How to Object to a Defendant's hospital records being admitted into evidence in a DWI trial.

1. Does the State intend to compel the hospital to produce Defendant's hospital records, despite the privilege?

To compel a hospital to produce defendant's medical records, the State must rely on NCGS §8-53, which provides that medical records are confidential except,

> "Any resident or presiding judge in the district, either at the trial or prior thereto.. . . may compel disclosure if in his opinion **disclosure is necessary to a proper administration of justice**. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."

The decision that disclosure is necessary to a proper administration of justice "is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling." State v. Drdak, 330 N.C. 587, 592, 411 S.E.2d 604, 607 (1992). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." State v. Wilson, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

The North Carolina Supreme Court in State v. Drdak set forth a template for the State to use to argue that a judge should compel hospital record production. First, the district attorney must file a motion to compel disclosure of defendant's medical records.[1]

At such properly noticed motion hearing, the State must put forth proper foundational evidence to sustain the blood test's admissibility. In Drdak, the North Carolina Supreme Court affirmed the lower court's admission of the defendant's medical records based on the following:[2]

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[1] In Drdak the Court compelled production of defendant's medical records pursuant to the "other competent evidence of a defendant's blood alcohol level" as opposed to that obtained from chemical analysis pursuant to NCGS §§ 20-16.2 and 20-139.1.

[2] This evidence meets the requirements necessary to provide a proper foundation for the admission of the blood alcohol test results. Robinson v. Ins. Co., 255 N.C. 669, 122 S.E.2d 801 (1961). ("However, as to whether or not a blood alcohol test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field. In other words, a foundation must be laid before this type of evidence is admissible. . . Moreover, it should be made to appear that the blood was taken from the body of the deceased before any extraneous matter had been injected into it."255 N.C. at 672, 122 S.E.2d at 803.) This Court has held such results admissible in other cases prior to the adoption of the implied consent statute. E.g. . . ; State v. Moore, 245 N.C. 158, 95 S.E.2d 548 (1956)". Drdak, 330 N.C. at 592, 593, 411

First, the State showed that the hospital's blood alcohol test was performed less than an hour after the defendant's car crashed into the tree (so there must be evidence admitted of the time of accident and the time of the test.) Secondly, the State put forth admissible evidence that an experienced phlebotomist withdrew the blood sample under routine procedure pursuant to the doctor's orders. Thirdly, there was evidence admitted that a trained laboratory technician analyzed the blood sample using a Dupont Automatic Clinical Analyzer which was capable of testing either whole blood or serum. Fourthly, the evidence showed the result was 0.178 grams per milliliter of blood. Fifthly, the result was recorded and relayed to the attending physician by computer screen in order to assist him in his determination of appropriate treatment of the defendant. Sixthly, the results of the test were made a part of the medical records of the hospital in the defendant's case.

76 A.L.R.5th 1 (Originally published in 2000) provides an index of SPECIFIC SHORTCOMINGS IN PROOF ALLEGED by the State in its foundation to admit defendant's hospital records:

A Failure of Handler to Testify
- Lack of testimony from person who drew blood sample
- Lack of testimony from person who performed blood alcohol analysis
- Lack of testimony from person who transported blood sample
- Lack of testimony from other person in chain

B Defects in Testimony of Handler
- Lack of specific recall
- Factual errors or inconsistencies
- Use of documents to complement handler's testimony

C Other Specific Shortcomings Alleged
- Storage in unrestricted area
- Documentary
- Problems with seals on container holding sample
- Delays
- Sample mailed
- Sample placed in mail drop
- Identity of donor questioned
- Amount of blood drawn questioned
- No writing on vial
- Sample not produced at trial

2. By which avenue shall the State attempt to compel hospital record production?

The nonexclusive avenues by which a State may attempt to compel disclosure of medical records from a hospital are by subpoena or search warrant. In Drdak, the State obtained the records by subpoena.

S.e.2d at 608, 609.

NCGS § 15A-802 provides that Rule 45 of the N.C. Rules of Civil Procedure re: subpoenas applies to criminal proceedings. Until North Carolina Appellate courts decide, it is an open question if the State may establish a hearsay exception for hospital business records based solely on an affidavit from a records custodian. Another question is whether such records are nontestimonial by reference to the records themselves.

In the unpublished case, State v. Wood, decided in January 2013, the Court of Appeals attempted to answer the above questions. In Wood, the Court of Appeals affirmed the trial court's decision to admit the defendant's medical records by deciding that hospital medical records created for treatment-related purposes (as in an emergency room) are not testimonial since such records are not documents created for the purpose of establishing or proving some fact at trial. Furthermore, business records which include hospital records are admissible through a recognized exception to the prohibition against the admission of hearsay evidence even if the declarant is available as a witness. NCGS 8C-1, Rule 803(6). See "Special Rules for the Admission of Hospital Medical Records by Shea Denning on the UNC School of Government Blod, ncriminallaw.sog.unc.edu.

But see NCGS § 8-44.1 "Hospital medical records," not mentioned by Shea Denning with the UNC School of Government or the Court of Appeals in State v. Wood. NCGS § 8-44.1 provides that "Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45C, or if they are certified, identified, and authenticated by the live testimony of the custodian of such records."

See Thorp's North Carolina Trial Practice Forms, Database updated June 2013, § 45:11 for a form written objection to subpoena [Rule 45(c)(3)], attached hereto.

Alternatively, the State may try to compel production of medical records from a hospital by a search warrant. To be valid, a search warrant must be valid on its face so please review a search warrant carefully to detect any issues or incorrect entries. In order to challenge a search warrant, the defendant must file a motion to suppress evidence obtained as a result of an illegal search. See NCGS 15A-245 and its annotated cases.

3. Once the judge decides to compel production of medical records, how should he or she proceed?

Please see the unpublished case Nicholson v. Thom 714 S.E.2d 868 (2011) wherin the Appeals Court approved of the way a trial court decided which medical records to compel production of. "As was appropriate, the trial court proceeded cautiously and methodically in determining that Defendant should produce the requested materials. In its 5 March 2010 order directing the production of the relevant materials for in camera review, the trial court carefully

defined the scope of production by requesting only "1) a copy of Defendant's application for disability related to her brachial plexus injury and 2) a copy of Defendant's medical records from August 17, 2005 to the present related to her brachial plexus injury." Only after reviewing the documents in chambers and hearing the arguments by counsel on 22 March 2010 did the trial court determine that "the Documents should be produced." The trial court carefully limited the availability of the requested documents by ordering that they "remain sealed with the Court," that they "only ... be disclosed to Plaintiff's counsel," and that they were "not to be disclosed by Plaintiff's counsel without further order of this Court[.]" See Roadway Express, 178 N.C.App. at 170–71, 631 S.E.2d at 45–46 (expressing approval of the trial court's "methodical" process of requesting only the medical records at issue between the parties, reviewing the requested documents in camera, and limiting scope of disclosure upon ordering production). Id.

4. What else must a defense attorney do to preserve his objection to production of defendant's hospital records?

If the judge does compel production of blood test results by NCGS 8-53, the next step is for Defendant not only to object and preserve the issue for appeal but to appeal the judge's order. State v. Drdak, 330 N.C. at 591. Otherwise, the higher court may rule the blood alcohol level is properly in the possession of the State.

In State v. Byers, 105 N.C. App. 377 (1992), the Court of Appeals ruled that in superior court a Defendant must challenge the admissibility of blood test results by a proper motion to dismiss pursuant to NCGS 15A-974 and 15A-975, in order to preserve the issue for appeal.

5. Conclusion

In sum, with all the tools at his disposal, a defendant must fight the admission of his personal hospital medical records. The above article attempts to provide some paths through which the defendant may pick his way through the thicket of admissibility.

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT/ SUPERIOR COURT DIVISION
FILE NO. _____

_____
Plaintiff,
v.

OBJECTION TO SUBPOENA AND MOTION TO QUASH

_____
[Name of defendant],

The undersigned objects, pursuant to Rule 45(c)(3) of the Rules of Civil Procedure and the United States and North Carolina Constitutions, to the subpoena attached hereto. The Defendant respectfully shows the court:

1. The above-referenced subpoena has been served on the undersigned commanding him/her to provide confidential medical records to the District Attorney.

2. The subpoena should be quashed on the following grounds:

   a. The subpoena fails to allow reasonable time for compliance.

   b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection in that the records it seeks are confidential medical records.
   c. The subpoena subjects the undersigned to an undue burden or expense.
   d. The subpoena is unreasonable or oppressive.
   e. The subpoena is procedurally defective.
   f.

3. The undersigned requests that this objection be received as an affidavit by the court.

WHEREFORE, THE DEFENDANT PRAYS THAT THE COURT:

1. Quash the Subpoena.
2. Limit the scope of the Subpoena as is appropriate.
3. For such other and further relief as is just and proper.

This the _____ day of _____ 20_____

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Marcus E. Hill, Attorney for Defendant
311 E. Main Street
Durham, NC 27701 (919) 688-1941

NOTES for Motion to Quash

A written objection must be served upon the party or attorney designated in the subpoena within 10 days after service of the subpoena. or before the time specified for compliance if the time is less than 10 days after service.

A written objection can be used to challenge a subpoena commanding a person to appear at a deposition or to produce records but not to challenge a subpoena commanding a person to appear at trial or hearing; instead, a motion to quash or modify subpoena. pursuant to Rule 45(c)(5). should be used.
The objection must comply with Rule 45(d) as well as the requirements of Rule 11.
If verification is needed. see Rule 43(e).