PUBLIC ACCESS TO NORTH CAROLINA COURT PROCEEDINGS AND RECORDS

Michael Crowell UNC School of Government June 2011

- 1. Access to court; closing the courtroom
 - 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 require criminal proceedings to be open.
 - 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 US 555 (1980).
 - 1. The First Amendment right also applies to jury *voir dire*. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*, 464 US 501 (1984).
 - 2. The right also applies to preliminary hearings. *Press-Enterprise Co. v. Superior Court for the County of Riverside (Press-Enterprise II),* 478 US 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 US 39 (1984).
 - 2. The right also applies to jury *voir dire*. *Presley v. Georgia*, 130 SCt 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 v. Georgia; supra; Globe Newspaper Co. v. Superior Court for Norfolk County, 457 US 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 NC Constitution ("All courts shall be open"). *Virmani v. Presbyterian Health Services Corp.*, 350 NC 449 (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.*
- 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*, _____ NC App ____, 705 SE2d 399 (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 GS 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 GS 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 NC App 520, *temp stay allowed*, 336 NC 784, *rev denied*, 337 NC 804 (1994); *Bell v. Jarvis*, 236 F3d 149 (4th Cir 2000). *Also see State v. Burney*, 302 NC 529 (1981).
 - iii. Courts have inherent authority to maintain proper order and decorum, including exclusion of disruptive individuals. GS 15A-1033 specifically authorizes the exclusion of a disruptive person from a criminal trial, and GS 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 NC 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 <u>fails</u> to exclude spectators who attempt to influence jurors through demonstrative acts or dress. See State v. Braxton, 344 NC 702 (1996) (no error in failing to remove spectators wearing buttons with the victim's photograph); and *State v. Maness*, 363 NC 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. Those statutes include:
 - i. GS 7B-323(b) A person who has been placed on the list of individuals responsible for child abuse or serious neglect may seek judicial review of that decision in district court. Upon a party's request the court may close the review proceeding.
 - ii. GS 7B-801 The court is to decide whether hearings on juvenile abuse, neglect and dependency, and termination of parental rights, are to be closed, taking into account the nature of the allegations, the age and maturity of the juvenile, the benefit to the juvenile of confidentiality, the benefit to the juvenile of an open hearing, and the extent to which confidentiality of the juvenile's file will be compromised by an open hearing. The hearing may not be closed if the juvenile asks that it be open.
 - iii. GS 7B-2402 Hearings related to undisciplined and delinquent juveniles are to be open unless the court closes for good cause, taking into account the nature of the allegations, the age and maturity of the juvenile, the benefit to the juvenile of confidentiality, the benefit to the public of an open hearing, and the extent to which confidentiality of the juvenile's file will be compromised by an open hearing. The hearing may not be closed if the juvenile asks that it be open.
 - iv. GS 8C1, Rule 412(d) An in camera hearing is required on admissibility of evidence of the sexual behavior of a complainant in a rape or sex offense case.
 - v. GS 15-166 The courtroom may be closed during the testimony of rape or sex offense victim (see the discussion above).
 - vi. GS 15A-623(e) Grand jury proceedings are secret.
 - vii. GS 15A-1033 The court may remove a person disrupting a criminal trial.
 - viii. GS 15A-1034 Access to the courtroom may be limited in a criminal case to ensure order and the safety of those present.
 - ix. GS 48-2-203 Adoption hearings are closed.
 - x. GS 66-156 An in camera hearing may be held to protect trade secrets in litigation over misappropriation of trade secrets.
 - xi. GS 90-21.8(d) Court proceedings relating to a minor's consent to abortion are confidential.
 - xii. GS 122C-224.3(d) The district court hearing to review the voluntary admission of a minor for mental illness or substance abuse is closed unless the minor's lawyer requests that it be open.
 - xiii. GS 122C-267(f) An outpatient mental illness commitment hearing is closed unless the respondent requests that it be open. (The same rule applies to supplemental hearings and rehearings.)
 - xiv. GS 122C-268(h) An inpatient mental illness commitment hearing is closed unless the respondent requests that it be open. (The same rule applies to rehearings.)
 - xv. GS 122C-268.1(g) An inpatient commitment hearing held following an automatic commitment based on the defendant being found not guilty of a crime by reason of insanity is to be open.

- xvi. GS 122C-286(f) A substance abuse commitment hearing is closed unless the respondent requests that it be open.
- f. Suing for access to civil proceeding GS 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. 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 Communications, Inc.*, 435 US 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 Company v. Goetz,* 886 F2d 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 NC App 180 (2009). The qualified right of access to court documents is based on Art. I, § 18 of the NC 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 (GS Chapter 132)
 - i. Court records come under the broad definition of public record in GS 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 GS 7A-109(a) reiterates that records maintained by the clerk of court pursuant to Administrative Office of the Courts rules are public.
 - iii. The only court documents which the public records law specifically exempts from disclosure are:
 - 1. Settlement documents in cases involving medical malpractice actions against public hospital facilities. See GS 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 GS 132-1.3.]
 - 2. Arrest and search warrants before they have been returned by law enforcement agencies. See GS 132-1.4(k).
 - iv. The definition of a public record in GS 132-1 is broad and includes "all documents, papers, letters, maps, books . . . regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government" "Agency of North Carolina government" is further defined to include all public officers and public offices, thus encompassing court officials and employees. The statute indicates the legislature's intent that, as a general rule, the public will have liberal access to public records. News & Observer Publishing Co. v. Poole, 330 NC 465 (1992).
 - v. E-mails and other documents in electronic form may be public records the same as paper documents.
 - 1. As with paper records, the rules on which e-mails have to be retained and for how long are set by the records retention schedule of the Department of Cultural Resources.
 - 2. If an e-mail is sent or received in connection with public business, it is a public record regardless of whether it was transmitted and stored on a public or private computer.
 - 3. Purely personal e-mail is not a public record just because it was sent or received on a public computer.
 - 4. E-mail with only a short-term value such as reminders of meetings, inquiries about scheduling, news reports, etc., may be deleted as soon as their reference value ends, but other e-mails of more lasting interest must be retained according to the records retention schedule.
 - vi. Unlike some other states, there is no case law in North Carolina exempting the judicial department from the public records law based on separation of powers.
 - vii. The best resource for information about the public records law is the 2009 School of Government publication <u>Public Records Law for North Carolina Local Government</u> by David M. Lawrence.

- viii. Statutes other than the public records law address the confidentiality of various kinds of court records. These statutes include:
 - 1. GS 1A-1, Rule 26(c) The judge in a civil case may limit discovery and order that documents be sealed.
 - GS 7B-2901(a) Records of cases of juvenile abuse, neglect and dependency are not open to public inspection and may be examined only by court order. That statute and GS 7B-2902 provide for public disclosure in certain circumstances, and GS 7B-3100 provides for sharing of information by agencies in some situations.
 - GS 7B-3000(b) Records of cases involving delinquent and undisciplined juveniles are not open to public inspection and may be examined only by court order. That statute and GS 7B-3001 provide for disclosure to certain individuals and agencies, and GS 7B-3100 provides for sharing of information by agencies in some situations.
 - GS 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.
 - 5. GS 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.
 - 6. GS 15A-908 The judge may limit discovery in criminal cases and order the sealing of documents presented for in-camera review.
 - GS 15A-1002(d) A report on the capacity of the defendant to stand trial is to be sealed but copies provided to counsel.
 - GS 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.
 - 9. GS 48-9-102 All adoption records except the decree of adoption and the entry in the special proceedings index are confidential, subject to disclosure under other provisions of Article 9 of Chapter 48.
 - 10. GS 90-21.8(f) and (h) In a district court proceeding relating to a minor's consent to abortion the court is to order that a confidential record of the evidence be maintained. If the minor appeals for a de novo hearing in superior court, the record of that hearing is confidential.
 - 11. GS 114-19.28 The clerk of court is to create a "separate confidential file" for the petition of a convicted felon to have the right to possess firearms restored.
 - 12. GS 132-1.3 Settlement documents in cases involving state or local agencies are public records except for medical malpractice actions against hospital facilities, and may be sealed only upon a finding by the court of an overriding interest and a determination that no measure short of sealing would protect that interest.

- 13. GS 122C-207 Court records in mental illness and substance abuse proceedings are confidential but may be disclosed pursuant to GS 122C-54(d) which allows a district judge to order disclosure upon a motion and a determination that it is in the best interest of the individual or public.
- 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 Services Corp.*, 350 NC 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 sealing court records. *France v. France*, ____ NC App ____, 705 SE2d 399 (2011).
- 3. Restricting statements about or reporting of court proceedings
 - 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 US 333 (1996).

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 Association v. Stuart*, 427 US 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 US 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 US Supreme Court decision in *Nebraska Press Association v. Stuart*, cited above, on the requirements for a gag order. *See Sherrill v. Amerada Hess Corporation*, 130 NC App 711 (1998).
 - ii. Although the US 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 Com'rs*, 184 NC App 110 (2007).
 - iii. GS 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
 - i. Rule 3.6 prohibits lawyers from making statements that "have a substantial likelihood of materially prejudicing" the trial.
 - 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.
- 4. 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:
 - 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.

6/8/11

This paper may be used for educational purposes without permission. Use for commercial purposes or without acknowledgement is prohibited.
© 2011 School of Government, University of North Carolina at Chapel Hill