PRIVACY AND THE COURTS

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INTRODUCTION

On December 5 and 6, 2005, I attended a National Conference on Courts and the Media entitled "Confidentiality in the Courts and the Media – the Gathering Storm." It was sponsored by the National Center for Courts and Media, First Amendment Center, Reporter's Committee for Freedom of the Press, and the National Judicial College.

Several of the topics, including a debate over a Federal Shield Law and a reporter's privilege, and access to terrorism proceedings, were extremely interesting, but are matters our state courts are unlikely to consider in the near future on a regular basis. However, the conference also addressed some other issues which the North Carolina Superior Courts are dealing with on an increasing basis. These included restrictions on juror information, access to court information and documents, access to the courtroom, and "gag orders." In this presentation I want to share with you some of the information presented at this conference, as well as to further address how these important subjects have thus far been addressed in North Carolina.

Like so much of what we encounter, these issues involve important considerations regarding individual rights versus rights of society, which must be delicately balanced.

I. ACCESS TO JUROR INFORMATION

Perhaps now more than ever before, we have a heightened concern for the individual's right to privacy. This concern spills over into the area of juror participation. Like many of you, I often meet with jurors following their discharge in criminal cases and any sentencing proceedings in order to answer their questions. Often, if a defendant has been convicted, jurors will express concern about the defendant or his family finding out who they are and doing them harm. Moreover, with the increasing tendency of the press to seek post-verdict interviews with jurors in the high profile cases, jurors have sometimes expressed concern that their identity and other personal information may be abused by the press or other members of the public.

The American Bar Association's standard on this matter provides that "The judge should ensure that the privacy of prospective jurors is reasonably protected and that questioning is consistent with the purpose of voir dire process." STANDARDS RELATING TO JURY USE AND MANAGMENET (STANDARD 7 (c) 1993).

North Carolina has a master list of all jurors who may be summoned in each two-year cycle. This list is available for public inspection, although it does not set forth the order in which the jurors will be summoned. N.C.G.S. 9-4, 9-2.1.

Of course, judges may place restrictions upon the questions posed to prospective jurors in voir dire. In State v. Lloyd, 321 NC 301, 366 SE 2d 316 (1988), the court prohibited defense counsel from inquiring into a juror's religious denomination or participation in church activities. The court stated: "Even though the state and defendant are entitled to inquire into a prospective juror's belief and attitudes, neither has the right to delve without restraint into all matters concerning potential jurors' private lives." State v. Lloyd, Supra at 307.

In addition, the United States Supreme Court has given the courts authority to close the courtroom to the public during jury selection. This is permissible when the questions "touch on deeply personal matters that the person has legitimate reasons for keeping out of the public domain." Press Enter. Co. vs. Superior Ct of Cal., Riverside County, 464 US 501 (1984).

Superior Court Judge Charles Lamm gave an excellent presentation at the Spring 2001 Conference of Superior Court Judges, in which he discussed juror privacy in the high profile case of State vs. Rae Carruth in Mecklenburg County. In that case, Judge Lamm utilized juror questionnaires, but told the jury panel during orientation that the questionnaires would be kept confidential, be utilized by counsel only during the jury selection, and that afterwards they would be collected and sealed by the court. Judge Lamm further entered an order not to release any information about a juror without a prior order of the court, until conclusion of the case at the Superior Court level. His order also provided that questionnaires would remain sealed, to be opened only by further order of the court or for purposes of appellate review. He did not prohibit the publishing of any artist's sketches of jurors, inasmuch as he did not feel the court had the authority to do so. He noted that television did broadcast sketches of potential jurors seated in the jury box, but those sketches only depicted the body of a subject such as to show whether they were male or female, and black or white.

In recent years, there has been a trend in various jurisdictions to empanel "anonymous juries." The first fully anonymous jury trial occurred in New York City in 1977 with the trial of drug kingpin Leroy Barnes. The court opined that the defendant presented a high risk of danger to jurors, and took the extraordinary measure of concealing the identities of the jury. Since then, anonymous juries have been used in a number of state and federal courts.

There are different kinds of "anonymity", associated with anonymous juries. In some cases, the defendant does not know the identity of the jurors. In other cases dealing with issues of juror privacy rather than safety, the parties know the identity of the jurors, but not the public. The court may also choose to withhold other information, such as responses to juror questionnaires, ethnicity, religion or occupation.

As expected, the press has vigorously opposed such use of anonymous juries. An anonymous jury was used in the corruption trial of former Louisiana Governor Edwin Edwards. In arguing why the press should have access to juror information, media attorney James Swanson stated, "it is possible, for example, that suspicions may arise in a particular trial...that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups. It would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret." In Re: Globe Newspaper Company, 920 F2d 88 (First Cir 1990). On the other hand, the court in that case expressed concern about jurors being harassed by the media. In the trial judge's order granting the government's motion for an anonymous jury, the judge cited that one of the reasons for the anonymous jury was that "certain members of the media aggressively followed, identified and contacted jurors in violation of the anonymous jury order issued by Judge Polozola" in the prior Edwards trial, which resulted in a mistrial because of a hung jury.

Other arguments for using anonymous juries include claims that jury anonymity may considerably enhance the reliability of the voir dire process, that it safeguards jurors from intimidation during the trials, and that it promotes greater juror participation.

Another objection to anonymity include lack of accountability to the community to follow the law. Other arguments are that the use of anonymous juries impairs the selection of an impartial jury, impedes the discovery of juror misconduct, and infringes on the right of the public to open court proceedings.

It may well be that before long, we will be seeing requests for the use of anonymous juries in North Carolina courts. Hopefully, the attached resources may prove of some assistance to you should that issue arise.

II. ACCESS TO COURT DOCUMENTS

Everyone agrees that there is a need for the public to have trust and confidence in the court system. We have traditionally believed that the public's right to know what is happening in the court system will help ensure such trust. Nevertheless, as issues involving the individual's right to privacy rage on in the press, particular in light over increased national security concerns, it is important to closely scrutinize this issue more so than we perhaps have done in the past.

In the article entitled "Privacy and the Courts" at the Spring 2002 issue of Popular Government, Professor Jim Drennan wrote that, "As it is true with court closings, the general rule about court records is that they are open to public inspection. In addition to the general public records statute, there is a specific statute making the court records maintained by the clerk of court, (the official records) opened for inspection. Also, North Carolina appellate courts have made it clear that the records held by the courts are public." "Privacy and the Courts," James C. Drennan, Popular Government, Spring

2002, page 28, citing N.C.G.S. 7A 109 (a) and Virmani v Presbyterian Health Services Corp. 350 NC 449, 476, 515 S.E.2d 675, 695 (1996). A copy of this outstanding article is attached, and will prove extremely helpful to you in studying these matters. I will see if Jim Drennan can link this article to the Judges' website.

However, there are exceptions to this rule. In civil cases, records of proceedings which result from closed court proceedings are typically closed. Examples include juvenile records, (N.C.G.S. 7B-2900, 3,000), involuntary commitment records (N.C.G.S. 122 C-207) records of minors seeking waivers of parental consent for abortion (N.C.G.S. 90-21.8), and adoption records of the court that could lead to the identity of the birth parents (N.C.G.S. 48-9-102). Similarly, in criminal cases certain records are placed under seal. Reports regarding a defendant's competency to stand trial are sealed and become public only if the records are introduced into evidence (N.C.G.S. 15A-1002(d)). Moreover, pre-sentence reports are not public records, and reports submitted by Sentencing Services programs may also be sealed. N.C.G.S. 15A-1333, and N.C.G.S. 7A-773.1,-774)

In North Carolina, we have seen an increasing trend for requests that settlement negotiations and consent documents be sealed. Indeed, such provisions are often contained in the final settlement agreement. N.C.G.S. 132-1.3 provides that settlement documents in lawsuits against governmental agencies, except for malpractice actions involving hospitals, may not be sealed by the court unless there is a determination that the presumption of openness is overcome by an overriding interest in maintaining confidentiality of the proceeding, and that the interest may not be served by any means except by sealing the documents. The law declares a preference that such records remain open.

However, there is no such requirement in nongovernmental civil cases. Advocates for open courts and the media object to sealing such documents because, "The effect is to keep from the public information that could help citizens, such as settlements for injuries stemming from the use of defective or dangerous products". PACKER AND STEVENS, NORTH CAROLINA MEDIA LAW HANDBOOK, 17 17 (Chapel Hill, N.C.; N.C. Press Found., 1996).

In non-governmental cases, many of us seal settlements routinely. Some have raised the question as to whether or not this contributes to "the privatization of justice," wherein large corporations involving cases of great public interest are being handled through private judges and private rules, with the public being ignorant of what is transpired. They argue there is a fear that the public courts, by sealing such records, are being turned into private dispute resolution forums.

Identity theft is a rapidly growing problem in our culture, and there is evidence that court records may be a potential source of identity theft. Many court files contain social security numbers, and these records are available to the public. The attached materials include an article from The Charlotte Observer dated January 22, 2006, detailing potential and real risks regarding identity theft.

The debate or access to court records also applies to electronic court records. There appear to be various approaches to addressing this issue including:

(1) Open electronic access, with minimal limits.
(2) Generally opened electronic access, coupled with significant limits on remote electronic public access and exclusions of certain categories of information from public record.
(3) Electronic access only to documents produced by the courts.
(4) Systematic re-evaluation of the content of the public case file, combined with limited access to electronic files.

These approaches are further explained in the attached paper entitled "Selected Issues in the Development of Rules on Public Access to Court Records," by Robert P. Deyling.

As we began to consider these issues in North Carolina, we may wish to consider some of the approaches employed by other jurisdictions. Enclosed in the handout materials are the Local Civil and Criminal Rules of the United States District Court for the District of New Jersey, which sets forth that court addresses issues regarding electronic filing systems.

III. ACCESS TO THE COURTROOM

An open courtroom is a fundamental cornerstone towards insuring both a justice system based on fairness and an educated public.

There are very few situations when public access to our courtrooms is blocked. These include juvenile cases (N.C.G.S. 7B-2402), involuntary commitments (N.C.G.S. 122C-267(f), adoptions (N.C.G.S. 48-2-203), proceedings involving judicial consent for a minor's abortion (N.C.G.S. 90-21.8), and testimony of a victim of a sexual offense (N.C.G.S. 15-166).

The case of Virmani v. Presbyterian Health Services, Corp., 350 NC 449, 515 S.E.2d 675 (1999) held that a media organization must file a separate, new lawsuit in which to seek access to a closed courtroom. However, in 2001, the General Assembly enacted a statute which allowed the press to petition for such access in the theme action to which they were denied access. N.C.G.S. 1-72.1

A judge must be extremely careful when endeavoring to block free access to the courtrooms.

IV. GAG ORDERS

Increasingly, we are seeing orders in which trial participants are limited and restricted as to their comments to the press. Judges view these as "orders limiting trial publicity, whereas the press usually refers to them as "gag orders."

Of course, the attorneys' code of ethics limits counsel as to what they can say to the press. Rule 3.6 of The Rules of Professional Conduct provides: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra judicial 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."

The rule goes on to provide that counsel may disseminate certain information to the press including: The claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved; the information contained in the public record; that an investigation of a matter is in progress; the scheduling or result of any step in litigation; the request for assistance in obtaining evidence and information necessary thereto; and 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. Moreover, in criminal cases, counsel may also state the identity, residence, occupation and family status of the accused; if the accused has not been apprehended, information necessary to aid in their apprehension of that person; the fact, time and place of the arrest; and the identity of investigating and arresting officers or agencies in the length of the investigation. Attorneys may also make statements that a "reasonable lawyer" would believe is required to protect a client from substantial under prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.

For years, there have been attorneys on both sides who want to try their cases in the press. In addressing such conduct, Courts seek to strike that delicate balance between guaranteeing the right of free expression and safeguarding the parties' rights to a fair trial. The comment to Rule 3.6 states: "Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be practical nullification of the protective effect of the rules of forensic decorum and exclusionary rules of evidence. On the other hand, there are vital social interest served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has the right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significant in debate and deliberation over questions of public policy."

The subject of "gag orders" appears to have occurred in the trial of Dr. Sam Sheppard of Cleveland, Ohio in the murder trial of his wife. In the court's opinion, Justice Clark stated "the trial judge could have proscribed extra judicial statements by any lawyer, party, witness or court official which divulged prejudicial matters."

Gag orders typically prohibit prosecutors, defense attorneys, police officers, court personnel or witnesses from talking with the media about any aspect of the case after the commencement of the proceedings.

Media advocates contend that the court has the authority to impose other remedies that will safeguard the right to a fair trial and does not run afoul of the First Amendment. These include effective voir dire to expose juror bias, jury sequestration, change of venue, and continuing the trial. Others maintain that such tools are "bankrupt remedies in preserving the defendant's right to a fair trial." "Free Press v Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard – Mu' Min Remedy", 69 S.Cal. L.Rev. 1587 (1996), by Charles Whitebread and Darrell Contreras.

The issuance of such orders or not has affects greatly the rights of many, and must be undertaken with great care.

CONCLUSION

Our free American society has always experienced the tension between the rights of the people as a whole versus the rights of the people as individuals. Judges have a special and even unique role in helping resolve that tension in the cases litigated daily in our courts.

There are new issues evolving which will require all the study and sophistication we can bring to that task. Perhaps some of these materials will assist you in some measure as you seek to balance the delicate scales of justice.