PRO SE LITIGANTS – PREFILING INJUNCTIVE RELIEF

"THE GATEKEEPER ORDER"

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I. Definition – A gatekeeper order is an order entered after a hearing and in response to a Rule 11 Motion for Sanctions in which order the Court imposes as a sanction or one of several sanctions limitations or restrictions upon a litigant's access to the court or courts.

II. Procedure –

a) Notice and an opportunity to be heard

The record must reflect that notice was given and that a gatekeeper order is being sought. The order should reflect these as findings of fact.

b) Create an adequate record for appellate review

It is suggested that the record should include a listing of all the cases and motions that led the court to conclude the gatekeeper order was needed, that the record show that the pro se litigant's activities were numerous or abusive, and that the record be sufficiently developed to show that the judicial system is being or has been abused.

III. Form of Order –

a) Findings of fact –

1) specific to the situation before the Court

2) very detailed – cannot be too many

3) incorporate findings/rulings from prior filings of the same lawsuit or from separate lawsuits

4) specific finding of fact that the pro se litigant's actions were either frivolous or harassing

"At the common law, the term referred to a claim or defense so palpably lacking in legal support as to require no argument or

presentation. A better definition in the modern context, judging from the array of such actions, is that 'frivolous' is essentially equivalent to 'ridiculous'." Ruth v. Congress of the United States, 71 F.R.D. 676 (D.N.J. 1976)

5) "As our prior cases have indicated, the district court, in determining whether or not to restrict a litigant's future access to the courts, should consider the following factors: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts 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." Safir v. United States Lines Inc., et al., 792 F.2d. 19 (2nd Cir. 1986)

b) Conclusions of Law – i.e. basis of authority for the order

1) Violation of Rule 11 –

a) order must have sufficient findings of fact and conclusions of law to meet the general requirements for imposition of a Rule 11 sanction

b) re: improper purpose. See Mack v. Moore, 107 N.C.App. 87 (1992) at page 93

"For example, an improper purpose may be inferred from "the service or filing of excessive, successive, or repetitive [papers]. . .," from "filing successive lawsuits despite the res judicata bar of earlier judgments,". . . from "the filing of meritless papers by counsel who have extensive experience in the pertinent area of law". . .from "continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate". . .

c) motion for Rule 11 sanctions must be timely made

2) Inherent power of the Court –

a) "Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not

be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice." Beard v. N.C. State Bar, 320 N.C. 126, 129 (1987)

"The court has the inherent authority to do what is reasonably necessary for the proper administration of justice." Beard at 130.

b) Ends of justice and failure to respect the authority of the courts – In Lee v. O'Brien, 151 N.C.App. 748 (2002), an unreported opinion, the parties were neighbors who sued in District Court pro se. After a jury trial, the trial judge granted a permanent injunction against the plaintiff in part as follows:

"6) From filing any civil actions, criminal complaints or magistrate summons against anyone in Wake County, without the prior written approval of a District Court Judge of Wake County[.]"

Held: No error because:

"The trial court found that plaintiff had initiated multiple civil and criminal actions solely for the purpose of harassment and that "Plaintiff will continue to engage in such actions and that the ends of justice will not be served by the unfettered filing of such actions by the Plaintiff." It further found that, by continually violating orders and injunctions already in place, plaintiff has failed and will continue to fail to respect the authority of the courts. Based on the facts and circumstances present in this case, we find the trial court's permanent injunction and restraining order does not deny plaintiff access . . . to the courts."

c) CAUTION: If you contemplate relying solely upon either basis, (a) or (b), review In Re Alamance County Court Facilities, 329 N.C. 84 (1991)

"Even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body, nor may it violate the constitutional rights of persons brought before its tribunals. Furthermore, doing what is "reasonably necessary for the proper administration of justice" means doing *no more* than is reasonably necessary." In Re Alamance at page 99

"No procedure or practice of the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights."

"The commissioners were served with notice of the hearing and informed of their rights to be represented by an attorney and to present evidence. In response to motions filed by the commissioners, however, the court stated that the movants lacked standing, as they were not parties to the action. "[I]n order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he *must be a party to such proceeding*." In Re Alamance at 107 and 108

3. Discretion of the Court –

IV. Scope of the order –

a) Narrowly tailored to address the perceived abuse

In De Long v. Hennessey, et al., 912 F.2d 1144 (9th Cir. 1990) a prefiling order provided:

"Plaintiff Steven M. De Long is hereby enjoined from filing any further action or papers in this court without first obtaining leave of the general duty judge of this court."

Held: Overly broad, discretion abused, and order vacated:

"The order has no boundaries . . . orders restricting a person's access to the courts must be based on adequate justification supported in the record and narrowly tailored to address the abuse perceived. We find such care is demanded in order to protect access to the courts, which serves as the final safeguard for constitutional rights.

b) To the contrary, see Armstrong v. Koury Corp., 16 F. Supp.2d 616 (M.D.N.C. 1998). In this case Judge Osteen issued an injunction which provided in part:

"1. The court enjoins Plaintiff, or anyone acting on his behalf, from filing any action in any court, state or federal, against Koury Corporation, or any agent, employee or assignee of Koury Corporation, without first obtaining leave of this court;

2. The court enjoins Plaintiff, or anyone acting on his behalf, from filing any new action or proceeding in any federal court, without first obtaining leave of that court;

3. The court enjoins Plaintiff from filing any further papers in any case, either pending or terminated, in the Middle District of North Carolina without first obtaining leave of court."

Held: Affirmed, 168 F.3d 481 (4th Cir. 1999)

V. The Gatekeeper –

a) Judge –

A limitation or restriction that a pro se litigant must seek and obtain prior leave of court before instituting suit or filing pleadings has been upheld in Virginia, Georgia, New Jersey, and Ohio.

b) Clerk of Court –

". . .to refuse to accept any submissions for filing except petitions for leave of court, unless such filings are accompanied by an order of this court granting leave. In the event that Plaintiff succeeds in filing papers in violation of this order, upon such notice, the clerk of court shall, under authority of this court order, immediately and summarily strike the pleadings or filings."

He further provided that "Leave of court shall be forthcoming upon Plaintiff's demonstrating through a properly filed motion, pursuant to Local Rule 7, MDNC, that the proposed filing: (1) can survive a challenge under Rule 12 of the Federal Rules of Civil Procedure; (2) is not barred by principals of issue or claim preclusion; (3) is not repetitive or violative of a court order; and (4) is in compliance with Rule 11 of the Federal Rules of Civil Procedure.

The court **ORDERS** Plaintiff to attach a copy of this order and injunction to any such motion for leave of court."

c) Attorney –

1) In Kondrat v. Byron, 63 Ohio App.3d 495 (1989), the following restrictions on a pro se litigant's future filings against the named defendants were affirmed:

No future filings unless "(A) The offered filing carries with it the signature of an officer of the Court of Common Pleas of Lake County, Ohio, which signature is in compliance with Rule 11 Ohio Civil Rules of Procedure, or (B) The offered filing is first submitted to a judge of the Common Pleas Court of Lake County, Ohio, for that judge to make an independent determination that the subject matter of the offered case does [not] arise out of and/or is not a duplication of the same or similar issues previously raised in prior cases filed by Robert J. Kondrat and that

such action is properly venued[.]"

2) To the contrary, see In Re Lawsuits of Anthony J. Carter, 235 Ga.App. 551 (1998)

In this case the following limitation was imposed:

". . . that the clerk of court "shall not file any law suit brought by, or on behalf of Anthony J. Carter unless same is signed by a member in good standing of the State Bar of Georgia who shall certify that the complaint sets our [sic] a prima facie case upon which some relief could be granted."

Held: Vacated because the order. . .

". . . requires Carter to hire an attorney in order to gain access to the court for any claim, legitimate or not, and in effect delegates to that attorney, at least preliminarily, what should otherwise be the judicial task of determining frivolousness or maliciousness. It creates a conclusive presumption that, regardless of its content, a suit filed by Carter pro se constitutes harassment. So the order prejudges the case and denies process altogether, much less due process, unless Carter as plaintiff relinquishes his constitutional right to self-representation. In other words, it indiscriminately interdicts all suits by Carter when he seeks to invoke his right of self-representation."

d. Pro se litigant enjoined from appearing pro se except as a pauper –

1) In Kreager v. Glickman, et al., 519 So.2d 666 (1988) the District Court of Appeal of Florida, Fourth District held the following restrictions supported by Florida case law:

"a. While this court may not speak for other divisions as that is a matter for each such judge or the Chief Judge to determine upon petition, Mr. Kreager shall not further appear in this division pro se. Any further appearance by Mr. Kreager shall be only through an attorney admitted to and in good standing with the [sic] Florida Bar, which attorney shall be responsible for the consequences of his or her filings on behalf of Mr. Kreager.

c. Mr. Kreager shall not proceed in forma pauperis in this division unless and until he has complied with the statutory requirements regarding affidavits of indigency."

2) In Board of County Commissioners, et al. v. Winslow, 862 P.2d 921 (1993) the Supreme Court of Colorado itself entered the following injunction: ". . .(Winslows) are hereby enjoined from appearing pro se in

any state court and from further appearing pro se in any state court action now pending in which they seek affirmative relief. With respect to cases now pending, respondents are ordered to arrange for the appearance of legal counsel authorized to practice law in the courts of this state within forty-five days from the issuance of this opinion. In the event that respondents fail to enlist the aid of counsel, respondents' requests for affirmative relief shall be dismissed with prejudice." NOTE: This restraint did not prevent the Winslows from appearing pro se as defendants.