

## **GATEKEEPER ORDERS (PRE-FILING INJUNCTIONS)**

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### Basics of gatekeeper orders

Courts have the inherent authority to enter pre-filing injunctions — also referred to as gatekeeper orders — restricting individuals from filing new lawsuits or other papers without court approval, when necessary to prevent abuse of the judicial process and protect other parties.

The gatekeeper order should be the judge's last resort after other attempts to control the litigant, such as Rule 11 sanctions, have failed. As with any disciplinary matter, the subject should be given notice of the proposed order and a chance to respond before it is entered. The order should be limited to the circumstances showing abuse — that is, if all the abusive litigation is directed at one particular party, the order should only limit filings related to that party, or if the frivolous filings all are in one court, the order should be limited to that court.

The order needs to specify the history that has led to its entry, in sufficient detail that an appellate court can review for the trial court's abuse of discretion.

The order must include a means for the person to file legitimate actions. One possibility is to require that the proposed filing be first submitted to a designated judge to be approved for filing. Another option is to allow a filing if it is accompanied by a certificate from a lawyer that the lawyer has read the document and has also read the gatekeeper order and concludes that the filing meets the standards of Rule 11. A lawyer's certification should not be the only alternative available, however, because that would have the effect of requiring the person to employ a lawyer.

Either in the gatekeeper order or separately the court should instruct the clerk's office on how to handle improperly filed documents. The clerk might be instructed to not accept for filing any papers from the litigant without a signed approval from a judge, for example. Notice of the gatekeeper order also should be given to all parties who have been on the other side of cases from the abusive litigant, so they will know of relief available to them if frivolous documents get filed despite the order.

### North Carolina appellate cases

Although there are few North Carolina appellate decisions on gatekeeper orders, and most of them are unpublished, the appellate courts clearly condone such orders and indeed have entered their own gatekeeper orders. There is little discussion of gatekeeper orders in the appellate cases because the

litigants are *pro se* and typically fail to properly preserve issues for appeal, leading to dismissal on procedural grounds.

Some state appellate cases dealing with gatekeeper orders are:

*Estate of Dalenko v. Monroe*, N.C. Ct. of App., No. COA08-844 (May 19, 2009) (unpublished) —

Ms. Dalenko, acting *pro se*, was appealing the dismissals of claims she filed on behalf of her father's estate in 2007. The dismissals were based, at least in part, on the claims being filed in violation of a gatekeeper order entered in 2001. The case with the gatekeeper order itself had been appealed unsuccessfully. Because of the earlier history the Court of Appeals did not discuss the standard for issuance of a pre-filing injunction, but the opinion implicitly accepts the validity of the gatekeeper order, and quotes it extensively, making the order a useful example of the kind of findings which support a pre-filing injunction.

The gatekeeper order violated by Ms. Dalenko included findings that she had been sanctioned by five other judges and had exhibited a pattern of disregard for the rules that would have required reporting her to the State Bar if she were a lawyer. The order also specifically found that Dalenko had filed frivolous claims for the purpose of harassment and had placed an undue burden on the judicial system. The order prohibited her from filing any document with the Wake County clerk's office without a certificate by a lawyer that the lawyer had read the document, that the document complied with Rule 11, and that the lawyer had read the gatekeeper order.

In the appeal of the dismissal of the 2007 claims Ms. Dalenko argued that the 2001 pre-filing injunction was not intended to apply outside the case in which it was entered and that, if so applied, the order would violate Rule 65(d) of the Rules of Civil Procedure which says injunctions are binding only on parties, their lawyers and others in active concert or participation with them. The Court of Appeals rejected her arguments, saying, among other things, that there was no violation of Rule 65(d) because Ms. Dalenko was a party to the action in which the gatekeeper order was entered even if the defendants in her newest lawsuit were not.

*Dalenko v. Wake Cty Dep't of Human Servs.*, 157 N.C. App. 49, *disc. rev. denied*, 357 N.C. 458 (2003), *cert. denied*, 540 U.S. 1178 (2004) —

This is Ms. Dalenko's appeal of the lawsuit in which the 2001 gatekeeper order was entered. The gatekeeper order itself is not discussed, but the court approved another method of addressing abusive litigants. After an earlier frivolous lawsuit the trial judge had invoked G.S. 1-109 to require Dalenko to post a prosecution bond of \$20,000 to proceed in her new lawsuit against the same agency. The previous lawsuit had resulted in sanctions against Dalenko, and the new lawsuit was based on the same allegations. The \$20,000 prosecution bond was calculated to cover anticipated costs for the defendants, based on the experience in the previous litigation. The Court of Appeals

held that the trial court had discretion to go beyond the \$200 specified in G.S. 1-109 for prosecution bonds.

*Smith v. Noble*, 155 N.C. App. 649 (2002) —

Smith tried to sue the judge, law enforcement officers, the clerk of court and others over the handling of her civil cases. After dismissing the cases, the trial court entered a pre-filing injunction prohibiting Smith from filing any lawsuit in state court without approval of the senior resident superior court judge for the district. Smith appealed on various grounds, including that the injunction violated the open courts provision of the North Carolina Constitution (Art. I, § 18: “All courts shall be open . . . .”) as well as her free speech and due process rights. The appeal was dismissed for Smith’s failure to present arguments and cite authority.

*Lee v. O’Brien*, N.C. Ct. of App., No. COA01-1231 (Aug. 6, 2002) (unpublished) —

Lee was permanently enjoined from calling police with unwarranted complaints against her neighbor O’Brien, and from filing any civil action or criminal complaint in Wake County without approval of a district judge. The order was based on findings that Lee, acting *pro se*, had filed multiple unsupported civil actions and criminal complaints; that the filings were motivated by harassment and annoyance; and that she would continue to do so unless enjoined; and that she had failed to respect the authority of the courts. The Court of Appeals held that the gatekeeper order did not deny Lee access to law enforcement and the courts because it prohibited only “unfounded or harassing complaints” to the police; the order was limited to complaints against the named defendants; and court filings were allowed with approval of a judge.

*Wendt v. Tolson*, N.C. Ct. of App., No. COA03-1680 (Aug. 16, 2005) (unpublished) —

Wendt had filed and lost three lawsuits after losing an administrative appeal concerning tax liability. As a Rule 11 sanction the trial judge ordered Wendt not to file any other lawsuit without the approval of the senior resident superior court judge of the county. The Court of Appeals accepted without discussion that a gatekeeper order was an available sanction, but held that the imposition of sanctions required findings of fact which were missing in this case. Because the record contained evidence to support the sanction, the appellate court remanded to the trial court to enter specific findings and conclusions.

*State v. Rowe*, N.C. Ct. of App., No. COA05-210 (Dec. 20, 2005) (unpublished) —

The Court of Appeals rejected a prisoner’s appeal of contempt based on his violation of a pre-filing injunction, because he had not properly raised the constitutional issues in the trial court. The injunction prohibited the prisoner from filing any more motions for appropriate relief or other filings seeking relief from his larceny and habitual felon convictions, after 24 such motions and filings had been rejected.

## Federal cases

In federal court, the All Writs Act, 28 U.S.C. § 1651(a), authorizes trial courts to restrict access to the courts by parties who repeatedly file frivolous litigation. That statute gives federal judges statutory authority in addition to the authority they share with state court judges, *i.e.*, the inherent authority to prevent abusive litigation and the Rule 11 authority to impose sanctions for frivolous lawsuits.

Some useful federal cases include:

*Safir v. United States Lines Inc.*, 792 F.2d 19 (2<sup>nd</sup> Cir. 1986) —

This is a frequently cited case that lists the factors to be considered by the trial judge in deciding whether to restrict a litigant's future access to the courts. The factors to be considered are:

- The litigant's history of litigation and whether it has included harassing or duplicative lawsuits.
- The litigant's motive in pursuing the litigation, e.g., whether the litigant has an objective good faith expectation of prevailing.
- Whether the litigant is represented by counsel.
- Whether the litigant has caused needless expense to other parties or has imposed an unnecessary burden on the court and its personnel.
- Whether other sanctions would be adequate to protect the court and other parties.

"Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." At 24.

*Cromer v. Kraft Foods North American, Incorporated*, 390 F.3d 812 (4<sup>th</sup> Cir. 2004) —

This is the leading Fourth Circuit case on the standards for issuance of a gatekeeper order. In addition to adopting the *Safir* list of factors to be considered the court offered this guidance:

- A pre-filing injunction is a drastic remedy to be used sparingly and only when exigent circumstances justify it.
- Use of such measures against a *pro se* litigant should be approached with particular caution.
- The pre-filing injunction must be narrowly tailored to fit the circumstances. (In *Cromer* the injunction was not narrowly tailored because it restricted the defendant from filing any lawsuit without court approval although his history showed only vexatious litigation related to his employment discrimination lawsuit.)
- The litigant must be given notice and an opportunity to be heard before a gatekeeper order is entered.

*Procup v. Strickland*, 793 F.2d 1069 (11<sup>th</sup> Cir. 1986) —

This opinion is useful as a reference because it includes a long list of citations for different kinds of measures courts have taken to stop abusive filings by federal prisoners, including orders that the prisoner obtain court approval for any new filing; that the prisoner provide an affidavit that claims are novel, subject to contempt for false swearing; that the prisoner may file only a specified number of complaints; that the prisoner include a list of all previous filings with each new filing; that the prisoner not serve as a writ writer for any other prisoner; limiting the number of pages allowed in each new filing; and requiring an affidavit as to the attempts made by the prisoner to obtain a lawyer.

*Armstrong v. Koury Corporation*, 16 F.Supp.2d 616 (MDNC 1998) —

This is a good example of a gatekeeper order entered by a federal district court in North Carolina.

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