CONSTITUTIONAL CONSIDERATIONS IN CONTROLLING THE COURTROOM

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1. **Restrictions on expression**

There may be times when a court has to deal with demonstrators or with spectators or parties or even lawyers who wish to express a political view, either through speaking or expressive conduct. First Amendment free speech issues arise whenever the government, including a court, attempts to place restrictions on expression. The degree of protection depends on the place where the expression is attempted. Courtrooms and courthouses generally are places where free speech may be restricted.

a. *Protection of expressive conduct* — Free speech protection applies not only to spoken or written words but also to expressive conduct. Wearing an armband, for example, may be a symbolic act protected by the First Amendment. *Tinker v. Des Moines Independent Community School Dist.*, 393 US 503 (1969). Artistic expression can be protected expressive conduct, the same as conduct expressing political, social or religious messages. *Nat'l Endowment for the Arts v. Finley*, 524 US 569 (1998). Soliciting funds, too, can be a form of protected speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980).

Most conduct, particularly commercial activity, is not expressive conduct protected by the First Amendment; the question is whether the conduct is intended to express a message. As explained in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995), a parade is entitled to free speech protection because the marchers are making a collective point to bystanders, but the First Amendment would not apply to a group of people who are just walking from here to there.

For a recent Fourth Circuit discussion of expressive conduct, see *Willis v. Town of Marshall, North Carolina*, 426 F3d 252 (4th Cir 2005), in which the court held that recreational dancing for one's own pleasure is not expressive conduct entitled to First Amendment protection.

b. *Protection given to speech depends on location* — The First Amendment does not give citizens the right to exercise free speech rights on any government property at any time. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is

lawfully dedicated." *Adderley v. State of Florida*, 385 US 39, 47 (1967). "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Association*, 453 US 114, 129 (1981).

The courts have adopted a forum analysis to determine when the government's interest in limiting the use of its property outweighs the interest of those wishing to use the property for free expression. Thus, the extent to which the government can restrict expression depends on the nature of the forum. Strict scrutiny applies to any attempt to limit public expression at a traditional public forum or a designated public forum, but a policy limiting expression at a nonpublic forum need only be reasonable.

c. *Traditional public forum* — Some government-owned property is a public forum by its nature and must be open to First Amendment expression, subject to reasonable time, place and manner restrictions.

"[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. . . ." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 US 308, 315 (1967).

"In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 US 171, 177 (1983), quoting *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 US 37, 45 (1983).

i. As summarized in the discussion below under "Nonpublic forum," courtrooms and courthouses are not considered traditional public forums.

Areas around courthouses may be public forums, however. In *United States v. Grace, supra*, the Supreme Court held that the public sidewalks forming the perimeter of the Supreme Court grounds are traditional public forums, just like other public sidewalks, and that a federal statute prohibiting parading, picketing and similar activity on those sidewalks was unconstitutional.

The Supreme Court, on the other hand, has upheld a state statute prohibiting picketing or parading "in or near a building housing a court" with the intent to interfere with or impede justice or to influence a judge, juror or court officer. *Cox v. Louisiana*, 379 US 559 (1965). "There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create." At 562.

G.S. 14-225.1 prohibits picketing, parading or using a sound truck or like device within 300 feet of a courthouse or the residence of a judge, juror, witness or prosecutor, with the intent to interfere with the administration of justice or influence the judge, juror, etc.

ii. Restrictions on the time, place and manner of First Amendment activity at a public forum may be communicated in any manner that reasonably informs the user of the restriction. The restrictions may be incorporated in published regulations, for example. *Clark v. Community for Creative Non-Violence*, 468 US 288 (1984). The restrictions may be posted on a sign. *Leiss v. United States*, 364 A2d 803 (DC Ct App 1976). The restrictions may be communicated by a guard (*Leiss*), by an administrative assistant in charge of the property (*Hemmati v. United States*, 564 A2d 739 (DC Ct App 1989)), by the officer on duty in charge of the property at the time (*State v. Occhino*, 572 NW2d 316 (Minn Ct App 1998)), or by some other person with authority over the property.

d. <u>*Designated public forum*</u> — A location which is not a traditional public forum may become one when the government designates it as a place for public expression. If so, any restrictions on expression are subject to the same strict scrutiny as would apply to a traditional public forum.

A designated public forum cannot be created inadvertently, it must be done intentionally. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 US 788, 802 (1985). "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.*, at 804.

i. Although courthouses generally are nonpublic forums (see below), a portion of a courthouse might become a designated public forum depending on what uses are allowed for that space.

ii. The covered portico area of a federal building (which housed a federal court), was used occasionally for demonstrations, but there was an unwritten policy of excluding demonstrators from that area and, therefore, it had not become a designated public forum. *United States v. Gilbert*, 920 F2d 878 (11th Cir 1991). The adjoining unenclosed plaza, however, had become a designated public forum because it was opened by the government as a place for public expression, with demonstrations occurring there frequently. *Id.*

iii. A New Jersey county courthouse was considered a designated public forum for purposes of filming a movie because court officials had allowed it to be used regularly for filming movies and television shows and had never before denied permission. *Amato v. Wilentz*, 753 F Supp 543 (DC NJ 1990), *rev'd on other grounds*, 952 F2d 742 (3rd Cir 1991).

e. <u>*Nonpublic forum*</u> — When government property is not a traditional public forum, and has not been designated by the government as a public forum, it is a nonpublic forum, and government restrictions on expression will be upheld so long as they are reasonable and are not based on the speaker's viewpoint. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius, supra*, 473 US at 808.

i. Courtrooms and the courthouse lobby are nonpublic forums. "A courthouse — and, especially, a courtroom — is a nonpublic forum." *Berner v. Delahanty*, 129 F3d 20, 26 (1st Cir 1997). "The lobby of the courthouse is not a traditional public forum or a designated forum, not a place open to the public for presentation of views." *Sefick v. Gardner,* 164 F3d 370, 372 (7th Cir 1998). "The courtroom is a nonpublic forum, *Berner*, 129 F.3d at 26, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir." *Mezibov v. Allen*, 411 F3d 712, 718 (6th Cir 2005). "The building housing the Rutland District Court is a nonpublic forum." *Huminski v. Corsones*, 396 F3d 53, 90 (2nd Cir 2005) . Nor is a courthouse parking lot adjacent to the courthouse a public forum. *Id.*

ii. In *Berner v. Delahanty, supra*, it was considered reasonable for the judge to ban wearing political buttons in the courtroom. In *Sefrick v. Gardner, supra*, it was considered reasonable for the court to restrict the lobby to "sedate and decorous exhibits" and reject comic, caustic, sardonic artwork. In *Mead v. Gordon*, 583 F Supp2d 1231 (USDC OR), it was considered reasonable to exclude an individual from the courthouse for a year (unless the visit was specifically approved and escorted) for

disruptive conduct. Given the court's inherent authority to maintain order and protect the fairness, dignity and integrity of the judicial process, it was held reasonable for the judge to bar a defendant from wearing a T-shirt with a political message. *People v. Aleem*, 149 P3d 765 (Colo 2007). The ban served to protect the right to a fair trial.

iii. Time, place and manner restrictions can be unreasonable when they are too broad or leave too much discretion with supervising officials. In *People v. Tisbert*, 14 Cal Rptr2d 128 (LA Sup App 1992), for example, a ban on all forms of solicitation on all county property, including court buildings, was held to be too broad. The ordinance also was defective in allowing officials to permit solicitations for charitable programs they "deemed meritorious," without further guidance as to what was allowed and what not. In *Sammartano v. First Judicial District Court*, 303 F3d 959 (9th Cir 2002), a ban on wearing any clothing with symbols of motorcycle organizations in a government building which included courts was held too broad in the absence of any evidence that such clothing had been or was likely to be disruptive or intimidating and because of the failure to distinguish between courtrooms and other offices.

2. **Closing court proceedings**

a. *Constitutional considerations* — Both the United States and North Carolina constitutions generally require court proceedings to be open to the public, including the news media, unless there is an overriding reason for closing the courtroom.

Most of the case law concerns criminal proceedings. The public has a First Amendment right of access to criminal trials, even if both the prosecution and defense wish to close the proceeding. *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980). The same First Amendment right of public access applies to jury *voir dire* in criminal cases. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*, 464 US 501 (1984). And it applies to preliminary hearings. *Press-Enterprise Co. v. Superior Court for County of Riverside (Press-Enterprise II)*, 478 US 1 (1986).

Additionally, the Sixth Amendment provides that in criminal prosecutions "the accused shall enjoy the right to a speedy and public trial." The defendant's Sixth Amendment right to a public proceeding extends to a suppression hearing, *Waller v. Georgia*, 467 US 39 (1984), and to jury *voir dire*, *Presley v. Georgia*, 130 SCt 721 (2010).

A criminal proceeding may not be closed unless doing so is necessary to serve a compelling governmental interest (such as protection of witnesses, preserving the defendant's right to a fair trial, or avoiding public disclosure of sensitive information); there is no less restrictive measure which would protect that interest; and the scope and duration of the closure is kept as narrow as possible. The court must make findings sufficient to support the decision to limit access. *See Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 US 596 (1982).

Although the United States Supreme Court has not addressed whether the First Amendment provides a right of public access to *civil* proceedings, the North Carolina Supreme Court recognized a qualified right of access to civil trials under Article I, § 18 of the state constitution ("All courts shall be open . . . .") in *Virmani v. Presbyterian Health Services Corp.*, 350 NC 449 (1999). As with the First Amendment right, it may be overridden by a compelling public interest but only after considering less drastic alternatives.

b. *Right to sue for access* — GS 1-72.1 allows any person claiming a right to access to a civil proceeding to file a motion for that purpose without having to intervene in the proceeding. The trial court is required to enter a written ruling stating its reasons for granting or denying the motion. The ruling is subject to an immediate interlocutory appeal. The statute does not apply to proceedings involving juveniles.

   There is no comparable statute for criminal proceedings.

c. *Statutory directions* — Various statutes specify whether particular kinds of 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 8C-1, Rule 412(d) — Before admitting evidence of the sexual behavior of a complainant in a rape or sex offense case the court is to conduct an in-camera hearing on the admissibility of the evidence.

v. GS 15-166 — The trial judge may close the courtroom during the testimony of the victim in rape or sex offense cases.

vi. GS 15A-623(e) — Grand jury proceedings are secret.

vii. GS 15A-1034 — The presiding judge in a criminal case may limit access to the courtroom when necessary to ensure order or the safety of those present.

viii. GS 48-2-203 — Adoption hearings are closed.

ix. GS 66-156 — In an action for misappropriation of trade secrets the court may take reasonable steps to protect the trade secret, including holding in-camera hearings.

x. GS 90-21.8(d) — Court proceedings relating to a minor's consent to abortion are confidential.

xi. 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.

xii. 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.)

xiii. 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.)

xiv. 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.

xv. GS 122C-286(f) — A substance abuse commitment hearing is closed unless the respondent requests that it be open.

d. <u>*Court's inherent authority*</u> — The court has the inherent authority to close proceedings and 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.*, *supra*. In *Virmani* the court's authority was exercised to preserve the confidentiality of the medical peer review process.

3. **Access to court records**

   a. *Constitutional and common law rights of access* — Although the United States Supreme Court has held that there is a First Amendment right of access to some court proceedings — see the discussion above under "Closing court proceedings" — it has not decided whether there is a First Amendment right of access to court documents. The court has held that there is a common law right of access to court documents, but it is within the discretion of the trial court whether to limit such access. *Nixon v. Warner Communications, Inc.*, 435 US 589 (1978).

   The Fourth Circuit Court of Appeals has held that there is a First Amendment right of access to court documents in some circumstances in addition to the common law right of access. *In re Washington Post Co.*, 807 F2d 383 (4th Cir 1986). Whether the First Amendment right applies, rather than common law access, depends on whether the process historically has been open and whether public access plays a significant role in the process. *Baltimore Sun Company v. Goetz*, 886 F2d 60 (4th Cir 1989). If the First Amendment applies, any denial of access is subject to strict scrutiny, i.e., access may be denied only to serve a compelling state interest and the restriction on access must be narrowly tailored to serve that interest. If only the common law right of access applies, access may be denied when "essential to preserve higher values," but the restriction still must be narrowly tailored.

   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 a common law right of access and not a First Amendment right because historically the proceeding for issuing search warrants has not been open to the public. *In re Investigation into Death of Cooper*, ___ NC App ___, 683 SE2d 418 (2009). The *Cooper* court, recognized a qualified right of access to court records under Article I, § 18 of the North Carolina Constitution — "All courts shall be open" — but held that the qualified right was outweighed by compelling countervailing governmental interests in protecting the defendant's right to a fair trial, the integrity of the investigation, and the State's right to prosecute a defendant. That analysis is consistent with the decision in *Virmani v. Presbyterian Health Services Corp.*, 350 NC 449 (1999).

   b. *Public records law* — Constitutional issues generally are not as significant for access to court records because of the broad reach of the state public records law. Court records come within the broad definition of public records in GS 132-1 and thus must be made available to the public upon request. Additionally, GS 7A-109(a) reiterates that records maintained by clerks of court must be open to public inspection. The public records law allows certain specified records to be

kept confidential, such as particular categories of tax records (GS 132-1.1), trade secrets (GS 132-1.2), emergency response plans (GS 132-1.6), and records of criminal investigations (GS 132-1.4), but the only court records for which any specific confidentiality is provided are arrest and search warrants before they have been returned by law enforcement agencies. Those records are discussed below under "Sealing warrants."

c. *Statutes* — Several statutes address whether particular kinds of court records may be kept confidential, including:

   i. GS 1A-1, Rule 26(c) — The judge in a civil case may limit discovery and may order that documents be sealed.
   ii. 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.
   iii. 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.
   iv. 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.
   v. GS 15A-623(e), (f), (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.
   vi. GS 15A-908 — The judge may limit discovery in criminal cases and order the sealing of documents presented for in-camera review.
   vii. GS 15A-1002(d) — A report on the capacity of the defendant to stand trial is to be sealed but copies provided to counsel.
   viii. GS 15A-1333(a) — Presentence reports and information obtained by sentencing service 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.
   ix. 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.

x. 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.

xi. 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.

xii. 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.

d. *Sealing warrants* — GS 132-1.4(k) provides that arrest warrants and search warrants that have been returned by law enforcement agencies, indictments, criminal summons and nontestimonial identification orders are public records and may only be withheld if ordered sealed by court order. That is, an arrest warrant or search warrant is not a public record until the officer has returned the warrant to the clerk. The warrant then may be sealed only when doing so is "essential to preserve higher values and is narrowly tailored to serve that interest." *In Investigation into Death of Cooper, supra*. Those "higher values" may include protection of the defendant's right to a fair trial, maintenance of the integrity of an ongoing investigation, and protection of the state's right to prosecute a defendant. The "narrowly tailored" requirement means the court should first consider redacting the portion of the warrant that needs protection and also should consider a time limit on keeping the document sealed.

e. *Court's inherent authority* — The court has the 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.*, *supra*. "This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial." At 463. In *Virmani* the court's authority was exercised to preserve the confidentiality of the medical peer review process.

In criminal cases the most common reasons for sealing documents appear to be to protect one side's work product (e.g., sealing a request that the court approve payment for a psychiatric examination of the defendant) or to prevent harm to

someone (e.g., sealing a statement submitted at sentencing describing the defendant's cooperation in incriminating others).

4. **Restricting coverage of or reporting about court proceedings**

   a. *Constitutional issues* — A judge's failure to protect a defendant from massive negative media coverage before and during the trial can result in denial of the due process right to a fair trial. *Sheppard v. Maxwell*, 384 US 333 (1966). The judge could have limited the number and location of reporters in the courtroom, prohibited them from handling and photographing exhibits, insulated witnesses and jurors, and controlled the release of information by police officers, witnesses and lawyers. The judge also could have considered continuance of the trial, a change of venue and sequestration of the jury.

   On the other hand, an order restricting what parties, lawyers, witnesses, court officials or news 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 (1) publicity is likely to affect jurors and the right to a fair trial, (2) lesser alternatives such as a change in venue, postponement of the trial, and detailed *voir dire* of jurors, have been considered and are not sufficient to mitigate the risk, and (3) the order is likely to serve the purpose of preventing jurors from being influence, i.e., the order actually can be effective.

   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). Restraints on a lawyer are not subject to the same standard as restrictions on the news media. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." At 1071. "Even outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.*

   b. *Statute on reporting about open court proceedings* — 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. *Restrictions on cameras in the courtroom* — Rule 15 of the General Rules of Practice for the Superior and District Courts governs the electronic coverage of court proceedings, including radio and television coverage, motion picture and photography cameras, and recording microphones. Generally it is for the

presiding judge to decide whether to allow such coverage and under what terms. The rule specifically prohibits coverage of these kinds of proceedings:

- Adoptions
- Juveniles
- Proceedings before clerks
- Proceedings before magistrates
- Probable cause hearings
- Child custody
- Divorce
- Alimony
- Motions to suppress evidence
- Trade secrets
- In-camera proceedings

The rule also prohibits coverage of these categories of witnesses:

- Police informants
- Minors
- Undercover agents
- Relocated witnesses
- Victims and families of victims of sex crimes

The rule also prohibits coverage of jurors at any stage of the proceeding and specifies that there is to be no audio pickup or broadcast of attorney/client conferences, counsel conferences or bench conferences.

d. *North Carolina law on gag orders* — As discussed above, orders restricting what lawyers, parties, witnesses, police, court officials or the news media may say or write about a pending case are prior restraints on free speech and are presumed unconstitutional. North Carolina case law tracks the US Supreme Court cases discussed at the beginning of this section. *Sherrill v. Amerada Hess Corporation*, 130 NC App 711 (1998); *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Com'rs*, 184 NC App 110 (2007).

   Regardless of any order from the court, lawyers are obligated by Rule 3.6 of the Rules of Professional Conduct to not make statements that "have a substantial likelihood of materially prejudicing" the trial.