SOME LEGAL ISSUES IN MANAGING NOTORIOUS TRIALS

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1. Closing the courtroom

   a. Presumption that court is to be open — Generally trials must be open to the public, including the news media, unless there is an overriding reason for closing the courtroom.

   b. Criminal trials — Both the First and Sixth Amendments provide for open proceedings in criminal cases.

      i. The public has a First Amendment right to attend criminal trials, even when both the prosecution and defense wish to close the proceeding. *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980).

         (1) The First Amendment right of access applies to jury *voir dire* as well. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*, 464 US 501 (1984).
         (2) The right also applies to preliminary hearings. *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 US 1 (1986).

      ii. Additionally, the defendant has a constitutional right to an open proceeding. The Sixth Amendment states that in a criminal prosecution "the accused shall enjoy the right to a speedy and public trial."

         (1) The defendant's Sixth Amendment right to an open proceeding applies to a suppression hearing as well. *Waller v. Georgia*, 467 US 39 (1984).
         (2) The right also applies to jury *voir dire. Presley v. Georgia*, 558 US 209 (2010).

      iii. A criminal trial may be closed only when (a) doing so is necessary to serve an overriding governmental interest such as protecting witnesses, preserving the defendant's right to a fair trial, or avoiding public disclosure of sensitive information; (b) there is no less restrictive means to protect that interest; and (c) the scope and duration of the closure is kept as narrow as possible. The court must make findings sufficient to support the decision to close the court. *Waller, supra; Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 US 596 (1982).

      iv. GS 15-166 specifically authorizes closure of the courtroom during the testimony of the victim in a trial for rape or other sexual offense. Whether the statute may be applied is determined by the standards in *Waller v. Georgia*, discussed above. *State v. Jenkins*, 115 NC App 520 (1994); *Bell v. Jarvis*, 236 F3d 149 (4th Cir 2000). Examples of findings sufficient to justify closing the courtroom in such cases may be found in *State v. Williams*, ___ NC App ___, 754 SE2d 418 (2014) (courtroom closed while images of child pornography shown during a trial for sexual exploitation of a minor), and in *State v. Comeaux*, ___ NC App ___,

741 SE2d 346 (2012), and *State v. Rollins*, ___ NC App ___, 752 SE2d 230 (2013) (courtroom closed during the testimony of the victim of sexual abuse of a minor).

c. Civil trials — The United States Supreme Court has not addressed whether the First Amendment provides a right of public access to civil trials as well as criminal. The North Carolina Supreme Court, though, has recognized a qualified right of public access to civil proceedings under Article I, Section 18 of the State Constitution ("All courts shall be open . . . ."). *Virmani v. Presbyterian Health Servs. Corp.*, 350 NC 449 (1999).

   i. The state constitutional qualified right of public access may be overridden by a compelling public interest, but the court first must consider less restrictive alternatives. *Virmani, supra.* The public interest to be protected in *Virmani* was the confidentiality of medical review committee records exempted from the public records law by the legislature.

   ii. An agreement by the parties in a domestic case to maintain confidentiality of all proceedings between them is not by itself a sufficiently compelling reason for the court to close a proceeding. *France v. France*, 209 NC App 406 (2011).

d. Excluding individuals from the courtroom —

   i. Courts in other jurisdictions use two different standards for excluding particular individuals or groups from the courtroom. In some, the standard is the same as for closing the courtroom altogether, as discussed above, *i.e.*, individuals or groups may be excluded only for an "overriding interest." Other courts say there need be only a "substantial reason" for the exclusion of individuals. Although North Carolina's appellate courts have considered cases in which the trial court excluded particular family members or acquaintances, they have not spoken directly on whether the standard for excluding individuals might be different than the standard for closing the courtroom.

   ii. Courts have inherent authority to maintain proper order and decorum, including the exclusion of disruptive individuals. The authority to exclude disruptive individuals from criminal trials is codified as GS 15A-1033, and GS 15A-1035 declares that in addition to the statutory authority a court has inherent authority to maintain order.

      (1) The removal of several gang members from a murder trial as disruptive was justified based on intimidation of jurors in the previous trial of the same case. *State v. Dean*, 196 NC App 180 (2009). The court did not address the constitutional public trial issue because the defendant did not raise it in a timely manner.

      (2) The removal of most family members and supporters of both the defendant and victim was proper during the victim's testimony in a trial for rape and sexual offense even though a high school class was allowed in the courtroom during the testimony. *State v. Register*, 206 NC App 629 (2010). The exclusion was based on the potential for outbursts and other inappropriate reactions. The defendant failed to timely raise the issue of a constitutional right to have family present.

iii. A defendant might argue a denial of the due process right to a fair trial if the court fails to exclude spectators who are attempting to influence jurors through demonstrative acts or dress. Such arguments were made unsuccessfully in *State v. Braxon*, 344 NC 702 (1966) (spectators were wearing buttons with the victim's photograph), and *State v. Maness*, 363 NC 261 (2009) (police officers in uniform momentarily stood near the jurors in a trial for murder of an officer).

e. Statutes on closing proceedings — A number of statutes specify whether particular proceedings are to be open or closed. The principal statutes affecting superior court are:

i. GS 8C-1, Rule 412(d) — An *in camera* hearing is required on the admissibility of evidence of the sexual behavior of a complainant in a rape or sex offense case.
ii. GS 15-166 — The courtroom may be closed during the testimony of a rape or sex offense victim (see the discussion above).
iii. GS 15A-623(e) — Grand jury proceedings are secret.
iv. GS 15A-1033 — A person may be removed for disrupting a criminal trial.
v. GS 15A-1034 — Access to the courtroom may be limited in a criminal trial to ensure order and the safety of those present.
vi. GS 66-156 — An *in camera* hearing may be held to protect trade secrets in litigation over the misappropriation of trade secrets.

f. Suing for access to civil proceeding — GS 1-72.1 allow any person claiming a right of access to a civil proceeding to file a motion for that purpose without intervening in the case. There is no comparable statute for criminal cases.

2. Restricting free speech rights in courthouses and courtrooms

a. Basics of free speech analysis —

i. In a location that is a traditional public forum or has become a designated public forum because the government has designated it as a place for public expression, any restriction on free speech is subject to strict scrutiny and must be based on a compelling governmental interest. The government also may create a limited public forum by establishing an outlet for a limited type of expression at a location that otherwise would not be public. An example would be a school opening classrooms and meeting rooms to student groups but not others. Any restriction on a limited public forum must be reasonable in light of the purpose served by the forum (*e.g.*, denying access to a community organization when the rooms are limited to student groups) and must not discriminate based on point of view. If a location is a nonpublic forum, speech may be restricted so long as the restriction is reasonable and not based on the speaker's point of view. *Cornelius v. NAACP*, 473 US 788 (1985).

ii. Free speech protection applies to expressive conduct as well as spoken or written words. An armband is expressive conduct. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503 (1969). Dress likewise can be expressive conduct. Soliciting funds may be a form of expressive conduct, too. *Village of Schaumburg v. Citizens for a Better Env't*, 444 US 620 (1980). Most conduct is not expressive conduct subject to First Amendment protection,

however; the right of free speech depends on whether the conduct is intended to express a message. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995).

b. Application of free speech rights to courthouses and courtrooms —

i. A courtroom is a nonpublic forum. *Berner v. Delahanty*, 129 F3d 20 (1st Cir 1997); *Mezibov v. Allen*, 411 F3d 712 (6th Cir 2005).

ii. A courthouse is a nonpublic forum. *Berner v. Delahanty*, 129 F3d 20 (1st Cir 1997); *Huminski v. Corsones*, 396 F3d 53 (2nd Cir 2005).

iii. The parking lot adjacent to a courthouse is a nonpublic forum. *Huminski v. Corsones*, 396 F3d 53 (2nd Cir 2005).

iv. Even in a nonpublic forum restrictions on speech can be unconstitutional if they are too broad or leave too much discretion with supervising officials. An example of restrictions in courthouses that were considered too broad is *Sammartano v. First Judicial Dist. Court*, 303 F3d 959 (9th Cir 2002), where there was no history to justify the ban on biker jackets and the ban was applied to county office portions of the building, not just the courts.

v. A designated public forum is not created inadvertently, by inaction or by permitting limited public expression. The creation has to be intentional. *Cornelius v. NAACP*, 473 US 788 (1985). An outside plaza that was part of a federal building housing a court was considered a designated public forum because the government approved its use for demonstrations on a regular basis. *United States v. Gilbert*, 920 F2d 878 (11th Cir 1991).

vi. A limited public forum was created when the government allowed a courthouse to be used regularly for filming movies and television shows. Court officials could not then deny access to a new movie because they disapproved of its theme. *Amato v. Wilentz*, 753 F Supp 543 (DNJ 1990), *vacated on other grounds*, 952 F2d 742 (3rd Cir 1991). A limited public forum might also be created, for example, if court or county officials allow a courthouse lobby or other space to be used by organizations raising money for charitable purposes. Once that limited use is established, officials could not then deny access to a different fund-raising organization because they did not think the cause worthwhile.

vii. A prohibition on wearing political buttons in the courtroom is reasonable. *Berner v. Delahanty*, 129 F3d 20 (1st Cir 1997).

viii. It is reasonable to limit artwork in a courthouse lobby to "sedate and decorous exhibits." *Sefick v. Gardner*, 164 F3d 370, 373 (7th Cir 1998).

c. Regulating courtroom attire —

i. As discussed above, dress can be expressive conduct subject to First Amendment analysis. Even if dress is expressive, intended to communicate a particular message, the barring of such messages in the courtroom and courthouse, which generally are nonpublic forums, will be considered reasonable in light of the need to assure a fair trial. Indeed, a defendant

might argue denial of the due process right to a fair trial if spectators are allowed to wear clothing with a message about the case. *See State v. Braxton*, 344 NC 702 (1996).

ii. Most dress is not intended to be expressive, is not intended to communicate a message. In those situations, no First Amendment analysis is required, the court need consider only its authority to maintain proper order, decorum and respect.

iii. Rule 12 of the General Rules of Practice for Superior and District Courts provides: "Business attire shall be appropriate dress for counsel while in the courtroom." There does not appear to be any case law in North Carolina concerning that rule or the court's inherent authority to impose standards of dress and appearance on parties, witnesses and spectators. There is considerable case law from other jurisdictions, however, clearly recognizing such authority. The standards for courtroom attire should be reasonable and not rigid and not based on the judge's own taste; the standards must be communicated clearly before any discipline may be imposed; the court should recognize that society's standards change over time; and accommodation should be made for religious garb (see below).

iv. Cases from other jurisdictions concerning regulation of courtroom dress, in no particular order, include: *Sandstrom v. State*, 309 So2d 17 (Fla Dist Ct App 1975); *Friedman v. District Court*, 611 P2d 77 (Alaska 1980); *Bly v. Henry*, 624 P2d 717 (Wash 1981); Peck v. Stone, 32 AD2d 506 (NY App Div 1969); *Kersevich v. Jeffrey Dist. Court*, 330 A2d 446 (NH 1974); *Doyle v. Aison*, 216 AD2d 634 (NY App Div 1995).

v. Religious garb also raises constitutional issues, but that is beyond the scope of this paper. While there does not appear to be any North Carolina law on the subject, there are numerous cases from other jurisdictions. For a useful article see Samuel J. Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 Fordham L. Rev. 1505 (1998).

3. Restricting access to court records

a. Constitutional and common law considerations

i. The United States Supreme Court has never decided whether there is a First Amendment right of access to court documents. The Fourth Circuit, however, had held that there is such a constitutional right when the documents pertain to a proceeding which historically has been open to the public and when public access to the proceeding plays a significant role in the process. *Baltimore Sun Co. v. Goetz*, 886 F2d 60 (4th Cir 1989).

ii. While it has not ruled on a constitutional right of access to court documents, the US Supreme Court has decided that there is a common law right. Under the common law right, though, the trial court has discretion whether to limit access. *Nixon v. Warner Communications, Inc.*, 435 US 589 (1978).

iii. If the Fourth Circuit's constitutional right is applied, access to court documents may be denied only to serve a compelling state interest, and the restriction on access must be narrowly tailored to serve that interest. If, instead, the common law right of access is

applied, access may be denied when "essential to preserve higher values," and the restriction must be narrowly tailored to serve that purpose. As a practical matter, there does not appear to be a significant difference between the constitutional and common law standards.

iv. The North Carolina Court of Appeals has followed the Fourth Circuit's *Baltimore Sun* analysis to determine whether a First Amendment right of access applies to court documents. The court determined that a search warrant is not subject to the First Amendment right because it was not part of a process historically open to the public. The court held instead that a qualified right of access applied based on Article I, Section 18 of the North Carolina Constitution — "All courts shall be open." This qualified right of access can be limited by a countervailing "higher interest" such as protecting the defendant's right to a fair trial, preserving the integrity of an ongoing investigation, or protecting witnesses or innocent third parties. *In re Investigation into Death of Cooper*, 200 NC App 180 (2009).

b. The Public Records Law (GS Chapter 132)

i. Court records fit under the broad definition of a public record in GS 132-1 and, therefore, most questions about access to court records are resolved under the public records statutes and do not require consideration of the constitutional or common law issues discussed above.

ii. Additionally, GS 7A-109(a) states that records maintained by the clerk of court pursuant to Administrative Office of the Courts rules are public.

iii. The Public Records Law itself specifically exempts a few court documents from the disclosure. Those exemptions are:

(1) GS 132-1.3(a) provides that settlement documents in medical malpractice cases against public hospital facilities are not public records. But note that settlement documents in litigation involving other state and local public agencies are public records and may be sealed only when there is an overriding interest in their confidentiality.
(2) GS 132-1.4(k) provides that arrest and search warrants are not public records until they have been returned by law enforcement agencies.
(3) Some law enforcement records and trial preparation documents also are exempted from the Public Records Law, but those are not court records.

iv. Statutes other than the Public Records Law also address the confidentiality of several kinds of court records. The statutes most applicable to superior court include:

(1) GS 1A-1, Rule 26(c) — The judge in a civil case may limit discovery and order that documents be sealed.
(2) GS 15-207 — Information obtained by a probation officer is privileged and is to be disclosed only to the court and the Secretary of Correction and others authorized by them.
(3) GS 15A-623(e), (f) and (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.

(4) GS 15A-908 — The judge may limit discovery in criminal cases and order the sealing of documents presented for *in camera* review.

(5) GS 15A-1002(d) — A report on the capacity of the defendant to stand trial is to be sealed but copies provided to counsel.

(6) GS 15A-1333(a) — Presentence reports and information obtained to prepare such reports are not public records and may be made available only to the defendant, the defendant's lawyer, the prosecutor and court.

c. The court's inherent authority to limit access to documents

i. The court has 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 Servs. Corp.*, 350 NC 449 (1999). In a criminal case, the interests justifying sealing of records may include the need to protect the defendant's right to a fair trial, preserving the integrity of an ongoing investigation, protecting witnesses and innocent third parties, and safeguarding the state's right to prosecute a defendant. *In re Investigation into Death of Cooper*, 200 NC App 180 (2009).

ii. An agreement by the parties in a domestic case to maintain confidentiality in any proceeding against each other does not bind the court and does not by itself establish a compelling reason for sealing documents or closing the court proceeding. *France v. France*, 209 NC App 406 (2011).

4. Restricting statements about or reporting of court proceedings (gag orders)

a. Constitutional considerations

i. The failure to protect a defendant from massive negative media coverage before and during a trial can result in denial of the due process right to a fair trial. *Sheppard v. Maxwell*, 384 US 333 (1966). Actions that may be taken to assure a fair trial include limiting the number and location of reporters in the courtroom; limiting the release of information by lawyers, court officials, law enforcement, and witnesses; continuing the trial until a more favorable time; changing venue; and sequestering jurors.

ii. An order restricting what the media, parties, lawyers or witnesses may say about a case is a prior restraint on free speech and is presumed unconstitutional. To be valid such an order must be based on findings of fact supported by evidence in the record that (a) publicity is likely to affect jurors and the right to a fair trial; (b) lesser alternatives such as a change in venue or continuance of the trial or extended *voir dire* of jurors have been considered and are not sufficient to mitigate the risk; and (c) the order is likely to prevent jurors from being influenced, *i.e.*, the order actually can be effective. *Nebraska Press Ass'n v. Stuart*, 427 US 539 (1976).

iii. The First Amendment does not prohibit the discipline of a lawyer under bar rules that prohibit remarks that create a "substantial likelihood of material prejudice" at trial.

Restrictions on lawyers are not subject to the same standard as restrictions on the news media. *Gentile v. State Bar of Nevada*, 501 US 1030 (1991).

b. North Carolina law

i. North Carolina applies the requirements of *Nebraska Press Ass'n v. Stuart*, discussed above, to gag orders. *See Sherrill v. Amerada Hess Corp.*, 130 NC App 711 (1998).

ii. North Carolina applies the same standard to orders restricting the comments of lawyers as applied to orders restricting the news media. *See Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 184 NC App 110 (2007).

iii. 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. North Carolina Rules of Professional Conduct

i. Rule 3.6 prohibits lawyers from making statements that "have a substantial likelihood of materially prejudicing" the proceeding.

ii. Rule 3.8(f) instructs prosecutors to refrain from out-of-court statements that "have a substantial likelihood of heightening public condemnation of the accused." Prosecutors also are to try to prevent law enforcement officers and others assisting in the case from making such statements.

5. North Carolina Supreme Court rule on cameras and recording in the courtroom

a. Rule 15 of the General Rules of Practice for the Superior and District Courts governs the televising, photographing, broadcasting and recording of proceedings. The rule applies to the news media and also applies to others' use of cameras, smart phones with cameras, recorders and similar devices.

b. Under Rule 15 the senior resident superior court judge may set policies about the use of cameras, etc., in the courtroom, including the location of equipment, but the final decision about coverage of a particular proceeding belongs to the presiding judge.

c. Rule 15 prohibits coverage of the following kinds of proceedings:

i. Adoption proceedings
ii. Juvenile proceedings
iii. Proceedings before clerks
iv. Proceedings before magistrates
v. Probable cause hearings
vi. Child custody hearings
vii. Divorce proceedings
viii. Temporary and permanent alimony hearings

ix. Hearings on motions to suppress evidence
x. Proceedings involving trade secrets
xi. *In camera* proceedings

d. Rule 15 prohibits coverage of the following kinds of witnesses, regardless of the nature of the proceeding:

i. Police informants
ii. Minors
iii. Undercover agents
iv. Relocated witnesses
v. Victims and families of victims of sex crimes

e. Rule 15 prohibits coverage of jurors during any stage of a proceeding, including jury selection.

f. Rule 15 prohibits any coverage that picks up audio or otherwise broadcasts a bench conference or a conference between a lawyer and client, or between opposing counsel, in a court facility.

6. Judge's comments on a case

a. Prohibited comments —

i. Canon 3A(6) of the North Carolina Code of Judicial Conduct (see text below) prohibits a judge from commenting on the merits of any pending case in either state or federal court involving a question of state law. The judge is to encourage court personnel under the judge's supervision to also refrain from such comments.

ii. The North Carolina code differs from the American Bar Association's model code of judicial conduct. The model code prohibits comments on a pending <u>or impending</u> (anticipated) matter in any court <u>if</u> the comment might be expected to affect the outcome or fairness of the proceeding. Thus, the North Carolina code is less restrictive than the model code in that it applies only to pending proceedings, but is more restrictive in that it prohibits any comment on such cases, not just comments likely to affect the proceeding.

iii. The preamble to the North Carolina Code of Judicial Conduct says that no other code or proposed code is to be relied upon for its interpretation. Accordingly, a judge should not rely on interpretations of the ABA model code.

iv. *In re Harrison*, 359 NC 415 (2005), appears to be the only published opinion concerning the canon on commenting on a case. The judge was removed from office for mental and physical incapacity which had prompted several violations of the Code of Judicial Conduct. The violations included the judge's assertions that named lawyers and judges were conspiring to have her assassinated, and also included a lengthy letter to the local newspaper discussing a domestic case over which the judge had presided, written while the case still was on appeal.

b. Permitted comments — Canon 3A(6) authorizes a judge to speak publicly in the course of public duties and to explain court proceedings. It is permissible, therefore, for a judge to meet with reporters to explain and answer questions about the procedural aspects of a trial while avoiding comment on the merits of the case, the demeanor of the witnesses, the performance of the lawyers, or similar matters.

c. Canon 3A(6) of the North Carolina Code of Judicial Conduct —

"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 a faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations."