

## **GATEKEEPER ORDERS (PRE-FILING INJUNCTIONS)**

Michael Crowell  
UNC School of Government  
*December 2009*

1. Courts have the inherent authority to enter pre-filing injunctions — also referred to as gatekeeper orders — restricting individuals from filing new lawsuits or other papers without court approval, when necessary to prevent abuse of the judicial process and protect other parties.
2. The gatekeeper order should be the judge's last resort, after other efforts to control the litigant have failed. As with any disciplinary matter, the subject should be given notice of the proposed order and a chance to respond before it is entered. To the extent possible the order should be limited to the circumstances showing abuse — for example, if all the abusive litigation is directed at one particular party, the order should only limit filings related to that party.
3. The order needs to specify the history that has led to its entry, in sufficient detail that an appellate court can review for the trial court's abuse of discretion.
4. The order needs to include a means for the person to file legitimate actions. One possibility is to allow filing upon approval of a judge; another is to allow a filing if it is accompanied by a certificate from a lawyer that the lawyer has read the complaint, etc., and it meets the standards of Rule 11 of the Rules of Civil Procedure (though this raises questions of its own because it has the effect of requiring the person to employ a lawyer).
5. Either in the gatekeeper order or separately the court should instruct the clerk's office on how to handle improperly filed documents. The clerk might be instructed to not accept for filing any papers from the litigant without a signed approval from a judge, for example.
6. There are few North Carolina appellate decisions on gatekeeper orders, and most of them are unpublished, but it is clear that the appellate courts condone such orders. One reason there is so little discussion of gatekeeper orders in the appellate cases is that the litigants are *pro se* and typically fail to properly preserve issues for appeal, leading to dismissal on procedural grounds.
7. A recent North Carolina appellate court discussion of a gatekeeper order is found in *Estate of Dalenko v. Monroe*, N.C. Ct. of App., No. COA08-844 (May 19, 2009), an unpublished opinion. Ms. Dalenko, acting *pro se*, was appealing the dismissals of claims she filed on behalf of her father's estate in 2007. The dismissals were based, at least in part, on their being filed in violation of a gatekeeper order entered in 2001. The case with the gatekeeper order itself had been appealed unsuccessfully. Because of the earlier history the Court of Appeals in its May 2009 opinion did not discuss the standard for issuance of a pre-filing injunction, but the opinion implicitly accepts the validity of the gatekeeper order, making it a useful example of the kind of findings which support a pre-filing injunction.

The 2001 gatekeeper order included findings that Ms. Dalenko had been sanctioned by five other judges and had exhibited a pattern of disregard for the rules that would have required reporting her to the State Bar if she were a lawyer. The order also specifically found that she had filed frivolous claims for the purpose of harassment and had placed an undue burden on the judicial system. The order prohibited Dalenko from filing any document with the Wake County clerk's office without a certificate by a lawyer that the lawyer had read the document, that the document complied with Rule 11, and that the lawyer had read the gatekeeper order.

In the appeal of the dismissal of the 2007 claims Ms. Dalenko argued that the 2001 pre-filing injunction was not intended to apply outside the case in which it was entered and that, if so applied, the order would violate Rule 65(d) of the Rules of Civil Procedure which says injunctions are binding only on parties, their lawyers and others in active concert or participation with them. The Court of Appeals rejected her arguments, saying, among other things, that there was no violation of Rule 65(d) because Ms. Dalenko was a party to the action in which the gatekeeper order was entered even if the defendants in her newest lawsuit were not.

8. In *Estate of Dalenko v. Monore*, discussed above, the court noted that the lawsuit in which the gatekeeper order had been entered had been appealed and decided in *Dalenko v. Wake Cty Dep't of Human Servs.*, 157 N.C. App. 49, *disc. rev. denied*, 357 N.C. 458 (2003), *cert. denied*, 540 U.S. 1178 (2004). The gatekeeper order was not discussed in the earlier opinion, but the court had approved another method of addressing abusive litigants. After an earlier frivolous lawsuit the trial judge had invoked G.S. 1-109 to require Dalenko to post a prosecution bond of \$20,000 to proceed in her new lawsuit against the same agency. The previous lawsuit had resulted in sanctions against Dalenko, and the new lawsuit was based on the same allegations. The \$20,000 prosecution bond was calculated to cover anticipated costs for the defendants, based on the experience in the previous litigation. The Court of Appeals held that the trial court had discretion to go beyond the \$200 specified in G.S. 1-109 for prosecution bonds.

9. The Court of Appeals also considered a gatekeeper order in *Smith v. Noble*, 155 N.C. App. 649 (2002). Smith tried to sue the judge, law enforcement officers, the clerk of court and others over the handling of her civil cases. After dismissing the cases, the trial court entered a pre-filing injunction prohibiting Smith from filing any lawsuit in state court without approval of the senior resident superior court judge for the district. Smith appealed on various grounds, including that the injunction violated the open courts provision of the North Carolina Constitution as well as her free speech and due process rights. The appeal was dismissed for Smith's failure to present arguments and cite authority.

10. In an unpublished opinion the Court of Appeals approved a gatekeeper order in *Lee v. O'Brien*, N.C. Ct. of App., No. COA01-1231 (Aug. 6, 2002). Lee was permanently enjoined from calling police with unwarranted complaints against her neighbor O'Brien, and from filing any civil action or criminal complaint in Wake County without approval of a district judge. The order was based on findings that Lee, acting *pro se*, had filed multiple unsupported civil actions and criminal complaints; that the filings were motivated by harassment and annoyance; and that she would continue to do so unless enjoined; and that she had failed to respect the authority of the courts. The Court of Appeals held that the gatekeeper order did not deny Lee access to law enforcement and the courts because it prohibited only "unfounded or harassing complaints" to

the police; the order was limited to complaints against the named defendants; and court filings were allowed with approval of a judge.

11. A gatekeeper order was accepted as a Rule 11 sanction in an unpublished opinion in *Wendt v. Tolson*, N.C. Ct. of App., No. COA03-1680 (Aug. 16, 2005). Wendt had filed and lost three lawsuits after losing an administrative appeal concerning tax liability. As a Rule 11 sanction the trial judge ordered Wendt not to file any other lawsuit without the approval of the senior resident superior court judge of the county. The Court of Appeals accepted without discussion that a gatekeeper order was an available sanction, but held that the imposition of sanctions required findings of fact which were missing in this case. Because the record contained evidence to support the sanction, the appellate court remanded to the trial court to enter specific findings and conclusions.

12. In another unpublished opinion, the Court of Appeals rejected a prisoner's appeal of contempt based on his violation of a pre-filing injunction, because he had not properly raised the constitutional issues in the trial court. *State v. Rowe*, N.C. Ct. of App., No. COA05-210 (Dec. 20, 2005). The injunction prohibited the prisoner from filing any more motions for appropriate relief or other filings seeking relief from his larceny and habitual felon convictions, after 24 such motions and filings had been rejected.

13. In federal court, the All Writs Act, 28 U.S.C. § 1651(a), authorizes trial courts to restrict access to the courts by parties who repeatedly file frivolous litigation. That particular statute gives federal judges statutory authority in addition to the authority they share with state court judges, *i.e.*, the inherent authority to prevent abusive litigation and the Rule 11 authority to impose sanctions for frivolous lawsuits. An often-cited federal case listing the factors to be considered by the trial judge in deciding whether to restrict a litigant's future access to the courts is *Safir v. United States Lines Inc.*, 792 F.2d 19 (2<sup>nd</sup> Cir. 1986). The factors to be considered are:

- The litigant's history of litigation and whether it has included harassing or duplicative lawsuits.
- The litigant's motive in pursuing the litigation, *e.g.*, whether the litigant has an objective good faith expectation of prevailing.
- Whether the litigant is represented by counsel.
- Whether the litigant has caused needless expense to other parties or has imposed an unnecessary burden on the court and its personnel.
- Whether other sanctions would be adequate to protect the court and other parties.

"Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." At 24.

14. *Cromer v. Kraft Foods North American, Incorporated*, 390 F.3d 812 (4<sup>th</sup> Cir. 2004), is the leading Fourth Circuit case on the standards for issuance of a gatekeeper order. In addition to adopting the *Safir* list of factors to be considered the court offered this guidance:

- A pre-filing injunction is a drastic remedy to be used sparingly and only when exigent circumstances justify it.
- Use of such measures against a *pro se* litigant should be approached with particular caution.

- The pre-filing injunction must be narrowly tailored to fit the circumstances. (In *Cromer* the injunction was not narrowly tailored because it restricted the defendant from filing any lawsuit without court approval although his history showed only vexatious litigation related to his employment discrimination lawsuit.)
- The litigant must be given notice and an opportunity to be heard before a gatekeeper order is entered.

15. The opinion in *Procup v. Strickland*, 793 F.2d 1069 (11<sup>th</sup> Cir. 1986), includes a long list of citations for different kinds of measures courts have taken to stop abusive filings by federal prisoners, including orders that the prisoner obtain court approval for any new filing; that the prisoner provide an affidavit that claims are novel, subject to contempt for false swearing; that the prisoner may file only a specified number of complaints; that the prisoner include a list of all previous filings with each new filing; that the prisoner not serve as a writ writer for any other prisoner; limiting the number of pages allowed in each new filing; and requiring an affidavit as to the attempts made by the prisoner to obtain a lawyer.

16. A good example of a gatekeeper order entered by a federal district court in North Carolina is *Armstrong v. Koury Corporation*, 16 F.Supp.2d 616 (MDNC 1998).

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