

**CONTEMPT: SPECIAL ISSUES WHEN DEALING WITH THE MEDIA
(Or, What I Learned About Rule 15, and How I Learned It)**

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(I sincerely appreciate the assistance of Attorneys William E. Moore, Jr., of Gastonia and Raymond E. Owens, Jr. of Charlotte for their research in this matter, and for permission to use their work in our professional educational program. I also thank School of Government Professor Michael Crowell, and Gaston College intern Barbara McCray for their help in preparing this presentation.)

INTRODUCTION

In January 2007, I conducted a contempt hearing involving a reporter, photographer, and news editor of a Charlotte television station stemming from brief televised footage which included the profile of several jurors in a capital murder case in Gaston County on November 28, 2006. In the course of dealing with the issues in that hearing, I stumbled upon some surprises, and appreciate our Conference Education Committee allowing me to share what I learned with you. It may help you be better prepared than I was in the event you encounter a similar situation.

The Honorable Ronald Payne, Superior Court Judge, presided over that quadruple murder trial, and cited these media personnel to appear before me to show cause why they should not be punished for contempt of court for these broadcasts. Because the district attorneys prosecuting the murder case informed Judge Payne of these broadcasts, they were potential witnesses, and asked to be recused from prosecuting these contempt charges. I agreed and appointed Gastonia attorney William E. Moore, Jr. of the Gastonia firm of Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A. as special prosecutor for the state, pursuant to G.S.5A-15(9).

The three respondents were represented by Raymond E. Owens, Jr. of Kennedy, Covington, Lobdell & Hickman, LLP, of Charlotte.

**CURRENT STATE RULES ON MEDIA COVERAGE OF JUDICIAL
PROCEEDINGS**

Each judicial district has adopted local rules regarding electronic media and still photography coverage of public judicial proceedings. In the district where the video recording of the jurors' profiles occurred, District 27-A, the local rules are set forth in an

Order of the Honorable Robert W. Kirby, Senior Resident Superior Court Judge entered March 22, 1991. This Order adopted Rule 15 of the General Rules of Practice for the Superior and District Courts as the governing rule for electronic media and still photograph personnel.

Rule 15(a)(4), of course, strictly prohibits coverage of jurors at any stage of a judicial proceeding.

However, Rule 15(d) contains something I had never noticed. It designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the media, and establishes procedures for these intermediaries to interact with presiding judges regarding the media coverage of judicial proceedings.

Rule 15(d)(2) states that, "It is the express intent and purpose of the rule to preclude judges...from having to "negotiate with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of that media representative is expressly intended to prevent presiding judges from having to engage in discussion with others in the media."

My understanding of and experience with the way photography or television is allowed in North Carolina courtrooms is that a reporter or camera operator approaches the judge who is to preside over the proceedings in advance of the trial, makes a specific request for permission to photograph or televise certain portions of the proceedings, and the judge responds appropriately. A violation of the judge's order would constitute contempt of court.

In this case no representative of this particular Charlotte television station contacted Judge Payne about the broadcast, which contained profiles of several jurors, nor was there any blanket request by the television station in advance or during the trial. Moreover, Judge Payne did not issue any blanket order prior to or during the trial regarding courtroom photography, nor was there a need for him to do so.

WILLFUL CONDUCT NECESSARY TO CONSTITUTE CONTEMPT

The special prosecutor and defense counsel began to prepare for the hearing by reviewing the local rules pertaining to television in the courtroom, Judge Kirby's order of March 22, 1991. Basically, this order adopts Rule 15 of the General Rules as the local rule of District 27-A.

Rule 15 provides that local reporters and press officials will not approach a presiding judge with a request for televised coverage, but will instead go through one or more of the three media representatives selected by the three statewide media organizations. However, Mr. Moore and Mr. Owens were unable to locate the identity of any such representatives, or whether such representatives had ever been designated under

Rule 15. The special prosecutor and respondents' attorney were unable to find any judge in District 27-A or any other judicial district who knew who the media representatives were, or had ever been contacted by such representatives. Neither were they able to ascertain if these media organizations had ever appointed these representatives.

The respondents were cited for contempt of court under G.S. 5A-11(a)3 and (7). This law provides that the burden of proof for contempt requires a showing beyond a reasonable doubt of a "willful disobedience of resistance to, or interference, with a court's lawful process, order or instruction or its execution...[or] directive willful or grossly negligent failure to comply with the schedules and practices of the court resulting in substantial interference with the business of the court."

In order to punish a contemnor by fine or imprisonment, the state must also prove beyond a reasonable doubt that "The act or omission was willfully contemptuous; or...was preceded by a clear warning by the court that the conduct was improper." G.S.5A-15.

At the hearing, the state acknowledged that no "clear warning" had been given by the court to the employees of the television station (at least, in part, because no direct permission to film the proceedings had been sought). The special prosecutor and the respondent's attorney realized that the provisions of the local order are in conflict with certain material terms of Rule 15 regarding who is authorized to approach a presiding Superior Court Judge concerning the use of cameras in the courtroom. Although there was clear evidence that the television station had never sought permission from anyone to video tape the proceedings, let alone televise a juror's profile, the vague or conflicting directives of Rule 15 rendered the acts of the individuals named as contemnors unsusceptible to proof beyond reasonable doubt of willful disobedience or gross negligence.

During the hearing, counsel for the state and for the respondents further argued that Rule 15 of the North Carolina General Rules of Practice for Superior and District Courts is not a statute which may form an independent basis for criminal contempt. G.S. 5A-11 dictates the exclusive grounds upon which an order of contempt may be based. It also provides that:

"No person...may be punished for publishing a truthful report of proceedings in the court," and "no person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice."

Plainly, the broadcast of sitting jurors at the sentencing phase of an ongoing murder trial presents "a clear and present danger of an imminent and serious threat to the administration of criminal justice." However, since the state contended it was unable to prove that the respondents were willfully disobedient or grossly negligent, the television station's breach of Rule 15 appears to have been inadvertent.

The parties further argued that given the inadvertent violation of Rule 15, the conflicting directives concerning permitted contact with a presiding judge, the minimal exposure of the jurors' profiles, and the jury's verdict for a life sentence in the murder case, the conduct of the individuals named as contemnors should be more appropriately addressed under the court's inherent authority to enforce the general rules of practice and procedure in this case.

A presiding judge is empowered and required to enforce the general rules of practice, and the court has the inherent authority, and a corresponding duty to impose sanctions for violations of these rules. We trial courts have been admonished to take seriously our duty to insure that the mandates of the general rules of practice and procedure are strictly complied with in all cases, and to impose appropriate sanctions when they are not. See Se, State v. Whit, 5 Jones (NC) 224 (1858); Couch v. Private Diagnostic Clinic, 146 NC App 658, 554 SE2d 356 (2001).

Frankly, I had never delved into the depths of Rule 15, and have always dealt with reporters and media representatives directly. I have never been contacted by media representatives of media organizations specifically appointed under Rule 15, nor have any of the many judges with whom I have spoken about this ever been contacted by these individuals. Evidently, this rule was created to prevent a judge in a high profile case from having to deal with as many as 10 or 15 different reporters from various newspapers and television stations, and to encourage the media representatives to "pool" such photographs or televised footage as the presiding judge may allow. This is how the rule is "supposed to operate"; however, in reality, it does not appear to operate this way at all.

Therefore, the issues presented in what I had expected to be a fairly simple hearing proved far more complex than I anticipated.

DISPOSITION OF CONTEMPT HEARING

After carefully considering the matter, the issues, and the law, I adopted the recommendations of the special prosecutor and the respondent's attorney, and entered an order finding that the television station committed an inadvertent violation of Rule 15 in airing coverage of the jurors in the murder trial. Since the finding was that the violation was inadvertence rather than contemptuous, I was not limited by the statutorily restricted punishment for contempt. I imposed the following sanctions:

1. The television station was ordered to prepare and conduct an educational session for all newsroom employees concerning the events which led to the contempt hearing, and the legal requirements and restrictions related to electronic media and still photography of public judicial proceedings, including but not limited to Rule 15 of the General Rules of Practice and Procedure. This had, in fact, already occurred by the date of the hearing.

2. The television station was ordered to develop a public service CD, DVD, or video presentation for the local broadcast industry with regard to the legal requirements and restrictions related to electronic media and still photography coverage of public judicial proceedings. This was to include, but not be limited to, the requirements and restrictions of Rule 15. I ordered that the special prosecutor and I, as the Senior Resident Superior Court Judge for District 27-A, would review this presentation, and upon review, order it to be published and/or distributed in conjunction with regional and/or statewide media conferences attended or hosted by the television station. I further ordered that this presentation be shared with the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, for general distribution to the media.

3. The television station was further ordered to investigate the possible installation or enhancement of the microphones and sound system in the Gaston County Superior Courtrooms, such that the sound may be fed back to the media rooms for the media's use and reporting on trials, when permitted. I further ordered that the television station report back to the court on the feasibility and the costs of implementing such a system to be reviewed and approved by the court.

When this was done, the television station paid for installing such a system, which otherwise would have been purchased with taxpayer's monies.

4. Finally, I ordered the television station to compensate the public and the court system for this inadvertent breach of Rule 15 by paying \$1,500.00 to an entity that serves the public, such Legal Services of the Southern Piedmont, with instructions that the funds be earmarked for the use and benefit of the citizens of Gaston County.

SUGGESTIONS FOR THE FUTURE REGARDING COURTROOM PHOTOGRAPHY

It is clear that the presiding judge is rightfully vested with considerable discretion regarding electronic media and still photography coverage of public judicial proceedings. In exercising this discretion, the judge will consider a host of factors in balancing the rights of the parties to a fair trial, and the right of the public to know through a free press what is happening in their court system.

Beyond that, jurors have an absolute legal right not to be photographed. Display of such photography gives rise to jurors' fear of future harassment or retaliation. It also gives rise to concerns and distractions on the jurors' part, preventing them from giving their full attention to the trial at all times. The courts must insure that the media never pictorially portrays the jurors.

I suggest that each Senior Resident Judge re-examine his or her district's existing rules on media photography or televising of trials. You may find, as I did, that such rules were entered over fifteen years ago, and need to be updated. You may further find that the local rules simply adopt Rule 15 of the General Rules. If so, I would suggest that you

ascertain whether any of the television stations or newspapers in your community are aware of media representatives appointed by the three media organizations specified in Rule 15.

I have written the North Carolina Supreme Court and shared my concern that these media organizations may not have designated the representatives, as provided for in Rule 15. After considering the matter, I am sure the Supreme Court will take such action, if any, it deems appropriate to address this situation.

I also think it is important for judges to communicate with the local media organizations to make sure they are aware of and understand the local rules. Also, make sure that your local rules are posted in prominent places near the courtrooms or media reporting rooms so that the media will be aware of them. Unfortunately, our special prosecutor in the case involving the Charlotte television station discovered that our local rules were not so posted. That was quickly changed!

Ensure that any amendments to your local rules regarding photography and televised coverage of trials are expressly communicated in writing to the media organizations in your community.

Additionally, post rules in the office of your trial court administrator or trial court coordinator, and your district's website, if you have one.

Finally, even if the individuals who contact you about photographic or televised trial coverage are local rather than those appointed under Rule 15, make certain that you give an explicit "clear warning" that photographing members of the jury is improper and will result in judiciously imposed punitive sanctions.

OTHER ISSUES INVOLVING MEDIA AND CONTEMPT

There are a number of other scenarios in which the news media might appear before you on contempt charges.

One would be a violation of a "Gag Order."

Although the United States Supreme Court has recognized judicial authority to limit attorneys' comments if they have a "substantial likelihood of material prejudice", and the State Bar's rules essentially apply this same test in the Rules of Professional Conduct, the North Carolina Court of Appeals has imposed a more stringent standard to trial court gag orders restricting the comments of lawyers. In Sherrill v. Amerada Hess Corporation, 130 NC App 711 (1998) the Court of Appeals adopted the tougher standard set forth in Nebraska Press Association v. Stuart, 427 US 539 (1976) with respect to trial court gag orders restricting the comments of lawyers. The Court of Appeals held such orders unconstitutional, and ordered that they meet the same tests applied in Nebraska Press to an order directed to the news media itself.

As of the present, the North Carolina Supreme Court has not addressed these issues.

The Court of Appeals cases that deal with this issue are civil cases. It is possible the Court may give more leeway to restricting speech in criminal cases where the defendant's due process rights are involved.

It is also possible that media representatives might be cited for contempt of court for failure to obey a court order to disclose a confidential information source for a news article. Time does not permit a full consideration of the complexities of this issue. However, the first United States Supreme Court case to address a reporter's privilege was Branzburg v. Hayes, 408 US 665 (1971). The court rejected such a privilege for a five-four vote.

There may also be contempt citations issued against media representatives for publishing judicial records which are not public records or a sealed court document. I addressed some of these issues in a presentation to the Conference in the Summer of 2006, entitled "Privacy and the Courts", and would direct you to that manuscript at www.judges.unc.edu.

CONCLUSION

Conducting contempt proceedings against media representatives will result in substantial newspaper and television publicity. There will be considerable public scrutiny as to how you handle these hearings. It is imperative that the presiding judges do their homework, know the applicable law, and afford the respondents their due process rights, including notice and the opportunity to be heard, prior to issuing an adjudication regarding contempt.

I would sincerely urge you to avoid hastily arranged hearings or making any comments which appear that you have already or are close to making up your mind about the matter.

As always, preparation and a clear understanding of the law will ensure that a just result will be issued.