

LIMITING COMMENTS ON AND REPORTING ABOUT NORTH CAROLINA COURT PROCEEDINGS

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1. Constitutional considerations

- a. 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.

- b. 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.

- c. 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.

2. North Carolina law

- a. 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).
- b. 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).

- c. 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.

3. Rules of Professional Conduct

- a. Rule 3.6 prohibits lawyers from making statements that “have a substantial likelihood of materially prejudicing” the trial.
- b. 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.

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