

Open Courts and Fair Trials: Control of High-Profile Cases

Ann M. Anderson
Advanced Criminal Procedure
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anderson@sog.unc.edu



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SOG resources (selected)

- Various papers at sog.unc.edu
 - Microsite: Judicial Authority and Administration (search: Judicial Authority)
 - Includes primers on closing courts, gag orders, limiting public reporting, high-profile cases, etc.
- Blog posts:
 - Civil law blog (civil.sog.unc.edu):
 - *Gag Order? Punishment for Talking About a Case?* (Anderson 2017)
 - *Smartphones, YouTube, and Criminal Contempt* (Anderson 2017)
 - Criminal law blog (nccriminallaw.sog.unc.edu)
 - *Closing the Courtroom in Sex Crime Trials* (Welty 2012)

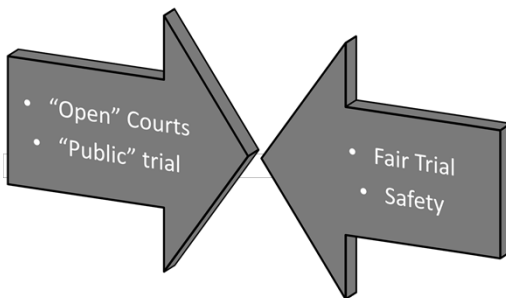




“In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [a fair trial]. *But when the case is a ‘sensational’ one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.*”

-*Nebraska Press Ass’n v. Stuart* (U.S. 1976)





Keeping a Balance



- May I Limit Access to the Proceeding?
 - Closing and excluding
 - General crowd control
 - Media (Photo, video, audio)
- May I Limit or Punish What People Say?
 - Reporters, participants, public
 - The lawyers



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Limiting Access:

May I Close the Proceeding?



- 1st Amend:
Public (and press) have presumptive right to attend
- 6th Amend:
Defendant has right to open proceeding (“public” trial)

“The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....”
In re Oliver, 333 U.S. 257.

Limiting Access:

May I Close the Proceeding?



Closure permitted only when:

- (1) The party seeking closure has advanced an overriding interest that is likely to be prejudiced;
- (2) The closure is no broader than necessary to protect that interest;
- (3) The trial court has considered reasonable alternatives to closure; and
- (4) The trial court has **made findings adequate to support the closure.**

-Waller v. Georgia, 467 U.S. 39 (1984)

Limiting Access: May I Close the Proceeding?



So what if a criminal proceeding is closed without meeting the Waller test (improper basis or inadequate findings)?

Structural error.

"[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual effect on the outcome."

—*Weaver v. Mass*, 582 U.S. __ (2017)
(quoting *Neder v. US*, 527 US 1 (1999))



Limiting Access: May I Exclude Individuals?



- Spectators generally?
 - Same *Waller* "overriding interest" standard.
 - *Waller* test applies even where GS 15-166 (sex assault cases) allows closure/exclusion.
 - State v. Comeaux*, 224 N.C. App. 595 (2014)
- "Disruptive" individuals: Easier.
 - The defendant:
 - G.S. 15A-1032 – Procedural steps required
 - Spectators/witnesses:
 - G.S. 15A-1033 – Much less process



§ 15A-1032. Removal of disruptive defendant.

(a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

- (1) Enter in the record the reasons for his action; and
- (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior. (1977, c. 711, s. 1.)






§ 15A-1033. Removal of disruptive witnesses and spectators.
 The judge in his discretion may order any person other than a defendant removed from a courtroom when his conduct disrupts the conduct of the trial. (1977, c. 711, s. 1.)

- Findings of fact not *required*. *State v. Dean*, 196 N.C. App. 180 (2009).
- But to establish a record of *why the court considered the spectators to be disruptive*, some findings would be wise.

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General Authority: Crowd and Courtroom Control

§ 15A-1034. Controlling access to the courtroom.

(a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present.

(b) The judge may order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings and may require that belongings carried by persons entering the courtroom be inspected. An order under this subsection must be entered on the record. (1977, c. 711, s. 1.)

§ 15A-1035. Other powers.
 In addition to the use of the powers provided in this Article, a presiding judge may maintain courtroom order through the use of his contempt powers as provided in Chapter 5A, Contempt, and through the use of other inherent powers of the court. (1977, c. 711, s. 1.)

General Authority:
Crowd and Courtroom Control

Consider:

- Holding planning meeting(s) with case management “team”:
 - County (head bailiff, other sheriff’s rep, Manager), Senior Resident, Clerk of Court, TCA

Some things to discuss...

<p><u>With Clerk, TCA, Senior Res</u></p> <ul style="list-style-type: none"> • Expanded jury pool • Space: <ul style="list-style-type: none"> – Courtroom selection – Avoiding disruption of other courtrooms – Arranging separate media room – Technology check • Courtroom seating plan • Designating the court’s media liaison – TCA? • Preparing Clerk’s staff for onslaught of information requests 	<p><u>With County/Sheriff</u></p> <ul style="list-style-type: none"> • More officers in courtroom and in and around courthouse • Enhanced weapons search • Security of windows, side and back entrances, perimeter • Juror safety issues – travel, secured entry and exit • Witness and custodial defendant safety • Evacuation and active shooter plans • Traffic and media truck control • Social media monitoring?
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General Authority:
Crowd and Courtroom Control

Consider:

- Holding planning meeting(s) with case management “team”:
 - County (head bailiff, other sheriff’s rep, Manager), Senior Resident, Clerk of Court, TCA
- Implementing courtroom orders:
 - Media rules (*more on that later...*)
 - Decorum order for attendees
 - Respectful behavior, entering/leaving during session, and **mobile phone and iPad/tablet rules**

Blog: civil.sog.unc.edu

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N.C.P.I.-Crim 100.15
INSTRUCTIONS RE CAMERAS AND MICROPHONES IN COURTROOM.
JUNE 2008

100.15 INSTRUCTIONS RE CAMERAS AND MICROPHONES IN COURTROOM.

NOTE WELL: For additional information regarding cameras and microphones in the courtroom see Chapter 22 of the North Carolina Trial Judges Bench Book as well as Rule 15 of the General Rules of Practice for the Superior and District Courts.

Before I speak to you concerning jury selection, I wish to mention the matter of possible news media coverage of this trial.

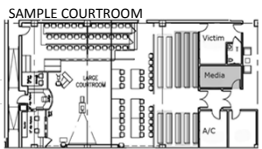
You may have noticed T.V. or camera equipment in the courthouse. Media coverage of jurors is expressly prohibited at any portion of the proceeding, including that portion in which a jury is selected. The cameramen and the photographers are not permitted to take pictures of you.

Therefore, you should not even consider whether this trial, or a portion of it, will be covered by the media by any of the means I have mentioned. It will not affect you personally, or the trial, so I urge you to put that matter out of your mind.

Limits on Media

Equipment and personnel must be:

- “Completely obscured”
- Inaudible in proceedings
- Set up in booth or partition with “appropriate openings”
 - Booth/partition must be approved by Senior Resident and County
 - Booth/partition requirement can be waived by *presiding judge*.



Limits on Media

How much equipment?

- TV cameras: Max 2
- Still photographer: 1, with max 2 cameras
- Wired audio: 1 system
- All broadcasts must use courtroom audio for audio pickup.
 - Want better? Media must provide and pay, with Senior Resident and County approval.

So, “pooling” required.

- Official representatives of media must make all arrangements, mediate all disputes, and are only ones authorized to “speak for the media to the presiding judge concerning the coverage of any judicial proceedings.”

Limits on Media

So, what if members of media don't comply?

- Easy: Withdraw privileges (Rule 15)
- More complicated: Contempt.

§ 15A-1035. Other powers.

In addition to the use of the powers provided in this Article, a presiding judge may maintain courtroom order through the use of his contempt powers as provided in Chapter 5A, Contempt, and through the use of other inherent powers of the court. (1977, c. 711, s. 1.)



Criminal Contempt - G.S. 5A-11

- (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
- (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
- (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

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- (7) Willful or grossly negligent failure to comply with the business of the court.
- (8) Willful refusal to testify or produce other evidence.
- (9) Willful communication with a juror in an improper manner.
- (9a) Willful refusal by a defendant to comply with a court order.
- (9b) Willful refusal to accept post-release supervision or to comply with the conditions of post-release supervision.
- (10) Any other act or omission specified elsewhere in this Article.

Was the order (Rule 15, local rule, or case-specific order) disseminated to the media and seen by the person who violated it?

Limiting Access: Limits on Media?



Some Practical Recommendations:

- **Don't be quick to ban:** Allowing a camera can prevent reporting errors and reduce confusion.
- **Savvy camera person:** Require experienced camera operator familiar with Rule 15 (or local rule).
- **Media room:** Allow a separate media room for video/audio feed so reporters need not crowd courtroom. *Post media rules/order in the room and on the door!*
- **Key exhibits:** Encourage parties to prepare copies in case of media request. Reduces disruption, confusion.

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Gag order? Punishment for talking about a case? Can a court do that?

This entry was contributed by Ann Anderson on August 18, 2017 at 2:36 pm and is filed under Civil Practice, Constitutional Issues, Contempt, Judicial Authority.

In an earlier post about high-profile trials, I touched on a trial judge's authority to restrict photos, audio, video, and broadcast of all or parts of an open court proceeding. To sum it up, the court has broad discretion to restrict dissemination of the proceedings in order to protect the integrity of the process. And under the right circumstances someone who violates the court's directive can be punished.

But what about another high-profile trial issue: When may a judge prevent people from reporting on or talking publicly about the case? Or punish a person for doing so?

Restrictions on talking about a case—"gag orders"

When a court enters a gag order—an order prohibiting the parties, their attorneys, witnesses, media, or others from talking about the case outside the court room—the court is restricting the exercise of speech. Such "prior restraints" on speech directly invoke the First Amendment and are presumed unconstitutional. To overcome this presumption, the restraint must meet the difficult standard established by the United States Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In *Nebraska Press Ass'n*, the court struck down an order prohibiting the media from reporting on certain confessions or admissions of the defendant. The court made clear that overcoming the presumption in favor of free speech is a "heavy burden," even when balanced against protecting the rights of an accused. The majority closed by saying:

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not to be abridged under all circumstances, but the barriers to prior restraint remain high and the



Limiting What People Say: Is a "gag order" allowed?



1st Amend:
Core purpose is to prevent prior restraints on speech.

"Heavy presumption" that the restraint is unconstitutional.

Three-part (nearly impossible) test:

- The *record shows* the publicity must be such that it would *necessarily* impair the criminal defendant's right to fair trial;
- *No* less restrictive alternatives exist that would mitigate effects of publicity; and
- The record shows that the restraint would effectively prevent the harm.

Nebraska Press Ass'n (US 1976);
Sherill (NC App 1998);
Beaufort County (NC App. 2007)



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Limiting What People Say: Special limits on lawyers?



Oh, right, the *lawyers*...

- Enjoy First Amendment protection from prior restraints *just like everyone else*.
- But, they are subject to *ethical* rules regarding “extrajudicial statements”:
 - All lawyers in the matter: Rule 3.6
 - Prosecutors: 3.8(f)



RPC 3.6 – Statements by counsel

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (A) the identity, residence, occupation and family status of the accused;
 - (B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (C) the fact, time and place of arrest; and
 - (D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity. . . .

“substantial likelihood of materially prejudicing” the case





RPC 3.8(f) – Statements by prosecutor

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(f) **except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.**



sog.unc.edu
(search: Judicial Authority)

THE COURT'S INHERENT AUTHORITY TO DISCIPLINE LAWYERS
Michael Crowell
UNC School of Government
October 2013

The court's inherent authority to discipline lawyers is well recognized and is not superseded by the State Bar's disciplinary powers.
The North Carolina Supreme Court has expressed concern about the loss of civility in the courts and has urged trial courts to take appropriate action.

1. **Disciplinary action may be imposed by either the court or State Bar** — Both statute and case law recognize that the court's inherent authority to discipline lawyers is not restricted by the parallel authority of the State Bar.

seriously their duty to ...
Practice for the Superior and District Courts) are strictly compelled ...
impose appropriate sanctions if they are not." — State v. ... 200 NC 285, 291 (1999)

"Inherent powers of courts, unaffected. ... Nothing contained in this Article [North Carolina State Bar] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." — NC Gen Stat § 84-36

"Furthermore, it has been held repeatedly that in North Carolina there are two methods by which disciplinary action or rebuke may be imposed upon attorneys — statutory and judicial. Statutes controlling. The judicial method is not displaced upon statutory authority, it arises because of a court's inherent authority to take disciplinary action

And while we're on the subject...

NC Code of Judicial Conduct

Canon 3

...

(6) A **judge** should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.



Another high-profile trial resource:

New Web page at National
Center for State Courts:
<http://www.ncsc.org/hpc>