SOME LEGAL ISSUES IN THE MANAGEMENT OF HIGH PROFILE TRIALS

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1. Closing the courtroom, limiting access

    a. Presumption of openness — Generally court proceedings must be open to the public, including the news media, unless there is an overriding reason for closing the courtroom.

    b. Closing criminal proceedings — Both the First and Sixth Amendments provide for open proceedings in criminal cases.

        i. The public has a First Amendment right to attend criminal trials, even if the prosecution and defense wish to close the proceeding. *Richmond Newspapers, Inc., v. Virginia,* 448 U.S. 555 (1980).

            1. The First Amendment right applies to jury *voir dire*. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*, 464 U.S. 501 (1984).
            2. The right also applies to preliminary hearings. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 U.S. 1 (1986).

        ii. The defendant has a right to an open proceeding. The Sixth Amendment provides that in a criminal prosecution "the accused shall enjoy the right to a speedy and public trial."

            1. The Sixth Amendment right extends to a suppression hearing. *Waller v. Georgia*, 467 U.S. 39 (1984).
            2. The right also applies to jury *voir dire*. *Presley v. Georgia*, 130 S. Ct. 721 (2010).

        iii. A criminal proceeding may not be closed unless doing so is necessary (a) to serve an overriding governmental interest (such as protecting witnesses, preserving a defendant's right to a fair trial, or avoiding public disclosure of sensitive information); (b) there is no less restrictive means of protecting that interest; and (c) the scope and duration of the closure is kept as narrow as possible. The court must make findings sufficient to support the decision to close the court. *Waller*, 467 U.S. 39*; Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596 (1982).

    c. Closing civil proceedings — Although the United States Supreme Court has not addressed whether there is a First Amendment right of public access to civil proceedings, the North Carolina Supreme Court has recognized a qualified right of

public access under Art. I, § 18 of the N.C. Constitution ("All courts shall be open . . . ."). *Virmani v. Presbyterian Health Servs. Corp.,* 350 N.C. 449, 474 (1999).

i. The qualified right of public access may be overridden by a compelling public interest, but the court first must consider less drastic alternatives. *Virmani*, 350 N.C. 449.
ii. An agreement by the parties in a domestic case to maintain confidentiality in any proceeding against each other does not bind the court and does not by itself establish a compelling reason for closing the court proceeding. *France v. France*, 705 S.E.2d 399 (N.C. Ct. App. 2011).

d. Excluding individuals —

i. Courts in other jurisdictions disagree over whether the standard for excluding individuals from the courtroom is the same as for closing the courtroom altogether. Some courts say that the same "overriding interest" standard (see the discussion above) applies to both situations; others say there need be only a "substantial reason" for excluding individuals. North Carolina appellate courts have not addressed the issue except in the application of G.S. 15-166 regarding exclusion of spectators in rape and sex offense cases (see below).

ii. The standard for excluding spectators from the courtroom during the testimony of a rape or sex offense victim under G.S. 15-166 is the same as for closing the courtroom, i.e., there must be an overriding governmental interest for doing so, the exclusion must be the least restrictive means of protecting that interest, and the exclusion must be kept as narrow as possible. *State v. Jenkins*, 115 N.C. App. 520 (1994); *Bell v. Jarvis*, 236 F.3d 149 (4th Cir 2000). *See also State v. Burney*, 302 N.C. 529 (1981).

iii. Courts have inherent authority to maintain proper order and decorum, including exclusion of disruptive individuals. General Statute 15A-1033 specifically authorizes the exclusion of a disruptive person from a criminal trial, and G.S. 15A-1035 declares that the court has inherent authority to maintain order in addition to the specific statutory authority.

For an example of exclusion of disruptive spectators see *State v. Dean*, 196 N.C. App. 180 (2009), involving removal of gang members from a murder trial.

North Carolina appellate cases have not directly addressed the constitutionality of removal of spectators, but it would seem obvious that there is an overriding governmental interest in removing disruptive spectators.

iv. A defendant might argue that the due process right to a fair trial has been denied when the court fails to exclude spectators who attempt to influence jurors through demonstrative acts or dress. *See State v. Braxton*, 344 N.C. 702 (1996) (no error in failing to remove spectators wearing buttons with the victim's photograph); and *State v. Maness*, 363 N.C. 261 (2009) (police

officers in uniform momentarily standing near jurors did not create mistrial in murder case with police officer victim).

e. Statutes on closing proceedings — A number of statutes specify whether particular proceedings are to be open or closed. The main statutes affecting superior court are:

   i. G.S. 8C-1, Rule 412(d) — In camera hearing required on admissibility of evidence of the sexual behavior of a complainant in a rape or sex offense case.
   ii. G.S. 15-166 — Closing the courtroom during the testimony of rape or sex offense victim (see the discussion above).
   iii. G.S. 15A-623(e) — Grand jury proceedings are secret.
   iv. G.S. 15A-1033 — Removal of person disrupting criminal trial.
   v. G.S. 15A-1034 — Limiting access to courtroom in criminal case to ensure order and safety of those present.
   vi. G.S. 66-156 — In camera hearing may be held to protect trade secrets in litigation over misappropriation of trade secrets.

f. Suing for access to civil proceeding — G.S. 1-72.1 allows any person claiming a right of access to a civil proceeding to file a motion for that purpose without having to intervene in the case. There is no comparable statute for criminal cases.

2. Restricting free speech rights in courthouses and courtrooms

   a. The court as a nonpublic forum at which speech may be restricted

      i. A courtroom is a nonpublic forum. *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005). The courthouse as a whole is a nonpublic forum. *Delahanty*, 129 F.3d 20*; Huminski v. Corsones*, 396 F.3d 53 (2d Cir 2005). The parking lot adjacent to the courthouse is a nonpublic forum. *Corsones*, 396 F.3d 53.
      ii. In a traditional or designated public forum, any restriction on free speech is subject to strict scrutiny and must be based on a compelling governmental interest. For a nonpublic forum like a courthouse, however, speech may be restricted so long as the restriction is reasonable and not based on the speaker's viewpoint. *Cornelius v. NAACP*, 473 U.S. 788 (1985).
      iii. A prohibition on wearing political buttons in the courtroom is reasonable. *Delahanty,* 129 F.3d 20. It is reasonable to limit artwork in a courthouse lobby to "sedate and decorous exhibits." *Sefick v. Gardner,* 164 F.3d 370, 373 (7th Cir. 1998).
      iv. Restrictions on speech in a nonpublic forum can be unconstitutional if they are too broad or leave too much discretion with supervising officials. For examples of restrictions in courthouses that were considered too broad *see Sammartano v. First Judicial Dist. Court,* 303 F.3d 959 (9th Cir 2002); *People v. Tisbert*, 11 Cal. App. 4th Supp. 1 (1992).

b. The courthouse can become a designated public forum

   i. A location which is not a traditional public forum is treated as one when the government designates it as a place for public expression. Restrictions on expression then become subject to strict scrutiny.
   ii. A designated public forum is not created inadvertently; it is not created by inaction or permitting limited public expression; the creation has to be intentional. *Cornelius*, 473 U.S. 788, 802.
   iii. An outside plaza that was part of a federal building housing a court was considered a designated public forum because it was used for demonstrations on a regular basis. *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991).

c. The courthouse can be a limited public forum

   i. A limited public forum is created when the government creates an outlet for a specific or limited type of expression at a location which otherwise would be a nonpublic forum. A school might allow classrooms or meeting rooms to be used by student groups but not by others, for example.
   ii. When a limited public forum is established, any restriction must be reasonable in light of the purpose served by the forum (e.g., distinguishing between student groups and outsiders in opening classrooms for club meetings) and must not discriminate based on viewpoint. *Cornelius*, 473 U.S. 788.
   iii. An example of a courthouse becoming a limited public forum (although at the time it was analyzed as a designated public forum) is *Amato v. Wilentz*, 753 F. Supp. 543 (D.N.J. 1990), *vacated on other grounds*, 952 F.2d 742 (3d Cir. 1991). After allowing a courthouse to be used regularly for filming movies and television shows, court officials could not deny access to a new movie because they did not approve of its theme.
   iv. A limited public forum might be created in a courthouse lobby or similar area if, for example, officials allow it to be used for organizations raising money for charitable purposes. Officials could limit the organizations to those serving a charitable purpose but could not discriminate based on whether they thought the charitable purpose was worthwhile.

d. Expressive conduct as speech

   i. Free speech protection applies not only to written and spoken words but also to expressive conduct.
   ii. An armband is an example of expressive conduct. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Dress can be expressive conduct as well. Soliciting funds, too, can be expressive conduct, subject to First Amendment protection. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).
   iii. Most conduct is not expressive conduct. Whether conduct is protected by the First Amendment depends on whether it is intended to express a message.

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

3. Restricting access to court records

   a. Constitutional and common law considerations

      i. The United States Supreme Court has not decided whether there is a First Amendment right of access to court documents, but has decided there is a common law right of access. It is within the discretion of the trial court to decide whether to limit such common law access. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

      ii. The Fourth Circuit has held that there is a First Amendment right of access to court documents when the proceeding to which the documents pertain has historically been open to the public and when public access plays a significant role in the process. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989).

      When the First Amendment right applies, access can be denied only to serve a compelling state interest, and the restriction on access must be narrowly tailored to serve that interest.

      When only the common law right of access applies, access may be denied when "essential to preserve higher values," and the restriction must be narrowly tailored.

      As a practical matter there does not appear to be a significant difference between the standard under the First Amendment and the common law standard.

      iii. The North Carolina Court of Appeals has followed the *Baltimore Sun* analysis in determining whether a First Amendment right of access applies to court documents, holding that search warrants are subject only to the common law right of access. *In re Investigation into Death of Cooper*, 200 N.C. App. 180 (2009). The qualified right of access to court documents is based on Art. I, § 18 of the N.C. Constitution ("All courts shall be open"). The qualified right of access can be limited by a countervailing "higher interest" such as protecting the defendant's right to a fair trial, preserving the integrity of an ongoing investigation, or protecting witnesses or innocent third parties.

   b. Public Records Law (G.S. Chapter 132)

      i. Court records come under the broad definition of public record in G.S. 132-1 and, thus, most disputes about release of court records are resolved under the public records statutes and do not require consideration of constitutional issues.

ii. Additionally G.S. 7A-109(a) reiterates that records maintained by the clerk of court pursuant to AOC rules are public.

iii. The only court documents which Chapter 132 itself specifically exempts from disclosure are:

1. Settlement documents in cases involving medical malpractice actions against public hospital facilities. See G.S. 132-1.3(a). [Settlement documents in actions against state and local public agencies other than hospitals are public records and may not be sealed except upon a finding that there is an overriding interest in sealing the document and that no measure short of sealing will protect that interest. See G.S. 132-1.3.]
2. Arrest and search warrants before they have been returned by law enforcement agencies. See G.S. 132-1.4(k).

iv. Statutes other than Chapter 132 address the confidentiality of various kinds of court records. The statutes most applicable to superior court include:

1. G.S. 1A-1, Rule 26(c) — The judge in a civil case may limit discovery and order that documents be sealed.
2. G.S. 15-207 — Information obtained by a probation officer is privileged and is to be disclosed only to the court and Secretary of Correction and others authorized by them.
3. G.S. 15A-623(e), (f) and (g) — Grand jury proceedings are secret; members of the grand jury and others present are prohibited from disclosing anything that transpired; the judge may direct that the indictment be sealed until the defendant is arrested; and anyone who wrongly discloses grand jury information is subject to contempt.
4. G.S. 15A-908 — The judge may limit discovery in criminal cases and order the sealing of documents presented for in-camera review.
5. G.S. 15A-1002(d) — A report on the capacity of the defendant to stand trial is to be sealed but copies provided to counsel.
6. G.S. 15A-1333(a) — Presentence reports and information obtained by sentencing programs to prepare such reports are not public records and may be made available only to the defendant, the defendant's lawyer, the prosecutor and the court.

c. Inherent authority to limit access to court documents.

i. The court has inherent authority to seal documents when necessary to ensure that each side has a fair and impartial trial or to serve another overriding public interest. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449 (1999).

ii. An agreement by the parties in a domestic case to maintain confidentiality in any proceeding against each other does not bind the court and does not by

itself establish a compelling reason for closing the court proceeding. *France v. France*, 705 S.E.2d 399 (N.C. Ct. App. 2011).

4. Restricting statements about or reporting of court proceedings (gag orders)

    a. Constitutional considerations

        i. The failure to protect a defendant from massive negative media coverage before and during a trial can result in denial of the due process right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

        Steps that might be taken to assure a fair trial include limiting the number and location of reporters in the courtroom; insulating witnesses and jurors from media contact; limiting release of information by court officials, law enforcement, witnesses and lawyers; continuing the trial until a more favorable time; changing venue; and sequestering jurors.

        ii. An order restricting what parties, lawyers, witnesses, court officials or the media may say about a case is a prior restraint on free speech and is presumed unconstitutional. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

        To be valid such an order must be based on findings of fact supported by evidence in the record that (a) publicity is likely to affect jurors and the right to a fair trial, (b) lesser alternatives such as a change in venue or continuance of the trial or detailed *voir dire* of jurors have been considered and are not sufficient to mitigate the risk, and (c) the order is likely to serve the purpose of preventing jurors from being influenced, i.e., the order actually can be effective.

        iii. The First Amendment does not prohibit discipline of a lawyer whose remarks create a "substantial likelihood of material prejudice" at trial. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Restrictions on a lawyer are not subject to the same standard as restrictions on the news media.

    b. North Carolina law

        i. North Carolina case law tracks the U.S. Supreme Court decision in *Nebraska Press Ass'n v. Stuart*, *supra*, on the requirements for a gag order. *See Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711 (1998).

        ii. Although the U.S. Supreme Court in *Gentile v. State Bar of Nevada, supra*, allows greater leeway in restricting the comments of lawyers than in restricting the news media, North Carolina applies the same standard to both. *See Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 184 N.C. App. 110 (2007).

iii. G.S. 7A-276.1 prohibits any court order restricting the publication or broadcast of a report about anything that occurred in open court or that concerns a public record. Such orders are declared void and no one may be held in contempt for their violation.

c. Rules of Professional Conduct for lawyers

i. Rule 3.6 prohibits lawyers from making statements that "have a substantial likelihood of materially prejudicing" the trial.

ii. Rule 3.8(f) instructs prosecutors to refrain from out-of-court statements that "have a substantial likelihood of heightening public condemnation of the accused." Prosecutors also are to try to prevent law enforcement officers and others assisting in the case from making such statements.

5. Rule on cameras in the courtroom

a. The use of television or still photography or broadcast or recording of court proceedings by the news media is governed by Rule 15 of the General Rules of Practice for the Superior and District Courts.

b. Although the senior resident superior court judge may set policies about use of cameras, etc., in the courtroom, including the location of equipment, the final decision about coverage of a particular proceeding belongs to the presiding judge.

c. Coverage of the following kinds of proceedings is prohibited by Rule 15:

i. Adoption proceedings
ii. Juvenile proceedings
iii. Proceedings before clerks
iv. Proceedings before magistrates
v. Probable cause proceedings
vi. Child custody proceedings
vii. Divorce proceedings
viii. Temporary and permanent alimony proceedings
ix. Proceedings on motions to suppress evidence
x. Proceedings involving trade secrets
xi. In camera proceedings

d. Even if coverage of a proceeding is allowed, coverage of these kinds of witnesses is prohibited by Rule 15:

i. Police informants
ii. Minors
iii. Undercover agents
iv. Relocated witnesses
v. Victims and families of victims of sex crimes

e. Coverage of jurors is prohibited at any stage of a proceeding, including jury selection.

f. Coverage may not include audio pickup or broadcast of conferences in a court facility between a lawyer and client, between co-counsel, between opposing counsel, or of bench conferences.

6. Judge's comments on a case

a. Prohibited comment under the Code of Judicial Conduct — Canon 3A(6) of the North Carolina Code of Judicial, reproduced below, prohibits a judge from commenting on the merits of any pending case in either state or federal court involving a question of state law. The judge also is to encourage court personnel under the judge's supervision to avoid such comment.

The state code differs from the American Bar Association's model code which prohibits comment on a pending or impending (anticipated) matters in any court, if the comment might be expected to affect the outcome or fairness of the proceeding. Thus, on the one hand, the North Carolina code potentially allows a judge to comment on a broader range of cases than does the ABA model code, by limiting the prohibition to pending cases involving state law. On the other hand, the North Carolina code is more restrictive than the ABA model in that it prohibits any comment on pending cases, not just comments likely to affect the outcome or impair the fairness of the proceeding. The preamble to the North Carolina code says that no other code or proposed code is to be relied upon for its interpretation. Accordingly, a state judge must follow the North Carolina Code of Judicial Conduct, and not rely upon interpretations of the ABA model code.

b. Case law on prohibited comments — There appears to be only one published decision concerning a disciplinary action against a judge in North Carolina for violating Canon 3A(6), *In re Harrison*, 359 N.C. 415 (2005). The district judge was removed from office for mental and physical incapacity which had prompted various violations of the code, including her assertions that several named lawyers and judges were conspiring to have her assassinated. The Canon 3A(6) violation was a lengthy letter to a local newspaper discussing a domestic case over which the judge had presided, written while the case was still on appeal.

c. Permitted public comment — Canon 3A(6) authorizes a judge to speak publicly in the course of public duties and to explain court proceedings. Thus it is permissible for a judge to meet with reporters to explain and answer questions about the procedural aspects of a trial while avoiding comment on the merits of the case, the demeanor of witnesses, the performance of the lawyers or similar matters.

d. Text of Canon 3A(6) of the North Carolina Code of Judicial Conduct:

A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar

abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as a faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.