a means of enforcing an order related to security, the courts will be reluctant to issue one, and appellate courts will examine the procedures used carefully.[25] No appellate cases in the state have approved this use of the contempt power, primarily because the issues typically are resolved before they get that far.

The *Alamance County* case offers an alternative procedure that is more protective of the county's interests in being heard. On large, systemic issues that cannot be addressed by a judge presiding over a

ISSUES OF INDIVIDUAL RIGHTS

Individuals sometimes challenge the security measures that courts impose, usually on the ground that the measures violate their constitutional rights. In most cases they challenge searches of persons entering a courthouse or a courtroom, typically conducted with metal detectors. Numerous cases, though, involve the imposition of other security measures. As an aid to readers interested in conducting more research on this subject, citations to and summaries of some leading cases follow.

State v. Lemons.[1] The court in this capital case upheld a judge's order that a sign be posted on the courtroom entrance advising members of the public not to enter unless they had business in the courtroom and warning that all persons entering would be searched for weapons. The court rejected the contention that this security measure violated the defendant's constitutional right to an open trial, noting that the case dealt with a sign, not outright closure; that defense counsel supported posting the sign; and that it was possible for a defendant to waive a constitutional right. The court relied on G.S. 15A-1034(a), which gives the presiding judge authority to "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings."

State v. Grant. In this case the court held that an order directing that courtroom observers be searched before entering was not evidence of court hostility to the defendant:

> It was necessary for the court to maintain discipline and decorum in the courtroom and its environs. The action of the court in prohibiting picketing, parading, and congregating in and around the courthouse and in requiring spectators to submit to a search for weapons before entering the courtroom was entirely proper.[2]

McMorris v. Alioto.[3] The court in *McMorris* approved the use of metal detectors in a federal courthouse as an administrative search if the search was necessary to secure a vital governmental interest (protecting courts from danger); was limited and no more intrusive than necessary to protect against danger; and was not conducted to gather evidence for criminal prosecutions. The court found metal detectors to be less intrusive than other search methods. Further, it judged pat-down searches to be a reasonable secondary search method if the metal detector was triggered.

U.S. v. Darden.[4] A federal court rejected the contention that the use of security measures conveyed to the jury that the defendant was dangerous, thereby depriving him of a fair trial. Measures included (1) placing numerous security personnel in the courtroom; (2) using metal detectors; (3) inspecting the belongings of defense counsel, initially within view of arriving jurors; (4) using an anonymous jury and assembling it in a secret location; and (5) transporting the jury from its sequestration site to the courtroom using armed guards and a helicopter escort. The court held that the trial judge must have wide discretion to ensure order and safety, and that the violent nature of the alleged conduct (racketeering and continuing criminal enterprise) justified the measures taken.

Holbrook v. Flynn.[5] In *Holbrook* the U.S. Supreme Court held that the use of uniformed state police to provide extra court security was not inherently prejudicial to the defendant's ability to receive a fair trial, and was permissible in the absence of a showing of prejudice. Establishing the particularized factual basis to shackle or gag a defendant, required by *Illinois v. Allen*,[6] was not necessary in this context.

U.S. v. DeLuco. In this case the U.S. Supreme Court rejected the contention that a policy requiring all courtroom spectators to provide written identification before being allowed to enter the courtroom violated the defendant's right to a public trial under the Sixth Amendment. The policy resulted in partial closure of the courtroom, justified by the government's interest in providing security at the trial. The court also suggested that the use of a metal detector did not result in closure:

> To cite an obvious example, magnetometer screenings are designed to prevent armed spectators from entering the courtroom, yet no one would suggest that conditioning spectator access on submission to reasonable security screening procedures for dangerous weapons violates the Sixth Amendment right to a public trial.[7]

Rhode Island Defense Attorneys Association v. Dodd.[8] The court in this case denied a request to enjoin a policy of searching all persons entering the courthouse, including attorneys, and of searching packages, briefcases, and the like for weapons. The court ruled that the policy did not violate the Fourth Amendment nor did it interfere with the defendant's right to counsel because it was limited to a search for weapons and did not involve inspection of confidential papers or confiscation of papers or files.

Martinez v. Winner.[9] A federal appellate court ruled that judicial immunity applied to actions taken by the trial judge to control order and security in the courtroom. Actions taken to that end, the court said, are "judicial" functions.

NOTES

1. State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (1998).
2. State v. Grant, 19 N.C. App. 401, 413, 199 S.E.2d 14, 23 (1973).
3. McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978). *See also* Klarfeld v. U.S., 994 F.2d 583 (9th Cir. 1991); Legal Aid v. Crosson, 784 F. Supp. 1127 (S.D.N.Y. 1992).
4. U.S. v. Darden, 70 F.3d 1507 (8th Cir. 1995).
5. Holbrook v. Flynn, 475 U.S. 560 (1986).
6. Illinois v. Allen, 397 U.S. 337 (1970).
7. U.S. v. DeLuca, 137 F.3d 24, 33 (1st Cir. 1998).
8. Rhode Island Defense Attorneys Ass'n v. Dodd, 463 A.2d 1370 (R.I. 1983).
9. Martinez v. Winner, 548 F. Supp. 278 (D. Colo. 1982).

specific case, it offers the only procedural roadmap that has the recent approval of the supreme court. The court attempted to ensure deference to executive and legislative functions while enabling the courts to take actions necessary to ensure their ability to function. Thus the opinion offers the safest procedure for courts to follow in disputes over security issues. To follow the recommended procedures, the court must (1) give the sheriff and the county notice and an opportunity to be heard on the matter, (2) find facts that support the exercise of its inherent power, and (3) narrowly tailor the order to minimize the intrusion on the discretion of the sheriff and the county.

In counties where security is not a problem, effective communication among the key actors and respect for one another's roles almost always are present. To be effective, communication must be reciprocal. Court officials help their case if they engage in continuing communications with county officials and the sheriff about their needs. They also help their case when they are respectful of the county's discretion and try to provide reasonable notice of their needs. Similarly, county officials help matters by being responsive when they can, and being willing to discuss the issue with court officials when they cannot be responsive.

Like many governmental matters, relationships on court security are forced marriages from which divorce is not possible. Any one of the many entities with a stake in the issue may create a problem for the others. However, because public safety is ultimately involved when problems arise, the incentive and the opportunity for finding common ground are great, and the cost for not doing so is high.

NOTES

1. N.C. Const. art. IV, § 20. This duty is codified in N.C. Gen. Stat. § 7A-300 (hereinafter the General Statutes will be cited as G.S.).

2. *See* G.S. 7A-340.

3. G.S. 7A-343(4).

4. G.S. 7A-343(6).

5. G.S. 7A-343(5).

6. In the Matter of Transportation of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

7. *See generally* Felix F. Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* (Reno, Nev.: National Judicial College, 1994).

8. State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (1998).

9. *See also* G.S. 15A-1035.

10. G.S. 7A-302.

11. G.S. 7A-304(a)(2); *In re* Alamance County Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

12. N.C. Const. art. VII, § 2.

13. *Alamance County*, 329 N.C. at 99, 405 S.E.2d at 133.

14. See cases cited in Stumpf, *Inherent Powers*, chap. 5, "Logistical Support."

15. *See* Carlson v. State, 220 N.E.2d 532 (Ind. 1966).

16. G.S. 7A-302.

17. Statutory support for that conclusion comes from G.S. 7A-343(1) and (3), which require the AOC to collect data and provide information services to the courts. Supplying the equipment necessary to do that is logically a part of the courts' operation, for which the AOC is responsible. Further, uniform, compatible equipment and programming across the state are essential parts of a uniform information system and must be under the courts' control.

18. G.S. 15A-1034, -1035.

19. *See Carlson*, 220 N.E.2d at 532.

20. Price v. Superior Court, 230 Cal. Rptr. 442 (Cal. Ct. App. 1986); Crooks v. Maynard, 732 P.2d 281 (Idaho 1987).

21. G.S. 153A-169.

22. *See* State v. Superior Court of Marion County, Rm. No. 1, 344 N.E.2d 61 (Ind. 1976) (approving inherent powers to order necessary equipment for courtroom); O'Coins, Inc. v. Treasurer of County of Worcester, 287 N.E.2d 608 (Mass. 1972). The practice of ordering specific security measures, with authority derived from the judge's inherent power to ensure a fair trial, has been commonly followed by judges for generations. Orders of this kind usually recite the specific findings that support them. *See also* State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14 (1973), which seems to approve this kind of order, although it was not discussed in terms of the court's inherent powers, as demonstrated by the following language from that case: "It was necessary for the court to maintain discipline and decorum in the courtroom and its environs. The action of the court in prohibiting picketing, parading, and congregating in and around the courthouse and in requiring spectators to submit to a search for weapons before entering the courtroom was entirely proper." 19 N.C. App. at 413, 199 S.E.2d at 23.

23. U.S. v. Darden, 70 F.3d 1507 (8th Cir. 1995). *See also* U.S. v. DeLuca, 137 F.3d 24 (1st Cir. 1998).

24. *See* Bozer v. Higgins, 596 N.Y.S.2d 634 (Sup. Ct. 1992), *modified*, 613 N.Y.S.2d 312 (Sup. Ct. App. Div. 1994), in which the court system's authority to issue a security policy was held to be part of running a separate, independent branch of government.

25. *See In re* Board of Commissioners, 4 N.C. App. 626, 167 S.E.2d 488 (1969).

Giving Lawful and Helpful Job References—Without Fear

JOANNA CAREY SMITH

Public employers often feel caught in a dilemma when providing references for an employee.[1] If they give a negative reference, they fear that the employee may sue them for defamation.[2] If they give a positive reference and the employee later misbehaves in his or her new position, they fear that the new employer may sue them for negligent referral.[3] As a consequence, many employers adopt a "name, rank, and serial number" or "just the facts" approach, confirming objective employment information without personally interpreting the employee's performance.

This article addresses employers' concerns by discussing both the legal protections that North Carolina has extended to employers and the ethical issues that they must consider when providing references. The article also offers administrative recommendations for giving protected employment references.

Illustration by David Terry

NORTH CAROLINA STATUTORY FRAMEWORK

In determining what personnel information is public and available for release generally and what information is confidential, public employers in North Carolina must look to the statutes governing employee personnel files (hereafter referred to as "personnel records acts"). Under the statutes nine personnel items about a public employee are public information and may be disclosed to anyone: name, age, date of original employment or appointment to service, current

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position, title, current salary, date and amount of most recent change in salary, date of most recent position change, and office or station to which currently assigned.[4] Unless a special set of circumstances exists, the employer may not release other information in an employee's personnel file to the public.[5]

In giving employment references, many public employers have felt that their safest route is to reveal only the public items under the personnel records acts. They have done so despite decisions by the North Carolina courts giving employers a qualified privilege to disclose more information to prospective employers.[6] They also have done so even though the personnel records acts do not prohibit a supervisor from speaking to a prospective employer about an employee's performance or skills based on the supervisor's direct experience or personal observation. (The acts prohibit only disclosure of confidential information directly from personnel records.)

Recognizing employers' concerns, the General Assembly has followed the lead of other states by ensuring that the release of otherwise confidential information will be protected in the limited context of providing employment references.[7] In 1997 the legislature enacted a statute providing both public and private employers with immunity from civil liability for disclosing certain information to prospective employers (see text of statute, below).[8] This statute protects employers who provide information about an employee's job history or job performance at the request of a prospective employer or at the request of the employee. The statute covers employees, agents, and other representatives of the current or former employer who are authorized to provide and actually do provide information in accordance with the statute's provisions. The statute grants this immunity only if employers provide the reference information to prospective employers, so public employers must assure themselves of the legitimacy of the request before releasing any information indicated by the statute.[9]

The statute uses but does not define the term "job history." It defines "job performance" as including the employee's suitability for reemployment; the employee's skills, abilities, and traits as they relate to his or

IMMUNITY STATUTE

§ 1-539.12. Immunity from civil liability for employers disclosing information.

(a) An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or upon request of the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when a claimant shows by a preponderance of the evidence both of the following:

(1) The information disclosed by the current or former employer was false.

(2) The employer providing the information knew or reasonably should have known that the information was false.

(b) For purposes of this section, "job performance" includes:

(1) The suitability of the employee for re-employment;

(2) The employee's skills, abilities, and traits as they may relate to suitability for future employment; and

(3) In the case of a former employee, the reason for the employee's separation.

(c) The provisions of this section apply to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with the provisions of this section. For the purposes of this section, "employer" also includes a job placement service but does not include a private personnel service as defined in G.S. 95-47.1 or a job listing service as defined in G.S. 95-47.19 except as provided hereinafter. The provisions of this section apply to a private personnel service as defined in G.S. 95-47.1 and a job listing service as defined in G.S. 95-47.19 only to the extent that the service conveys information derived from credit reports, court records, educational records, and information furnished to it by the employee or prior employers and the service identifies the source of the information.

(d) This section does not affect any privileges or immunities from civil liability established by another section of the General Statutes or available at common law.

(1997-478, s. 1.)

Note: This statute applies to causes of action arising on or after Oct. 1, 1997.

her suitability for future employment; and the reason for the employee's separation.[10] The immunity does not apply if the employer provided false information and knew or should have known that it was false.[11] Thus the statute provides an explicit measure of support for employers who provide thorough employment information in good faith.

The immunity statute does not expand the personnel information available to the public. The personnel records acts still permit public disclosure only of the most recent personnel actions, not the reasons for those actions. However, the immunity statute carves out a niche for disclosure of additional relevant performance information to a specific group—prospective employers. By enacting this statute, the legislature has clarified the existing public policy of providing full and relevant performance information to employers before they make hiring decisions.

CONSIDERATIONS IN MAKING REFERENCES

In making policy decisions about how to handle requests for employment references, public employers must balance competing legal, ethical, and administrative considerations.

Legal Considerations

Two employment-related claims that are important in this context are defamation and negligent referral. A "defamation claim" is a common-law claim that arises when an employer provides a referral that falsely impugns a present or past employee's professional reputation. A "negligent-referral claim" is a common-law claim that arises when an employer with a problem employee sues the former employer for not providing sufficient referral information before the hiring decision. Courts across the country have only recently begun to recognize negligent-referral claims, so not much case law exists yet.

Defamation

A defamation claim allows a person to recover damages from someone who "harms [his] reputation so as to lower him in the estimation of the community or deters third persons from associating or dealing with him."[12] As a practical matter, a defamation claim arises when employee X (or former employee X) of agency A tries to get a job at agency B and is not hired based on something agency A's representative either says or writes about her. The employee then sues agency A for compensatory and punitive damages.[13]

Employers sued for defamation who have the documentation to back up their statements should win in court: truth is an absolute defense to defamation.[14] Perhaps even more important, North Carolina courts have long held that employers have a "qualified privilege" (a limited right) to make statements to prospective employers. As long as the statements are (1) made in good faith, (2) on a subject that the source of the statement has a valid interest in upholding, and (3) to a person having a corresponding interest, right, or duty, the employer will not be liable for defamation. Even if a statement turns out to be false, the person making the statement is protected as long as he or she did not know or have reason to know that the statement was false.[15] The 1997 immunity statute in effect codifies this common-law privilege. Although the statute does not expand the defenses that already were available to employers, it certainly clarifies employers' protection.

Negligent Referral

Another potentially contentious situation arises when agency A wants employee Y to leave because of marginal performance or questionable conduct but has not figured out how to get him to leave quietly. Serendipitously a call comes from agency B: "Employee Y has applied for a position here. What can you tell me about him?" Tempted by the possibility that employee Y will leave on his own and concerned about a potential lawsuit from employee Y if he does not receive a good reference, agency A provides only minimal employment information to agency B. But if employee Y injures someone in his new position, agency A may find itself in court defending a negligent-referral claim brought by agency B.[16] Although there are not yet any reported appellate decisions on negligent referral in North Carolina, the California Supreme Court recently recognized that employers have some duty to prospective employers. In a case in which the employer passed on information that was highly positive but completely untrue, and thus fraudulently misled the new employer, the court said the following:

> [T]he writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons.[17]

Although such a claim may arise infrequently, it nevertheless might be pursued in some circumstances. A negligent-referral claim against agency A will help agency B insulate itself from a negligent-hiring claim brought by the person whom employee Y injures.[18] If agency B can prove that agency A did not disclose information that would have affected its initial hiring decision, it might recover damages from agency A or be indemnified for its liability.[19] By limiting references to information deemed public, public employers have a good argument that they are not misrepresenting any qualifications. However, because the new immunity statute now clarifies the common-law protection for employers who disclose information about an employee's job performance, public employers may have less justification than before for not revealing such information.

Ethical Considerations

In addition to examining their legal obligations in providing employment references, public employers ought to consider their ethical obligations of protection and care. They have an immediate obligation to their current and former employees to protect confidential personnel information. They have a corresponding obligation to provide favorable references when warranted by employees' performance, as a reward for and a recognition of such performance. At the same time, public administrators must recognize their responsibility to the public at large by encouraging hiring of the most qualified public servants and by promoting honest and truthful behavior.[20]

Persons in public service should remember their status as "especially responsible citizens" based on their dual roles as public employees and citizens.[21] As public employees, they must consistently guard the public's interest. In this role they act as policy makers and must remember that "ethical policy making requires citizens [to] hold one another accountable for what they know and value."[22] As citizens, they should hold themselves to a greater awareness than citizens who are not public administrators in managing public funds and providing quality service. They set an example for all citizens to follow and should recognize their accountability for decisions they make. They must strive both to uphold a higher standard of honesty when making comments on matters of public concern and to maintain credibility by their actions.[23] Although focusing on immediate problems may be easier, responsible public administrators cannot forget their duty to the general, albeit amorphous, public when providing references or making hiring decisions.[24]

So how does an ethical public administrator approach employment references? When faced with a question from a potential employer about an employee's job performance or job history, a public administrator should ask himself or herself the following questions:[25]

1. *Have I used "discernment"?* A responsible supervisor ensures that he or she understands what specific information is being sought and why. To help determine the level of information needed, the supervisor should seek clarification of questions posed by the prospective employer, the job duties in the position for which the employee has applied, and the stage of the hiring process.
2. *Have I interpreted the question correctly?* Rather than reacting out of habit and not providing information, a responsible supervisor will take time to evaluate the question and the context in which the information is being sought. For example, if the request has come in a telephone call, it is permissible to call the prospective employer back after due consideration of the matter or to send a written response, rather than feeling pressure to respond immediately.
3. *Will my action (response) fit the situation?* An employment reference should provide enough substantive performance information to help a prospective employer evaluate a prospective employee without either violating the supervisor's responsibilities to the employee or exceeding the direct experience of the supervisor.
4. *Will my action support my commitments?* A supervisor should know his or her values as a public administrator—for example, honesty, concern for the community, personal accountability, integrity, and upholding of laws—and let them guide him or her in providing reference information.
5. *Is my action congruent with my roles?* Again, public administrators have many roles. Does the information provided in an employment reference reflect the supervisor's roles as a taxpayer, a public servant, and a hiring supervisor?
6. *Have I used my imagination?* In other words, has the supervisor responsibly considered the effect of either providing or not providing information on the employee to the prospective employer?
7. *Am I willing to go public?* A responsible supervisor will consider the effect on himself or herself

if someone openly revealed the reference information.

8. *Am I willing to accept the consequences?* The answer to this question reveals whether the supervisor feels truly accountable for providing the employment reference.

If a public administrator can answer these questions affirmatively, he or she can feel confident of providing the prospective employer with a responsible, ethical reference that supports his or her values and commitments as a public employee.

Administrative Considerations

By protecting employers from civil liability for disclosing information about an employee's (or former employee's) job performance, the General Assembly has clarified the types of references that public employers may provide. With this codification, however, comes responsibility to answer reference questions thoughtfully. Public employers must ensure that their supervisors and personnel staff understand the statute's requirements and limitations.

First, a public employer must determine who will provide references. Currently, many agencies limit this authority to their personnel departments, which then release only the information authorized by the personnel records acts. By limiting references to their personnel departments, agencies maintain greater control over the release of information. But because the immunity statute explicitly authorizes release of information to prospective employers regarding the employee's suitability for reemployment and the reason for a former employee's separation, agencies may want to allow direct supervisors to provide references. Direct supervisors usually are more familiar with an employee's performance than the personnel department is. Alternatively, agencies may want to have direct supervisors submit a written evaluation to the personnel department containing information protected by the immunity statute, and continue to have the personnel department respond to requests for references. Such an approach recognizes the managers' knowledge about the daily performance of their employees. (For a sample form for this purpose, see Exhibit 1.)[26]

Second, a public employer must determine to whom it should release a reference under the immunity statute. The statute does not define "prospective employer."[27] Before revealing information protected by

EXHIBIT 1

[AGENCY NAME]

Performance Evaluation Form

(to be submitted to the personnel department for the purpose of providing information to a prospective employer)

Background Information

_____
(FORMER) EMPLOYEE NAME

_____
EMPLOYING DEPARTMENT

_____
POSITION(S) HELD

_____
PROSPECTIVE EMPLOYER

_____
DATE COMPLETED

Performance Evaluation Information

1. What is the former employee's suitability for reemployment?
   - ❍ I would reemploy this person in the same position.
   - ❍ I would reemploy this person in a position that better matches his or her skills, abilities, and traits.
   - ❍ I would not reemploy this person in the same position because of his or her lack of the following (check one or more and explain):
     - ❍ Skills _____
     - ❍ Abilities _____
     - ❍ Traits _____

2. What are the employee's skills, abilities, and traits as they may relate to suitability for future employment?
   This includes information about the employee's ability to perform the essential functions of the position, such as handling a multiline telephone system, analyzing and interpreting applicable policies and regulations, regularly following reasonable work instructions, regularly attending work, and fulfilling other performance responsibilities.

   _____
   _____
   _____
   _____

3. What is the reason for the former employee's separation?
   - ❍ Retirement
   - ❍ Resignation
   - ❍ Termination
   - ❍ Reduction-in-force
   - ❍ Other (please specify) _____

_____
SUPERVISOR'S SIGNATURE DATE

Your signature indicates that, to the best of your knowledge, the information provided is true and that there is no reason for you to know that the information is false.

This information is provided in accordance with Section 1-539.12 of the North Carolina General Statutes, effective October 1, 1997.

the immunity statute that is otherwise confidential personnel information, the agency must require specific verification from the prospective employer, such as written authorization from the employee or a signed copy of the employment application. A written request for a reference on the prospective employer's letterhead may suffice as well.

Third, a public employer should create and disseminate a written policy on references. The policy should reflect the agency's values and put all employees on notice about what information will be shared and with whom. The policy should include a section that articulates to whom the agency sees its obligations and why, and how the agency is balancing competing obligations. An established policy helps guide supervisors and personnel representatives when they are asked for employment references.

Fourth, a public employer should provide training to its personnel representatives and supervisors on the limitations of the immunity statute, its interplay with the relevant personnel records acts, and their responsibility as ethical public administrators to provide truthful, informative references based on an employee's job history and job performance. Necessary components of this training are explaining and defining language such as "suitability for re-employment"; helping staff determine the appropriate skills, abilities, and traits for a given position; and assisting staff in recognizing how much to share about an employee's separation. Training also should detail the information that the agency will require from a prospective employer to verify the legitimacy of the request; explain the agency's philosophy on and process for providing references; and review any forms that the agency has developed as a result of its new policy to help document the release of reference information. Even if an agency determines that its personnel department is the only appropriate channel for references and recommendations, it still may want to offer training to supervisors, who may be asked to submit information to the personnel department.

As an additional measure of protection, agencies may want to require that employees sign an authorization to release performance information either before their supervisor's disclosure of information or on their separation from service. (For a sample form, see Exhibit 2.)

Finally, those who provide references must be aware of any settlement agreement with the employee that expressly limits the type of reference information that they may release.[25]

EXHIBIT 2

[AGENCY NAME]

Employee's Authorization to Release Job Performance Information to Prospective Employer

Background Information

_____
EMPLOYEE NAME

_____
EMPLOYING DEPARTMENT

_____
POSITION(S) HELD

_____
PROSPECTIVE EMPLOYER (IF KNOWN)

Authorization to Release Performance Information

I, _____, understand that North Carolina law allows my employer to release certain information about my job history and job performance to a prospective employer. This information includes my suitability for reemployment with the agency or governmental body; my skills, abilities, and traits as they may relate to my suitability for future employment; and the reason for my separation.

I hereby authorize *(check one or both)*

❍ my supervisor_____
(NAME)

❍ a representative from the Personnel Department

to release this information. I ask that this information be provided when any prospective employer requests reference information.

_____
EMPLOYEE'S SIGNATURE DATE

This information is provided in accordance with Section 1-S39.12 of the North Carolina General Statutes, effective October 1, 1997.

SUGGESTIONS FOR IMPROVING THE IMMUNITY STATUTE

The immunity statute provides support for public employers who are concerned about their exposure to legal action if they provide more candid information to prospective employers than the state's personnel records acts authorize for disclosure to the general public. However, the statute might be refined by the legislature in three ways. First, the legislature might incorporate the protections of the immunity statute into the personnel records acts. This would help public employers reconcile their governing statutes. Second, the legislature might expand immunity to encompass information provided to current employers as well as information provided to prospective employers. Some employers cannot verify an applicant's job history or performance information before making hiring decisions, but they may want to do so afterward. Third, the legislature should define "prospective employer" and "job history" in the immunity statute. This would preclude different interpretations of the terms across agencies.

NOTES

1. This dilemma is not unique to public employers. The *Raleigh News & Observer* has published at least two articles in the past year on providing references in employment and education contexts. Diana Kunde, "References Best Given Carefully," *Raleigh News & Observer*, Feb. 28, 1999, p. 6E; Ethan Bronner, "Guidance Counselors, Fearful of Litigation, Cautious in Recommendations," *Raleigh News & Observer*, March 15, 1998, p. 12A.

2. Defamation is defined and discussed in more depth later in this article under the heading "Legal Considerations."

3. Negligent referral is defined and discussed in more depth later in this article under the heading "Legal Considerations."

4. State employees' personnel records are covered by N.C. Gen. Stat. § 126-23 (hereinafter G.S.), county employees' records by G.S. 153A-98, and city employees' records by G.S. 160A-168. Public information is essentially the same for local governments and state agencies.

5. Any information not defined as public is considered confidential personnel information. G.S. 126-24 (state employees), 153A-98(c) (county employees), 160A-168(c) (city employees). Most information considered confidential may be released only to the following persons: the employee or someone with the employee's written permission; the employee's supervisor; a person with an order from a court of competent jurisdiction; or an official of a state or federal agency when inspection is deemed by an official having custody of a personnel file to be necessary and essential to pursuance of the proper function of the inspecting agency. G.S. 126-24, 153A-98(c), 160A-168(c).

A department head in a state agency, a county manager with the concurrence of the county commissioners, or a city manager with the concurrence of the city council members may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of an employee and the reasons for that personnel action if, before releasing the information, that official determines in writing that the release is essential to maintain public confidence in the administration of the agency's or government's services or to maintain the level and the quality of its services. This written determination becomes a public record and a part of the employee's personnel file. *See* G.S. 126-24 (state employees), 153A-98(c)(7) (county employees), 160A-168(c)(7) (city employees).

6. The qualified privilege is discussed in more depth later in this article under the heading "Legal Considerations."

7. As of 1997, 26 other states provided immunity for certain employment references. *See* Fred Hartmeister, "Handling Requests for Employment References: Elevating Awareness among the Pitfalls and Pendulums," *Education Law Reporter* 119 (Aug. 1997): 1. *See also* Alan M. Koral, "Avoiding Workplace Litigation: When You Write, You May Be Wrong," *Practicing Law Institute Litigation and Administrative Practice*, Litigation Course Handbook Series, no. 562 (April 1997): 352.

8. G.S. 1-539.12. The act, which became effective on October 1, 1997, applies prospectively, not retrospectively. Further, it protects employers from civil liability only under state causes of action. Employers are not immune from liability under federal causes of action, such as discrimination claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act.

9. If a public employee releases or allows access to confidential personnel information without proper authority to do so, he or she is guilty of a Class 3 misdemeanor. On conviction, the employee may be fined in the discretion of the court up to $500. G.S. 126-27 (state employees), 153A-98(e) (county employees), 160A-168(e) (city employees).

10. G.S. 1-539.12(b).

11. G.S. 1-539.12(a)(1)–(2).

12. Prosser and Keeton, *On Torts* 111 (5th ed. 1984), *cited in* Stephen Allred, *Employment Law: A Guide for North Carolina Public Employers*, 2d ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1995), 29. There are five elements to a defamation claim: (1) publication (2) to a third party (3) of a written or spoken statement concerning the plaintiff (4) that is false and (5) harms the plaintiff's relationships with others. *See, e.g.*, Tallent v. Blake, 57 N.C. App. 249, 291 S.E.2d 336 (1982). The harm can be demonstrated by showing that the statement (1) tends to subject the plaintiff to ridicule, public hatred, contempt, or disgrace; (2) tends to impeach the plaintiff in his or her trade or profession; (3) charges the plaintiff with committing a punishable offense; or (4) charges the plaintiff with having a loathsome disease. Renwick v. The

News and Observer Publishing Co. (Raleigh) and Renwick v. Greensboro News Co., 310 N.C. 312, 317, 312 S.E.2d 405, 409, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858 (1984). *See* Gibby v. Murphy, 73 N.C. App. 128, 131, 325 S.E.2d 673, 675 (1985).

13. Compensatory damages reimburse a person for his or her actual monetary loss, including lost wages or medical expenses. Punitive damages punish the defendant for the intentional malice of his or her act and/or serve as a deterrent to other potential defendants.

14. *See Restatement (Second) of Torts*, § 573 (1977).

15. *See* Presnell v. Pell, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979). In this case the employer lost because its representative shared information about the terminated employee with co-workers, outside the scope of his qualified privilege.

16. This emerging claim follows the general requirements of negligence: (1) agency A owed a duty of care to agency B and (third-party) employees or customers of agency B; (2) agency A breached that duty by not disclosing relevant employment information; and (3) agency B (or third parties) suffered an injury (4) as a foreseeable result of agency A's failure to disclose the information. For a good general discussion of the policy reasons for this claim, *see* Janet Swerdlow, Note, "Negligent Referral: A Potential Theory for Employer Liability," *Southern California Law Review* 64 (Sept. 1991): 1645.

17. Randi W. v. Muroc Joint United School District, 929 P.2d 582, 591 (Cal. 1997).

18. The prospective employer's responsibilities in obtaining references are beyond the scope of this article. However, a general overview of a negligent-hiring or -retention claim may be helpful. In North Carolina such a claim is recognized when the plaintiff proves "(1) the *specific negligent act* on which the action is founded; (2) [the employee's] *incompetency*, by inherent unfitness or previous specific acts of negligence, from which *incompetency* may be inferred; . . . (3) either *actual notice* to the employer of such unfitness or bad habits, or *constructive notice*, by showing that the employer could have known the facts had he used ordinary care in oversight and supervision; and (4) that the *injury* complained of resulted from the incompetency proved." Moricle v. Pilkington, 120 N.C. App. 383, 386, 462 S.E.2d 531, 533 (1995), *citing* Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

19. Cases from other jurisdictions demonstrate that third parties also may establish standing to bring a negligent-referral claim. *See, e.g., Randi W.*, 929 P.2d 582; Jerner v. Allstate Insurance Co., 193 Daily Labor Report (BNA) D17 (Fla. Cir. Ct. 1995). In *Jerner* the defendant (Allstate) was sued for fraud and misrepresentation, among other charges, after an employee whom it positively recommended shot five co-workers at his subsequent workplace. Allstate had fired the employee after he carried a gun to work. The employee also had made threats to co-workers, claimed that he was an alien, and used his computer for devil worship. Once the court ruled that the plaintiffs (families of the victims) could seek punitive damages, the parties reached a confidential settlement.

20. In the 1997–98 session, the North Carolina General Assembly enacted laws limiting political hirings in state employment in order to reaffirm the state's commitment to select from a pool of the most qualified applicants. G.S. 126-14.2, -14.3 (effective Sept. 17, 1997). Although these statutes address the selection criteria and standards to be used in making hiring decisions, not those to be used in giving or receiving job references, they reinforce the importance of public employers making objective, defensible hiring decisions that will hold up to outside review.

21. The phrase "especially responsible citizens" is borrowed from Terry L. Cooper, *The Responsible Administrator: An Approach to Ethics for the Administrative Role* (3d ed.) (San Francisco: Jossey-Bass, 1990), 40.

22. Thomas E. McCollough, *The Moral Imagination and Public Life: Raising the Ethical Question* (Chatham, N.J.: Chatham House, 1991), 16.

23. *See* McCollough, *The Moral Imagination*, 84–85, for a discussion of the importance of standing by one's words and not getting lost in "officialese."

24. As the North Carolina Supreme Court has stated, "[P]ublic office is a public trust." Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 255, 90 S.E.2d 496, 498 (1955), *cited in* A. Fleming Bell, II, *Ethics, Conflicts, and Offices: A Guide for Local Officials* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997), 45.

25. The questions come directly from Lewis Smedes, *Choices: Making Right Decisions in a Complex World* (San Francisco: Harper & Row, 1986), 91–114. For this article I have summarized the author's points, but I recommend the whole chapter to those interested in a thoughtful discussion of the steps involved in making responsible decisions.

26. As well as giving such a form to a prospective employer, the public employer must place a copy in the employee's personnel file so that the employee has access to the supervisor's comments.

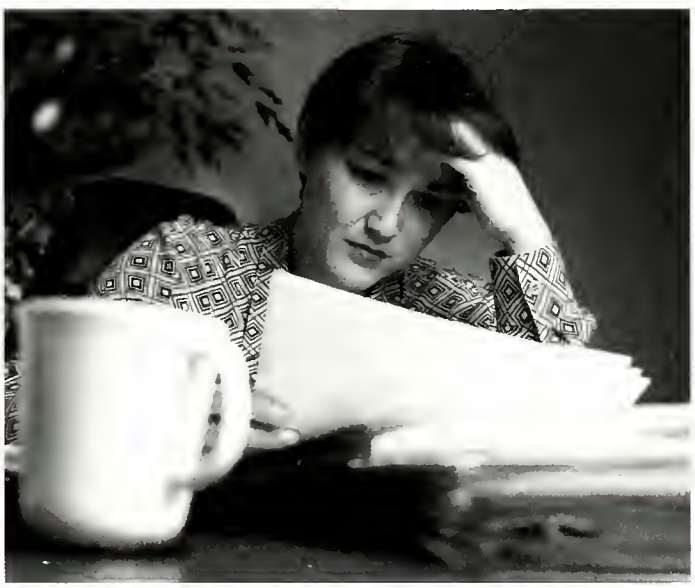
27. A bill similar to the 1997 immunity statute was introduced in the State House of Representatives in March 1997. It defined a "prospective employer" as a "recipient of a prospective employee's interest in employment, placement, or reassignment" and a "prospective employee" as "a person who has expressed to an employer, its agents, or job placement service an interest in employment, placement, or reassignment." This bill, which protected more detailed disclosure than G.S. 1-539.12 does, was not enacted into law. H.R. 538, 1997 Sess.

28. Settlements involving public agencies are presumed to be public records unless the judge, the administrative judge, or the administrative hearing officer finds by a written order that (1) the presumption of openness is overcome by an overriding interest and (2) such overriding interest cannot be protected by any measure short of sealing the settlement. The order must clearly state the overriding interest and include sufficiently specific findings of fact for a reviewing court to determine whether the order was proper. G.S. 132-1.3.

Responding to Subpoenas

A Guide for Mental Health Facilities

JOHN RUBIN AND MARK BOTTS



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

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

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

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

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

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

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

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

GENERAL PRINCIPLES

1. Are there different types of subpoenas?

Yes. There are two basic types of subpoenas:

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

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

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

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

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

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

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

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

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

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

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

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

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

5. What are permissible responses to a subpoena?

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

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

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

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

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

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

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

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

MECHANICS OF SUBPOENAS

7. Who may issue a subpoena?

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

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

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

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

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

10. How are subpoenas served?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. What travel expenses may I recover?

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

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

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

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

GENERAL CONSIDERATIONS IN RESPONDING TO SUBPOENAS FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONSIDERATIONS IN RESPONDING TO SUBPOENAS FOR CONFIDENTIAL RECORDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONSIDERATIONS IN RESPONDING TO SUBPOENAS TO TESTIFY

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

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

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

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

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

32. How should I prepare for my testimony?

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

NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How After-School Programs Help Students Do Better

KYLE GRAY, BARBARA ROOLE, AND GORDON P. WHITAKER

"I believe, from what I hear in the community and from the kids that I know, that the kids [in after-school programs] are less likely to be in trouble. They are more focused. I am a real believer, especially with adolescent kids, that the busier you keep them in structured supervised situations, the less time they have to get into trouble. Being a part of the drum corps is a source of pride for kids. One of the real positive outcomes of the program is that it gives kids a good focus and a source of pride in themselves and what they do."

—Marsha Bate, President of the Youth Services Action Group, Asheville, North Carolina

Middle school students appear to prefer after-school programs that *require* them to do homework! In a recent sixteen-month study that we conducted for the North Carolina Governor's Crime Commission, we found that students in grades 6 through 8 were twice as likely to attend after-school programs regularly if the programs included daily periods of structured homework assistance. The purpose of the study was to identify practices that strengthen after-school programs, deter delinquency, and make other positive differences in the lives of young people. Although further research is needed to determine the effect of after-school programs, we did identify several practices that appear to help students do better—structured homework assistance being one of the most important ones. This article summarizes the findings of our study.

BACKGROUND AND METHODS

After-school programs serve communities of children and youth all across the United States. However, no comprehensive national data are available on the number of programs or the number of children they serve. The most complete picture comes from the National Study of Before- and After-School Programs conducted for the U.S. Department of Education in 1993. The vast majority of the 1,300-plus programs sampled for that study served

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younger children. Most of the programs were operated by schools, churches, nonprofit agencies, or government departments, but more than a third were run by private, for-profit businesses.[1]

In North Carolina as in the United States generally, no reliable data are available on the number of after-school programs or the number of students enrolled in them. During the past five years, the numbers have undoubtedly increased as schools, nonprofit agencies, and local governments have responded to federal and state initiatives to support after-school programs. The largest of the North Carolina initiatives is the governor's Support Our Students (SOS) Program, which currently helps fund programs in 76 counties, serving some 12,000 students at 170 sites. SOS focuses on middle school youth, aiming to help them stay out of trouble and do well in school. According to the SOS Web page, "In the 1996–97 school year, community volunteers donated more than 88,000 hours of their time and talent to SOS, working one-on-one with students, teaching classes, serving on local advisory councils and helping with fundraising efforts. Local civic and community groups, businesses, schools and individuals . . . donated more than $3.4 million in cash and in-kind contributions to SOS that same year, helping expand the number of students that can be served locally."[2]

The Governor's Crime Commission also has helped fund after-school programs, particularly programs for middle school youth. The Crime Commission's Juvenile Delinquency Prevention Committee, interested in determining what features of those programs seemed most likely to help students stay out of trouble, asked us to undertake this study and, from the findings, to develop a handbook for strengthening after-school programs. In consultation with Crime Commission staff, we chose twelve programs funded by the Crime Commission to visit and discuss the study. After those visits and with the agreement of each program's manager, we selected the following six programs to be the subjects of the study:

- Asheville Housing Authority's Hillcrest Enrichment Program in Buncombe County
- Boys & Girls Clubs of Pitt County
- Cleveland County Schools' Black Youth in Action
- Robbinsville Middle School's After-School Program in Graham County
- Rockingham County SOS
- The YMCA of Greater Winston-Salem's SOS program in Forsyth County

The six programs were located in the mountains, the piedmont, and the coastal plain (for their county locations, see Figure 1). They included urban and rural settings and various racial mixes of students. Some focused on students who had been identified as "at risk" by school or court officials; others were open to the general population, including those who might be at risk.[3] Some required regular homework each day; others did not. Because there is no systematic description of after-school programs statewide, it is not possible to say how well this sample represented them all. However, we chose the six to represent the sorts of places, people, and activities that typify after-school programs all across North Carolina. Each reader will need to decide whether the findings seem applicable to the settings with which he or she is familiar.

Each program that we studied provided supervised activities for young people during the after-school hours at least four afternoons a week. The ages of the young people ranged widely, but most were from twelve to fifteen years old.

We studied seventeen after-school program sites operated by the six programs. We also studied 187 young people enrolled at the seventeen sites. To obtain this sample, in fall 1997 we invited all middle school students who were enrolled at the seventeen sites to become study participants. A total of 187 accepted the invitation, and their parents gave us consent to obtain data about the participants in at least one of four ways:

1. Fall and spring surveys
2. School records of grades, End-of-Grade test scores, attendance, and disciplinary actions
3. Juvenile court records
4. After-school program records

For most participants, we had data from all four sources.

CHARACTERISTICS OF AFTER-SCHOOL PROGRAMS

After-school programs vary according to local needs. However, those we studied and others nationwide have several common attributes:

- Use of enrichment activities—The programs that we studied offered more than ninety kinds of educational, social, cultural, recreational, and community-oriented enrichment activities for participants. The range, the quality, and the quantity of these activities varied by program,

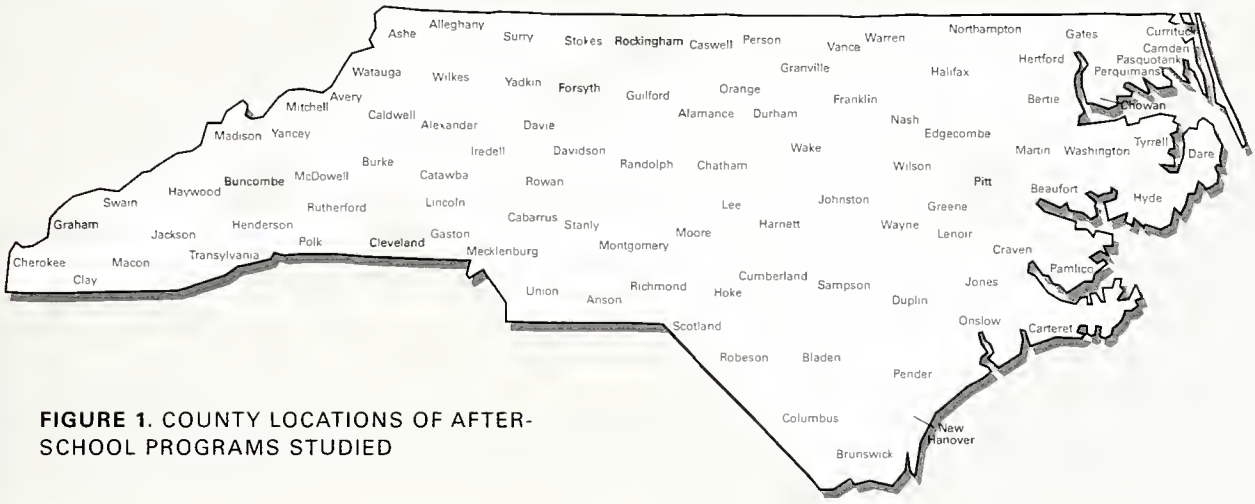


FIGURE 1. COUNTY LOCATIONS OF AFTER-SCHOOL PROGRAMS STUDIED

depending on the availability of resources and other factors. On a typical day, the programs offered participants a snack, some form of homework assistance, recreational activity, and group activity.

- Variation in enrollment—The typical size of after-school programs in North Carolina is not known. The National Study of Before- and After-School Programs reported that in 1991 the average enrollment in an after-school program in the South was thirty-five participants.[4] This average, however, masks wide variation in both the size of programs and the average daily attendance. Enrollment at the six programs in our study ranged from 28 to 2,114, with an average of 625. Two of the programs operated at a single site, the other four at three to eight sites each. Overall, the six programs operated at twenty-four sites. The average daily attendance was 49 per site. Most sites, however, averaged from 15 to 30 participants daily.
- Afternoon schedule—After-school programs typically operate from the close of the school day until the end of the work day, three to five days a week. Two of the programs in our study, however, offered extended programming into the early evening hours.
- Community sponsorship—A variety of community organizations and agencies sponsor the six programs we studied, including two nonprofit organizations, two public school systems, one county government unit, and one local housing authority. According to the 1993 national study, the three types of organizations that are most likely to sponsor both before- and after-school programs in the South are private corporations, nonprofit organizations, and public schools.[5]

CHARACTERISTICS OF STUDY PARTICIPANTS

Overall, the 187 study participants in the six programs were representative of the programs' overall membership in terms of age, gender, and race (see Table 1). Although the study participants ranged in age from ten to sixteen, the vast majority (87 percent) of them were from twelve to fifteen years old, the age group served by all the study programs.

We could not determine how representative the study participants were of young people in their age range who attend after-school programs statewide. No information is available about the demographic make-up of North Carolina's after-school programs.

PROGRAM CHARACTERISTICS AND ACTIVITIES STUDIED

Our aim was not to see what difference simply attending an after-school program might make. We had no control group of nonparticipants. Rather, our purpose was to identify the after-school program activities or policies that appeared to be more likely to deter delinquency and make other positive differences in the lives of participants. To address that issue, we explored the relationship between fourteen program characteristics

TABLE 1. DEMOGRAPHIC CHARACTERISTICS OF STUDY PARTICIPANTS AND ALL STUDENTS ENROLLED IN THE SIX PROGRAMS UNDER STUDY

	Number	Ages	Gender	Race	End-of-Grade Test Scores*
Study participants	187	10 to 16	51% female 49% male	64% African American 31% white 1% Hispanic 2% Native American 1% other	56% at or above grade level in reading and math
Overall program enrollment	1,181†	6 to 18	52% female 48% male	61% African American 36% white 1% Hispanic 1% Native American 1% other	Not available

*Scores in spring 1997, before the study began.
†The total average daily attendance of the six study programs.

(see Table 2) and five positive outcomes for youth: deterrence of delinquency (staying out of trouble), completion of homework, improvement of academic performance, improvement in End-of-Grade test scores, and improvement in self-esteem. Our major findings were as follows:

- Programs that provided structured homework assistance, had community-based sites or provided regular transportation, and used targeted enrollment/a high number of volunteer hours per child were more likely than programs that did not have these characteristics to attract participants and thus to help them stay out of trouble and/or improve their academic performance. (Because the sites that targeted at-risk youth for enrollment also had high numbers of volunteer hours per child, we could not determine the separate effects of these characteristics.)
- African-American students in programs with an African-American cultural enrichment emphasis were more likely than African-American students in programs with no such emphasis to increase their self-esteem.

The following sections present more detail on these findings. (For a description of the related handbook that we produced, which reviews the literature on after-school programs and describes effective practices in them, see the sidebar, page 44.)

DETERRENCE OF DELINQUENCY

An important goal of after-school programs is to deter delinquency by providing three to four hours of adult supervision on weekday afternoons. Young people attending these programs are engaging in activities with positive role models during the very hours when youth are most likely to get into trouble.[6] So in the study we looked at the relationship between various program characteristics and rates of program attendance (more than half of the program days versus less than half of the program days). Of the program characteristics studied, only structured homework assistance, community-based sites or regular transportation, and targeted enrollment/many volunteer hours were associated with higher rates of program attendance.

Structured Homework Assistance

A period of required homework assistance appears to help increase attendance at after-school programs. Most students in these programs said that they wanted to do better in school. In fact, at the end of the program year, when we asked participants to choose among eight possible reasons that they attended their program, 74 percent indicated that they did so to improve their grades. In contrast, 57 percent said that they attended to have fun with their friends, 56 percent because of the sports, activities, and games, and only 15 percent because their parents were not at home. Students chose the other four reasons in varying proportions (including to stay out of trouble, 44 percent), but they gave no other reason as frequently as they gave "to improve grades in school." (For the percentage choosing each reason, see Table 3.)

Moreover, a solid majority (80 percent) of participants at programs with structured homework assistance attended more than half of the program days, whereas a much smaller proportion (39 percent) of participants at programs without structured homework assistance attended that often (see Table 4, page 44). Combining structured homework assistance with recreation and other activities appears to be an effective way to attract regular participation. (For a description

TABLE 2. PROGRAM CHARACTERISTICS STUDIED

Characteristic	Definition or Description
Computer availability	Computers are available for participants to use at site.
Education level of staff members	High = More than 77 percent of staff members have bachelor's degree. Low = Seventy-seven percent or less of staff members have bachelor's degree.
Number of field trips per program day	This figure was estimated by dividing number of field trips by total number of program days.
Number of program days	High = Program operates 5 days per week. Low = Program operates 4 days per week.
Regular transportation	Participants are driven home in program vehicles at conclusion of each day.
Snacks and refreshments	Participants receive nutritious snack each day.
Student-to-staff ratio	This is ratio of average daily attendance at site to number of staff members.
Targeted enrollment policy*	Specific group of young people is recruited either by using set of at-risk criteria or by locating program sites in areas of high concentrations of low-income youth.
Volunteer hours per child*	This figure was estimated by dividing number of volunteer hours at program by program's average daily attendance.
African-American cultural enrichment emphasis†	Participants regularly learn about African-American cultural identity, history, and achievements through activities, field trips, discussions, and workshops.
Structured homework assistance	Participants are required consistently to complete homework assignments in quiet work area free from external distractions during established period each day. Participants receive individual tutorial assistance from volunteers, teachers, staff members, or peer leaders. Staff members maintain ongoing communication with participants' teachers and parents in order to monitor their academic progress.
Structured recreation emphasis	Participants engage in structured group activities such as marching band or drill team.
Community-based site	Program is located in public facility within walking distance of low-income neighborhoods, public housing communities, or public schools with high concentrations of young people.
School-based site	Program is located in public school in order to serve students who attend that school.

*These sites had either a high number of volunteer hours per child and a targeted enrollment policy or a low number of volunteer hours per child and no targeted enrollment policy. Thus we could not relate outcomes to one characteristic or the other.
†We did not encounter any cultural enrichment emphasis other than African American.

of the essential components of structured homework assistance, see the sidebar, page 45.)

Community-Based Sites/Regular Transportation

Study participants also were more likely to attend more than half of the program days at sites that were community-based or provided regular transportation. Being able to walk home from the program or having a program-provided ride was especially important in improving attendance at programs without structured homework assistance. Only 35 percent of the participants attended more than half of the program days at sites with no structured homework assistance and no community location or regular transportation. In

TABLE 3. REASONS FOR ATTENDING AN AFTER-SCHOOL PROGRAM

Reason	Percent Responding Yes (n = 144)*
To improve my grades in school	74
To have fun with my friends	57
Because of the sports, activities, or games	56
Because of the field trips	49
To stay out of trouble	44
Because my parents want me to attend	31
Because my parents are not home after school	15
Because my teachers or counselors asked me to	15

*n = number in the subsample.

contrast, 56 percent of the participants attended more than half of the days at sites that were community based or had regular transportation but no structured homework assistance. Regular transportation or a community site had a much smaller effect on regular attendance among participants at sites with structured homework assistance. More than 75 percent of students attended these sites more than half of the time. At community-based sites or sites with regular transportation, the proportion increased to 89 percent. (See Table 5.)

Targeted Enrollment/More Volunteers

Study participants at sites with targeted enrollment and high numbers of volunteer hours per child were nearly twice as likely to have attended more than half

TABLE 4. ATTENDANCE IN RELATION TO STRUCTURED HOMEWORK ASSISTANCE

	Structured Homework Assistance	
	Required (n = 125)*	Not Required (n = 46)*
Attendance Rate		
Attended more than half of program days	80%	39%
Attended less than half of program days	20	61

*n = number in the subsample.

TABLE 5. ATTENDANCE IN RELATION TO STRUCTURED HOMEWORK ASSISTANCE AND LOCATION OR TRANSPORTATION

	Structured Homework Assistance Required (n = 125)* Community Location or Regular Transportation?		Structured Homework Assistance Not Required (n = 46)* Community Location or Regular Transportation?	
	Yes (n = 46)*	No (n = 79)*	Yes (n = 9)*	No (n = 37)*
Attendance Rate				
Attended more than half of program days	89%	75%	56%	35%
Attended less than half of program days	11	25	44	65

*n = number in the subsample.

AFTER-SCHOOL PROGRAM HANDBOOK

Strategies and Effective Practices

The *After-School Program Handbook: Strategies and Effective Practices* presents program practices and strategies that will help communities start effective after-school programs and improve the operation of existing programs. The handbook features practices and strategies employed by the study programs that attracted high levels of student participation and helped students improve their behavior, self-esteem, and school performance. The handbook also presents various institutional practices and strategies that supported successful program operation. Summaries of the handbook's chapters follow.

Chapter 1 introduces the study of after-school programs conducted for the Juvenile Delinquency Prevention Committee and describes the methods that the research team used to assess program practices.

Chapter 2 outlines the findings of other studies that have observed positive influences of after-school programs on delinquency, academic perfomance, behavior, and self-esteem.

Chapter 3 discusses the formal and informal strategies used by the programs in the study to assess the needs of young people and parents.

Chapter 4 describes the institutional settings and practices that played an important role in implementing the study programs and other after-school programs.

Chapter 5 describes the program characteristics that were systematically related to greater deterrence of delinquency and other positive differences in the lives of the study participants.

Chapter 6 features the practices and the strategies used by program managers to maintain support of after-school programs.

Chapter 7 describes measures of academic performance, behavior, delinquency, self-esteem, and other variables that can be used to evaluate the effectiveness of after-school programs.

Chapter 8 describes a wide range of local, state, and national resources to support development and operation of after-school programs.

The After-School Program Handbook *is available free of charge from the Governor's Crime Commission, phone 919/733-4564.*

COMPONENTS OF STRUCTURED HOMEWORK ASSISTANCE

After observing structured homework assistance at the study sites, we identified five essential components:

Adequate work area and supplies—The room and the resources available for homework assistance are critical to its success. The room must be equipped with chairs and tables that allow participants to work on their homework either on their own or as a group. In addition, the room must have adequate lighting and temperature controls, be quiet, and be free of external noises and distractions. The sites must have adequate supplies as well, including paper, calculators, pencils, markers, dictionaries, and other reference books.

Consistent implementation—Homework assistance must be implemented consistently each day in order for participants to become familiar with the routine and the structure of completing their homework. The amount of time allotted for homework assistance also should remain constant. At study sites it ranged from 45 minutes to an hour. Because the schools did not assign homework over the weekend, many of the study sites rewarded participants by not requiring homework assistance on Friday afternoons, thus allowing participants more time for recreation.

Tutors—All the sites that provided structured homework assistance provided tutors to assist participants one-on-one with their school work. The tutors were volunteers, teachers, older peers, or staff members.

Communication with teachers—In after-school programs, an information gulf often exists between staff members and participants about the amount of homework assigned for the day. The programs we studied diminished this gulf by having regular communication between teachers and staff members. Regular communication with teachers was easier for staff members at school-based sites than for those at community-based sites. Some sites asked participants to maintain a homework log book that had to be signed by their teachers each day. Staff members also called or visited the teachers of participants at the beginning of the year to ensure that communication lines would remain open during the year.

Communication with parents—To ensure that program participants completed their homework assignments, staff members maintained continuous communication with parents. Staff members informed parents whether or not their child had completed his or her homework for that day. If he or she had not, parents would know to ask that the homework be completed at home.

of the program days than were study participants at programs without targeted enrollment and with low numbers of volunteer hours per child. When asked whether attending the program helped them stay out of trouble, 70 percent of the study participants who attended programs with targeted enrollment and high numbers of volunteers per child said yes. Only 51 percent who attended programs without targeted enrollment and with low numbers of volunteer hours per child said the same. (See Table 6.) The latter data came from participants' own reports; we did not have other data to confirm them.

There was no systematic relationship between any of the program characteristics analyzed and participants' school behavior. Nor was there any systematic relationship between the program characteristics and juvenile court adjudications concerning study participants. Only two of the participants were adjudicated delinquent or undisciplined during the period of the study.

ACADEMIC ACHIEVEMENT AND SELF-ESTEEM

To assess ways in which after-school programs might increase other positive outcomes for young people, we examined homework completion, grades in English and math, North Carolina End-of-Grade (EOG) test scores in math and reading, and self-esteem. The program characteristics that made positive differences in the lives of more study participants were structured homework assistance and an emphasis on cultural enrichment.

Structured Homework Assistance

Participants at sites with structured homework assistance were more likely than their peers at sites without

TABLE 6. HELP IN STAYING OUT OF TROUBLE IN RELATION TO TARGETED ENROLLMENT/VOLUNTEER HOURS

	Targeted Enrollment (Yes/No) and Volunteer Hours per Child (High/Low)	
	Yes/High (n = 109)*	No/Low (n = 62)*
Attending Program Helped Me Stay Out of Trouble		
Yes	70%	51%
No	30	49

*n = number in the subsample.

such assistance to complete their homework at the program and to improve their performance in English and math. Time and space were routinely set aside for students to work on their homework.

Students' motivation also is important, of course. The great majority of study participants (82 percent) who attended programs with structured homework assistance and said they attended to improve their grades in school indicated that they also finished all their homework at the program. In contrast, only 36 percent in such programs who did not say they attended to improve their grades reported finishing their homework. However, 58 percent of the participants who attended programs without structured homework assistance but attended to improve their grades indicated that they completed their homework at the program.

Further, 28 percent of the participants who attended programs with structured homework assistance increased their English grades from the previous year, versus only 6 percent who attended programs without structured homework assistance (see Table 7). The correlation with improvement in math grades was not as dramatic: 31 percent of the study participants who attended programs with structured homework assistance increased their math grades, whereas 22 percent of the study participants at programs without structured homework assistance also increased their math grades.

The relationship to EOG math scores was more pronounced. Almost twice as many study participants (35 percent) attending programs with structured homework assistance increased their EOG math scores as did those (18 percent) who attended programs without such assistance. Little difference was evident in EOG reading scores.

African-American Cultural Enrichment Emphasis

African-American participants at sites with an African-American cultural enrichment emphasis were more likely to increase or maintain their self-esteem scores than were African-American participants at sites that did not have such an emphasis. A large majority of African-American study participants (71 percent) at sites with an African-American cultural enrichment emphasis increased or maintained their self-esteem scores (as measured by the Coopersmith Self-Esteem Inventory), compared with only 47 percent of African-American participants at sites without a cultural enrichment emphasis. Put another way, more than half of the African-American participants at programs without an African-American cultural enrichment emphasis had lower self-esteem scores at the end of the study. (See Table 8.)

The pattern of changes in self-esteem among African-American students who were in programs with an African-American cultural emphasis is similar to the pattern of changes in self-esteem among non-African-American participants in programs with no explicit cultural emphasis in their programming. Almost all these non-African-American participants were white (only 2 were Hispanic, 3 Native American, and 5 other). We did not attempt to measure the extent to which programs with no explicit cultural emphasis may have implicitly reinforced the dominant culture. As we observe the findings in Table 8, however, we wonder whether the programs with African-American cultural emphasis may have provided their participants with the kind of positive reinforcement that many white children receive from the dominant culture.

PROGRAM FINANCES AND COSTS

The cost of serving young people at the study programs is quite low. On average, the six programs spent $9.13 per day on each program participant, based on average daily attendance. Other major findings about the costs of programs in the study are as follows:

- Costs were lower at larger, multisite programs. Programs were able to maximize their cost-effectiveness by serving more young people at more sites throughout their counties. In general,

TABLE 7. GRADES AND TEST SCORES IN RELATION TO STRUCTURED HOMEWORK ASSISTANCE

	Structured Homework Assistance	
	Required	Not Required
English Grades	(*n* = 97)*	(*n* = 33)*
Increased	28%	6%
Stayed the same	37	49
Decreased	35	45
Math Grades	(*n* = 97)*	(*n* = 32)*
Increased	31%	22%
Stayed the same	38	41
Decreased	31	38
EOG Math Test Scores	(*n* = 85)*	(*n* = 34)*
Increased	35%	18%
Stayed the same	53	76
Decreased	12	6

*n = number in the subsample.

TABLE 8. SELF-ESTEEM IN RELATION TO AFRICAN-AMERICAN CULTURAL ENRICHMENT EMPHASIS

	African-American Cultural Enrichment Emphasis?			
	Yes		No	
	African-American Students (n = 34)*	Non-African-American Students (n = 0)*	African-American Students (n = 51)*	Non-African-American Students (n = 48)*
Coopersmith Self-Esteem Score (Total)				
Increased	56%	NA†	43%	65%
Stayed the same	15	NA†	4	6
Decreased	29	NA†	53	29

*n = number in the subsample.
†NA = not applicable. At the programs with an African-American cultural enrichment emphasis, all the participants in the study were African American.

the larger, multisite programs were approximately one-third as expensive per child as the smaller, one-site programs.

- Costs were lowered through in-kind support and contributions. Program costs varied according to the amount of in-kind support and contributions that the programs collected. Generally, programs that had been established in their communities for long periods were more successful than other programs at pulling together resources.
- There was a high dependence on government revenues. The study programs relied heavily on government grants to support program operations. Overall, the six programs in the study received 56 percent of their total dollar revenues from government sources—none of which were their local board of education or the North Carolina Department of Public Instruction. (For graphic illustrations of how revenue sources differed for programs sponsored by governments and programs sponsored by nonprofit organizations, see Figures 2 and 3.)
- Fees charged to parents were low. Three of the programs in the study charged no fees. At the three that did charge fees, parents paid a minimum average hourly fee of $0.08 and a maximum average hourly fee of $0.71. In contrast, the National Study of Before- and After-School Programs found that in 1991, after-school programs serving low-income families charged parents a minimum average hourly fee of $1.69 and a maximum average hourly fee of $2.05.[7] The maximum average hourly fee charged by the three study programs is approximately one-third the maximum hourly average fee charged by after-school programs nationwide.

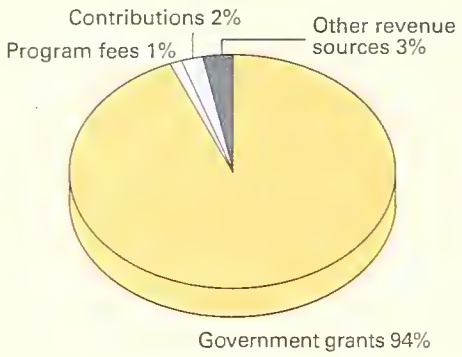
LIMITATIONS OF THE STUDY'S FINDINGS

The findings reported in this article are strongly suggestive but not conclusive. They should be viewed with caution. We studied only six after-school programs. Many other programs may have effective practices that we did not observe. Moreover, we cannot comment on the absolute effect of these programs on young people because a control group of nonparticipants was not available. All the youth participants in this study were enrolled in an after-school program. Because of time and funding restrictions, a control group was not possible. Without a group of nonparticipants for comparison, we cannot be certain how many of the observed improvements in young people's self-esteem, school grades, and conduct were due to their participation in an after-school program. Rather, we have identified patterns among participants that were systematically related to program practices that we expected to affect students' lives. For example, we found that more students in programs with a special feature such as structured homework assistance were likely to have improved their grades over the period of the study. We concluded that the structured homework helped improve the grades for some students. Additional research is needed to investigate further the effect of after-school programs across the state.

CONCLUSION

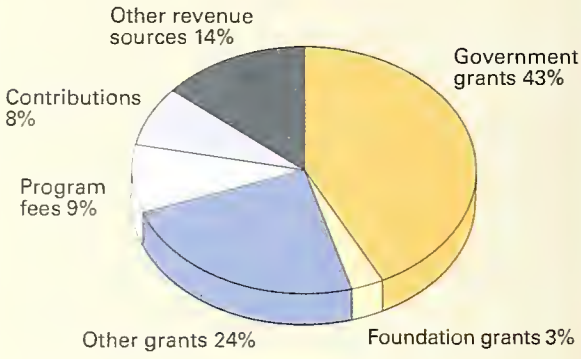
The staff members at the six after-school programs faced significant ongoing challenges to encourage young people to attend their programs regularly. In fact, 33 percent of the study participants attended their programs less than half of the total number of days the program was offered over the study period.

FIGURE 2. REVENUE SOURCES OF PROGRAMS SPONSORED BY GOVERNMENTS



Source: Adapted from Gordon Whitaker, Kyle Gray, and Barbara Roole, *Developmental Analysis of After-School Programs for the Governor's Crime Commission* (Chapel Hill, N.C.: Center for Urban and Regional Studies, The University of North Carolina at Chapel Hill, Nov. 1998), 84.

FIGURE 3. REVENUE SOURCES OF PROGRAMS SPONSORED BY NONPROFIT ORGANIZATIONS



Source: Adapted from Gordon Whitaker, Kyle Gray, and Barbara Roole, *Developmental Analysis of After-School Programs for the Governor's Crime Commission* (Chapel Hill, N.C.: Center for Urban and Regional Studies, The University of North Carolina at Chapel Hill, Nov. 1998), 85.

If after-school programs are going to make a positive difference in the lives of participants and help reduce delinquency, then participants must attend regularly. The programs struggled with limited funds to provide regular transportation in rural and urban areas. Their participants felt conflicts with other after-school activities such as band and sports. The programs sometimes encountered limited support and resources from the public schools and wavering levels of commitment from participants and their parents across the school year.

In response to the needs of after-school programs and youth, state policy makers should more effectively coordinate resources to support local programs that encourage regular attendance. This study suggests that attendance is likely to be higher in programs that target at-risk youth, provide regular transportation in rural areas, use community-based sites, and conduct structured homework assistance. Further, local community leaders and program supporters should explore providing structured homework assistance, community-based sites or regular transportation, and targeted enrollment. In terms of expense, supporting expansion of programs that already are successfully serving young people can be a low-cost way to increase the number of youth served. Also, building diverse funding bases and strong collaborations with other local agencies can help ensure continued program operation. Together these state and local strategies can help meet the academic and behavioral needs of young people by providing supervised programs for them during the after-school hours.

NOTES

1. Patricia Seppanen, John Love, Dianne Kaplan deVries, and Lawrence Bernstein, *The National Study of Before- and After-School Programs: Final Report to the Office of Policy and Planning, U.S. Department of Education* (Portsmouth, N.H.: RMC Research, 1993).

2. Support Our Students (SOS) Program, at http://www.dhhs.state.nc.us. sos.htm.

3. The criteria and the procedures used to identify and recruit at-risk youth varied by program. For example, the YMCA of Greater Winston-Salem's SOS program broadly defined an at-risk youth as any young person who was unsupervised during the after-school hours. In contrast, Rockingham County SOS's enrollment criteria took into account a student's academic performance, work habits, interpersonal skills, family needs, self-confidence, exposure level, race, gender, and access to reliable transportation.

4. Seppanen, Love, deVries, and Bernstein, *National Study*, 107.

5. Seppanen, Love, deVries, and Bernstein, *National Study*, 39. The sample size for the South was 450 programs.

6. H. N. Snyder, M. Sickmund, and E. Poe-Yamagata, *Juvenile Offenders and Victims: 1997 Update on Violence* (Washington, D.C.: U.S. Department of Justice, Offices of Juvenile Justice and Delinquency, 1997).

7. Seppanen, Love, deVries, and Bernstein, *National Study*, 107.

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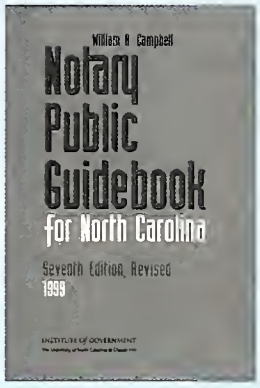

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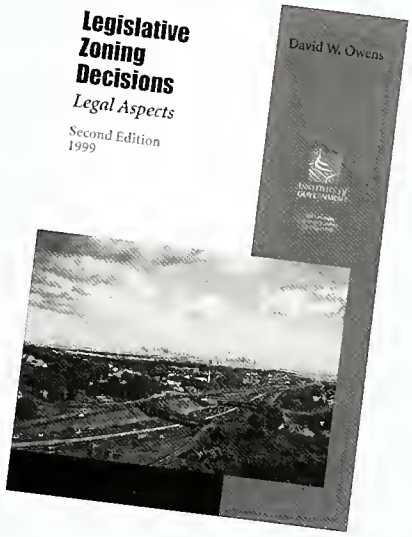

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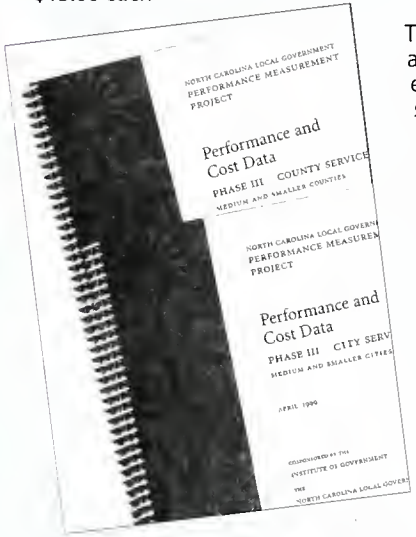

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