Overzealous/Vexatious Self-Represented Litigants: Gatekeeper Orders and Alternative Sanctions

Judge Lori G. Christian
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1. Vexatious litigant
    a. Definition
    b. Other jurisdictions response to vexatious litigation
    c. Hallmarks of vexatious litigant

2. Why Judges need to act
    a. Unduly burdensome to court system
    b. Causes needless expense to the parties
    c. Can amount to harassment of litigants and court personnel

POSSIBLE COURT RESPONSES TO VEXATIOUS LITGATION AND LITIGANTS

Rule 11 Motion

1. Applies to all signers

2. Violation of Rule 11 occurs if pleading or other paper is:
    a. Not well grounded in fact;
    b. Not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or
    c. Interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

3. Procedure[1]
    a. Initiated by a motion for sanctions pursuant to Rule 11 (including *sua sponte*)
    b. Requires timely and detailed notice and opportunity to be heard
    c. Evidentiary hearing required to resolve issues of fact or issues of credibility prior to determining whether sanctions should be imposed
    d. Form of hearing in the discretion of trial judge

[1] *See In re Kunstler,* 914 F.2d 505 (4th Cir. 1990), *cert. denied sub nom. Kunstler v. Britt,* 499 U.S. 969, 113 L. Ed. 2d 669 (1991); *Johns v. Johns,* 195 N.C. App. 201 (2009); *Griffin v. Griffin*, 348 N.C. 278 (1998); *Taylor v. Taylor Products Inc.*, 105 N.C. App. 620 (1992)

4. Review / Analysis of Motion[2]
    a. Avoid hindsight. Focus is on when the document was signed when reviewing the law and the signer's knowledge of the facts
    b. Resolve all doubts in favor of the signer
    c. Filed paper at issue is not to be read in conjunction with any responsive papers subsequently filed
    d. Continuing duty on the signer to analyze the basis for the signed paper and to withdraw it when it becomes apparent, or should become apparent, that the paper no longer comports with the rule

5. "Well grounded in fact" - two part analysis[3]
    a. Did signer undertake a reasonable inquiry into the facts; AND
    b. Did signer, after reviewing the results of their inquiry, reasonably believe that their position was in fact well-grounded in fact

6. Warranted by Law or Good Faith Argument for change in existing law
    a. Two-step analysis.
        i. Facial plausibility of the paper AND
        ii. Based on a "reasonable inquiry" into the law, did the signer form a "reasonable belief" that the paper was warranted by existing law?
    b. Objective standard applies to the analysis

7. Improper purpose
    a. Any purpose other than to vindicate rights or to put claims to a proper test
    b. Can be inferred from the alleged offender's objective behavior
    c. Objective standard
    d. Can be a fine line between zealous advocacy and abuse of the processes of litigation

8. Standard of proof for Rule 11 analysis: Preponderance of the evidence quantum of proof

9. Contents of Order
    a. Must include written findings of fact and conclusions of law
    b. If a violation is found, sanctions are mandatory
    c. If attorney fees awarded, must include the findings required for any award of attorneys' fees

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[2] *Cooter & Gell v. Hartmax*, 496 U.S. 384 (1990), *superseded by statute* on unrelated issue (violation of the Rule is complete when paper is signed); *Sheets v. Yahama Motors Corp., U.S.A.*, 891 F.2d 53 (5th Cir. 1990); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken -- when the signature is placed on the document."); *Bryson v. Sullivan*, 330 N.C. 644 (1992); *Tittle v. Case*, 101 N.C. App. 346 (1991)

[3] *Ward v. Jett Props, LLC, 191 N.C. App. 605 (2008) (two part analysis required); McClerin v. R-M Industries, Inc.,* 118 N.C. App. 640 (1995) ("In determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer."); *Twaddell v. Anderson*, 136 N.C. App. 56 (1999), *disc. review denied*, 351 N.C. 480 (2000); *Kohler Co. v. McIvor*, 177 N.C. App. 396 (2006)

10. Rule 11 sanctions[4]
    a. "Appropriate sanction" - Trial judge has broad discretion
    b. Award of attorneys' fees expressly allowed
    c. Involuntary dismissal
    d. Entry of a gatekeeper order
    e. Others?

[4] *Melton v. Stamm*, 138 N.C. App. 314 (2000) ("The decision of which sanction to impose for violation of Rule 11(a), including involuntary dismissal, is exercised in the broad discretion of the trial court"; *Fatta v. M&M Properties Mgmt., Inc.* , 224 N.C. App. 18 (2012) (Gatekeeper order a possible sanction)

Statutory Award of Attorneys' Fees as a Sanction

1. N.C. Gen. Stat. § 6-21.5
    a. Award of attorneys' fees available to prevailing party who defends against any non-justiciable pleading
    b. Justiciable: an issue that is real and present as opposed to imagined or fanciful.
    c. In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even when giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss.
    d. After finding no justiciable claim, court must then determine whether signer should reasonably have been aware of this at time of signing, and if so, did signer persist in litigating the case after they should have been reasonably aware of no justiciable issue
    e. Procedure:
        i. Prevailing party files motion
        ii. Hearing with notice and opportunity to be heard
        iii. Statute is strictly construed

2. Other statutes
    a. N.C. Gen. Stat. § 1D-45: mandatory award of attorneys' fees to a party who defends against a frivolous or malicious punitive damages claim and against a party who asserts a defense which filer knew or should have known was frivolous or malicious
    b. N.C. Gen. Stat. § 75-16.1: discretionary award of attorneys' fees to a prevailing party in an unfair and deceptive trade practices claim, namely a prevailing party who defends against a frivolous and malicious claim.

Gatekeeper Orders (Pre-Filing Injunctions)

1. **What is a Gatekeeper Order:** Pre-filing injunction that limits or restricts a litigant from filing new actions or other papers in existing actions

2. **Constitutional protections that are afforded by access to the Court**[5]
    a. Due process clause requires that every person have their day in court
    b. Constitutional protections afforded by access to the courts is a right that lies at the foundation of an orderly government.
    c. Gatekeeping orders impair this right but are authorized under certain circumstances.

3. **What is the Court's authority to enter a gatekeeper order**[6]
    a. *Inherent authority* to "do all things that are reasonably necessary for the proper administration of justice", but no more than is reasonably necessary
    b. Allowed as a sanction for a Rule 11 violation
    c. However, imposition of Gatekeeper Order must comport with Constitutional protections of due process and access to the Court

4. **Gatekeeper Order likely should be a "last resort"**[7]
    a. More than one meritless/frivolous filing is likely required before entering a Gatekeeper Order
    b. Possible exception: filings that contain outrageous and abusive allegations
    c. Entering a Gatekeeper Order is a drastic remedy because it limits a litigant's right of access to the courts

5. **Applicable in civil matters and criminal actions (to a limited degree)** [8]
    a. Might be available in criminal matters relating to the repeated filing of MARs asserting the same claim

6. **Procedure for entering Gatekeeper Order**[9]
    a. No North Carolina case particularly mandating a specific procedure
    b. Procedure initiated by opposing party filing a motion or court raising the issue *sua sponte*
    c. Proper notice and opportunity to be heard must be afforded the filer
    d. Filer must be put on notice of the specific conduct in question
    e. Filer must be put on notice that a gatekeeper order is a possible sanction

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[5] *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812 (4th Cir. 2004)

[6] *Beard v. N. Carolina State Bar*, 320 N. C. 126 (1987); Matter of Alamance Cty, Court Facilities, 329 N.C. 84 (1991)

[7] *Fatta v. M&M Properties Mgmt., Inc.*, 224 N.C. App. 18 (2012)

[8] *See State v. Ballard*, 283 N.C. App. 236 (2022*), citing State v. Blake,* 275 N.C. App. 699 (2020)

[9] *Medina v. Medina*, 281 N.C. App. 690 (2022); *Spahr v. Spahr*, 279 N.C. App. 683 (2021)

f. Filer must be allowed the opportunity to respond before a gatekeeper Order is entered
g. Weigh all relevant circumstances including the *Cromer* factors:
    i. The party's history of litigation, especially including whether they have a history of filing vexatious, harassing, or duplicative lawsuits;
    ii. Whether a party had a good faith basis for pursuing the litigation or simply intended to harass;
    iii. The extent of the burden on the courts and other parties resulting from the party's filings; and
    iv. The adequacy of alternative sanctions

7. **After Order is Entered**
    a. Order must be served on all parties
    b. Must be signed and filed
        i. Where filed? Depends on whether order is litigation specific or litigant specific

8. **Subject to an abuse of discretion review on appeal**[10]
    a. Trial court will be reversed only upon a showing that the court's action in entering the order are "manifestly unsupported by reason"
    b. North Carolina cases affirming gatekeeper orders
        i. Prohibiting plaintiff from filing further complaints related to decedent's estate. *Barrington v. Dyer*, 282 N.C. App. 404 (2022)
        ii. Restricting filings only in the relevant county. *Fatta v. M&M Properties Mgmt., Inc.*, 224 N.C. App. 18 (2012)
        iii. Restricted filings related to the foreclosure at issues against that specific petitioner and its attorneys or staff. *In re Vicks*, 772 S.E.2d 265, N.C. App. (2015) (published)
        iv. Restriction was limited to filings in a specific county and related to the matter at issue. *Johnson v. Bank of America*, 225 N.C. App. 265 (2013)
        v. Limited to filings in a specific county. *Lee v. O'Brien*, 151 N.C. App. 748 (2002) (unpublished)

9. **Contents of the Gatekeeper Order**
    a. Must be detailed and specific
    b. Include written findings of fact and conclusions of law to explain the basis for the injunction
        i. Consider including a list of all the egregious filings
        ii. Include findings of fact (and conclusions) regarding consideration of the factors in *Johnson v. Bank of America*

[10] *See Fatta v. M & M Properties. Mgmt., Inc.*, 224 N.C. App. 18 (2012); *Clark v. Clark*, 301 N.C. 123 (1980)

c. Conclusions of law should include that the Order is "necessary for the proper administration of justice"

10. **Narrowly tailor the prohibitions**
    a. A prohibition on ANY AND ALL FUTURE filings likely will be overbroad
    b. Order can be litigant specific or limiting filings only in the instant case
    c. If order is litigant specific – meaning no future filings in any case:
        i. Narrow the affected filing when you can. Consider:
            1. Injunction applies only as to filings against specific targeted individuals
            2. Injunction applies only as to filings in specific county(s) or judicial districts (versus statewide)
            3. Injunction applies only as to filings in cases with the same set of facts or circumstances or same type of cause of action

11. **Define a process whereby the filer can follow through on future legitimate filings.** For example:
    a. Prior review by a specific judge (or the Chief DCJ if that judge is not available); or
    b. Filing must be accompanied by a Rule 11 certification signed by an attorney
        i. If you include this option, you probably need to have an option that does not require hiring an attorney

12. **Define in the order what will happen if a litigant violates the Gatekeeper Order**.
    a. Contempt hearing
    b. Rule 41(b) sanctions
    c. Filing won't be accepted
    d. Motion will not be scheduled for hearing
    e. Rule 11 hearing (for violating the Gatekeeper Order and possibly an independent violation of Rule 11)
    f. Other?

13. **Define who is the Gatekeeper** and what they need to do (or not do) if a filing violates the Gatekeeper Order
    a. Clerk? Case manager (TCA/Family Court)?

14. **Serve a copy of the Gatekeeper Order on the Gatekeeper**
    a. If Gatekeeper Order is litigant specific, make sure the Clerk is directed to serve the order on all appropriate parties and Clerks in all affected jurisdictions

15. **Practical problems with enforcing Gatekeeper Order**
    a. Clerk as Gatekeeper

b. Trial Court Administrator/ Family Court Administrator as Gatekeeper
c. What is the Judge's role

16. **Practical and Ethical considerations With Self-Represented Litigants**
    a. May suffer from cognitive and/or mental health issues unknown to any parties to the action
    b. English may not be their first language
    c. Litigant may be under-educated

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Supplemental Materials Table of Contents

GATEKEEPER ORDERS (PRE-FILING INJUNCTIONS)

Michael Crowell, UNC School of Government (Jan. 2015)

Contents

I. Basics of Gatekeeper Orders.

A. Court's Authority. 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.

B. Last Resort. The gatekeeper order should be a last resort after other attempts to control the litigant, such as Rule 11 sanctions, have failed.

C. Notice to Subject of Order. As with any disciplinary matter, the subject must be given notice of the proposed order and a chance to respond before it is entered.

D. Narrowly Tailored. The order needs to be narrowly tailored to the circumstances showing abuse — that is, if all the abusive litigation is directed at one particular party, the order should only limit filings related to that party, or if the frivolous filings all are in one county, the order should be limited to that county.

E. Specify History. 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.

F. Include Means for Filing Legitimate Actions. The order must include a means for the person to file legitimate actions. One possibility is to require that the proposed filing be first submitted to a designated judge to be approved for filing. Another option is to allow a filing if it is accompanied by a certificate from a lawyer that the lawyer has read the document and has also read the gatekeeper order and concludes that the filing meets the standards of Rule 11. A lawyer's certification should not be the only alternative available, however, because that would have the effect of requiring the person to employ a lawyer.

G. Instructions for Clerk's Office. 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.

H. Notice to Other Parties. Notice of the gatekeeper order also should be given to all parties who have been on the other side of cases from the abusive litigant, so

they will know of relief available to them if frivolous documents get filed despite the order.

I. **Opportunity for Modification.** The order should include an opportunity for modification. For example, the order might allow the affected party to seek a change after six months or one year. Or the order might provide for automatic review by the court after a set time.

II. **North Carolina Case Law.** Although there are few North Carolina appellate decisions on gatekeeper orders, and most of them are unpublished, the appellate courts clearly condone such orders and indeed have entered their own gatekeeper orders. There are few appellate cases because the litigants usually are *pro se* and typically fail to properly preserve issues for appeal, leading to dismissal on procedural grounds.

Some appellate cases dealing with gatekeeper orders are:

Estate of Dalenko v. Monroe, 197 N.C. App. 231 (May 19, 2009) (unpublished) —

Although the opinion does not discuss the standard for issuance of a pre-filing injunction, it implicitly accepts the validity of the gatekeeper order entered in the case and quotes it extensively, making the order a useful example of the kind of findings that should be made by the trial judge.

The 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; and that she had filed frivolous claims for the purpose of harassment and had placed an undue burden on the judicial system. The order prohibited her from filing any document with the 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.

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 itself is not discussed, but the court approved the use of G.S. 1-109 to require Dalenko to post a prosecution bond of $20,000 to proceed in a new lawsuit against the same agency she had previously sued. 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 trial court had discretion to go beyond the $200 specified in G.S. 1-109 for prosecution bonds.

Lee v. O'Brien, 151 N.C. App. 748 (Aug. 6, 2002) (unpublished) —

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 the county without approval of a district judge, based on findings that Lee had

filed multiple unsupported civil actions and criminal complaints; that the filings were motivated by harassment and annoyance; 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; the order was limited to the one county; and court filings were allowed with approval of a judge.

Wendt v. Tolson, 172 N.C. App. 594 (Aug. 16, 2005) (unpublished) —

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.

III. Federal Law. The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal judges to restrict access to the courts by parties who repeatedly file frivolous litigation, giving the judges statutory authority in addition to the inherent authority they share with state judges to prevent abusive litigation and the Rule 11 authority to impose sanctions for frivolous lawsuits.

Useful federal cases include:

Safir v. United States Lines Inc., 792 F.2d 19 (2d Cir. 1986) —

A frequently cited case that lists the factors to be considered by the judge in deciding whether to restrict a litigant's future access to the courts:

- 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." 792 F.2d at 24.

Cromer v. Kraft Foods North American, Incorporated, 390 F.3d 812 (4th Cir. 2004) —

The leading Fourth Circuit case on the standards for issuance of a gatekeeper order. In addition to adopting the *Safir* list of factors 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.

Procup v. Strickland, 793 F.2d 1069 (11th Cir. 1986) —

A useful reference because it 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.

Armstrong v. Koury Corporation, 16 F.Supp.2d 616 (M.D.N.C. 1998) —

A good example of a gatekeeper order entered by a federal district court in North Carolina.

SAMPLE GATEKEEPER ORDER IN RESPONSE TO FRIVOLOUS AND GROUNDLESS FILINGS

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August 2012

Note: *This sample order is provided as a guide to writing a gatekeeper order — a prefiling injunction — when someone has persistently and consistently abused the judicial process by filing frivolous or groundless documents. The circumstances described in this sample are the kind that will be seen when the offender adheres to "sovereign citizen" views about the illegitimacy of the court system and believes that various kinds of pseudo-legal sounding documents can preserve misconceived "common law" rights. This sample is intended only to illustrate the kinds of findings and conclusions that might be applicable in such a case. Of course, each individual case needs to be considered and decided on its own merits, and the findings of fact and conclusions of law need to be tailored to that particular situation.*

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
JUSTICE COUNTY	12 CVS 02887
In re S.V. Citizen, Respondent)	ORDER IMPOSING A PREFILING INJUNCTION

THIS MATTER is before the court on the court's own motion to consider the entry of a prefiling injunction, also known as a gatekeeper order, regulating the filing of documents in the General Court of Justice by respondent S. V. Citizen. The court has previously provided notice to respondent of the proposed order, and the basis for its issuance, and has provided respondent a full and fair opportunity to dispute both the basis for entry of this order and the terms of the order. Although entry of a prefiling injunction is an extraordinary remedy, it is within the inherent authority of the court when necessary to preserve the orderly and efficient administration of justice and when a lesser remedy is not available or likely to provide adequate protection for litigants and court officials affected by the frivolous and groundless filings. Having

fully considered the evidence in this matter, including the numerous filings of respondent, and having heard and given full consideration to the arguments of respondent, the court now enters this ORDER, based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent S. V. Citizen is an adult citizen and resident of Justice County who is competent to understand the rules and procedures governing court proceedings and the filing of documents, and competent to understand directions from court officials concerning those matters.
2. Respondent, proceeding pro se, has filed numerous documents with the court over the last 18 months, including the following:
    a. A "Common Law Copyright Notice", filed March 8, 2011, as 11 CVS 00689.
    b. An "Affidavit of Citizenship and Domicile", filed March 8, 2011, as 11 CVS 00690.
    c. A "Registered Warrant Claim for Trust Special Deposit", filed April 15, 2011, as 11 CVS 00821.
    d. A "Legal Notice: Right to Travel," filed April 15, 2011, as 11 CVS 00822.
    e. An "Affidavit of Specific Negative Averment, Opportunity to Cure, and Counterclaim", filed June 20, 2011, in State v. Citizen, 11 CRS 02995.
    f. Various documents entitled "Negative Averment", filed in July and August, 2011, in State v. Citizen, 11 CRS 02995.
    g. A "Notice of International Commercial Claim Within The Admiralty ab initio Administrative Remedy", filed October 27, 2011, in Gibbons, et al., v. Citizen, 11 CVS 00766.
    h. An "Express Specific Reservations of Rights", filed November 15, 2011, in Gibbons, et al., v. Citizen, 11 CVS 00766.
    i. A "Certification of Non-Response", filed November 16, 2011, in Gibbons, et al., v. Citizen, 11 CVS 00766.
    j. An invoice for $20 million delivered to the Justice County Clerk of Court on January 9, 2012, but not filed with a case number.
    k. A copy of the court's Order Granting Motion for Judgment on the Pleadings in First Flight Bank v. Citizen, 10 CVS 00448, filed by respondent on January 9,

2012, with the following stamped on the order followed by respondent's signature: "Accepted for Value and Returned for Closure and Discharge without Dishonor and without Recourse for Me. Failure to State a Claim on Which Relief can be Granted."

l. A "Non-Negotiable Declaration in the Form for Trust Affidavit in Commerce", filed on February 15, 2012, as 12 CVS 00326.

m. A "Notice of Default for Notice and Demand for Full Disclosure", filed March 27, 2012, in Trusty Motors, Inc., v. Citizen, 11 CVS 011484.

n. A "Non-Statutory Abatement: Notice of Default, Default Judgment, and Praecipe", filed April 6, 2012, in Trusty Motors, Inc., v. Citizen, 11 CVS 011484.

3. Respondent's filings are consistently frivolous and groundless, often nonsensical, with no basis in fact or in procedural or substantive law, and with no relevance to an actual legal claim or to any pending matter, although they include words that sound like plausible legal terms. The filings are not based in reality and typically are not even comprehensible. By way of illustration, respondent's filings listed above included the following claims or arguments:

a. The "Common Law Copyright Notice" filed in March 2011 appears to be an attempt to copyright respondent's name for the purpose of claiming a $500,000 penalty anytime someone uses respondent's name without permission. The "notice" is filled with meaningless statements about a UCC Financing Statement, secured parties and hold-harmless and indemnity agreements. Any rational and reasonably intelligent person reading the document would recognize that it is not a plausible legal document. Its filing serves no purpose other than to clog the court files with meaningless paper.

b. The "Affidavit of Specific Negative Averment, Opportunity to Cure, and Counterclaim," filed in June 2011 was filed in response to a motor vehicle citation issued to respondent for speeding and apparently is intended to claim damages of seven million dollars from the judge in the case if the judge fails to offer "lawful proof" of the judge's authority over respondent as a "natural citizen of the North Carolina State state and Republic." The document says respondent is "seeking a remedy in Admiralty of a false claim from Superior Court of North Carolina Traffic Division" and appears to assert that the person named in the motor vehicle citation is a "fictitious corporate entity" and not the respondent. This summary of respondent's filing should be sufficient to establish its nonsensical nature and the extent to which it is divorced from the reality of the law. In this instance respondent's filing not only has no legal basis but also appears to be intended to intimate a court official into dismissing a lawful citation against the respondent.

c. The copy of the court order granting judgment against respondent in First Flight Bank v. Citizen that respondent filed with the clerk in January 2012 had these words stamped across the document in red ink: “Accepted for Value and Returned for Closure and Discharge without Dishonor and Without Recourse for Me. Failure to State a Claim on which Relief can be Granted.” Respondent’s signature was below the stamped words. It appears that respondent intends by this means to assert that respondent is not obligated to pay the judgment entered by the court. The words stamped on the order, while having a legal tone, are meaningless and ineffective in the context in which respondent has used them. Once again, respondent has filed a document that has no valid legal basis and appears to be premised on a strange view respondent holds as to how the law works. Moreover, in this instance the document is filed in direct defiance of the court’s order and pronounces the intent to avoid complying with the law.

4. There is no need to describe in detail the similar nature of the other documents filed by respondent and listed above. The titles respondent has given to the documents establish their frivolous and groundless nature. Suffice it to say that the remainder of the documents filed by respondent are of the same character as the several just described.
5. During the same time period that respondent filed the documents listed above respondent has not filed any legitimate documents with the court.
6. The documents filed by respondent are replete with pseudo-legal terminology that appears to be intended to either impress or scare the naïve reader.
7. The principal aim of the documents filed by respondent is for respondent to avoid responsibility for respondent’s actions, to intimidate court officials and parties who oppose respondent, and ultimately to evade the jurisdiction of the court.
8. When questioned by employees in the clerk’s office about the nature of documents being filed, respondent has been argumentative and abusive. Respondent has spoken in a raised voice and appeared greatly agitated and has accused those employees of being part of some undefined conspiracy to deny rights to respondent. Respondent has told the employees that they “will be held accountable” and has done so in a way that the employees have been frightened for their safety.

9. Respondent's misuse of the judicial process has resulted in a significant burden to court officials and litigants who oppose respondent. Respondent's frivolous and groundless filings require employees of the clerk's office and judges to sort through many pages of meaningless words to determine respondent's assertions and to assess what action to take. Litigants are faced with the time and expense of responding to, or seeking dismissal of, documents that purport to assert nonexistent rights or claims.
10. No legitimate legal purpose is served by respondent's filings. The purpose, rather, appears to be harassment and annoyance. The result is delay and needless increase in the cost of litigation.
11. Respondent appears to act upon a mistaken view of the world in which this court system and, indeed, the entire current federal, state and local government structure lacks legitimacy and in which some alternative "common law" prevails.
12. Respondent has offered no reasonable explanation for the frivolous and groundless filings and has shown no regret at the burden placed on court officials and litigants.
13. Respondent has offered no explanation to the court to suggest that respondent is acting in good faith.
14. Although respondent has been admonished on various occasions by the undersigned and other judges about these filings, respondent has persisted in filing such documents and is either unable or unwilling to follow the law. There is no reason to believe that respondent will desist from unduly burdening the court and litigants without further directive from the court.
15. If respondent were an attorney, respondent would have been disbarred by the court or the State Bar.
16. Respondent has not offered to the court any alternative other than a prefiling injunction to prevent the abuses described above.

CONCLUSIONS OF LAW

1. The court has the inherent authority, and the obligation, to safeguard the judicial process to protect the fairness of the process for all citizens and to prevent abuse and harassment of litigants and court officials and needless expense.
2. The court has the authority to limit the ability of an abusive litigant to file frivolous and groundless documents with the court, as well as the authority to impose other sanctions for such actions.
3. Respondent's numerous frivolous and groundless filings have caused undue delay in cases, disrupted the orderly administration of justice, and imposed needless increases in the cost of litigation.
4. There is no remedy short of a prefiling injunction to prevent respondent's abuse of the system and harassment and annoyance of court officials and litigants.
5. A prefiling injunction is necessary to prevent respondent's further abuse of the judicial process and respondent's harassment of court officials and litigants.
6. Respondent's right of access to the courts for legitimate purposes can be preserved through a process that requires the respondent to give notice and receive permission from the court before filing.
7. A prefiling injunction is the least restrictive alternative available to the court.

ORDER

NOW, THEREFORE, based on the preceding findings of facts and conclusions of law, the court orders as follows:

1. Respondent S.V. Citizen is enjoined from filing any document with the clerk of court for Justice County without the prior approval of the court as described below.

2. If respondent S.V. Citizen wishes to file a document with the clerk of court Citizen shall notify the senior resident superior court judge in writing. Citizen must state in writing the nature of the filing and its legal basis and shall include a copy of the proposed filing. Citizen shall notify the senior resident superior court judge in writing of any applicable statute of limitations or approaching deadline that needs to be considered.
3. The clerk of court shall not accept any filing from respondent Citizen unless it is accompanied by confirmation from the senior resident superior court judge, or another judge delegated by the senior resident superior court judge to handle such matter, that the filing has been approved.
4. In the alternative, respondent Citizen may submit the proposed filing to a lawyer licensed to practice in this jurisdiction. If the lawyer certifies in writing that the lawyer has read and is familiar with this order; that the lawyer has reviewed carefully the document Citizen wishes to file; that the lawyer has investigated the matter sufficiently to determine that there is a legitimate lawful basis for the filing; that the lawyer believes the document is being filed in good faith; and that the lawyer does not believe the filing to be frivolous or nonsensical and does not believe that it is being filed for the purpose of harassment or intimidation or to evade legal responsibility; then the clerk may accept such filing. In that circumstance the clerk shall file the lawyer's certification with respondent Citizen's document. Such certification by a lawyer shall not be construed as the establishment of an attorney-client relationship between the lawyer and Citizen.
5. If the court approves the filing of an action by respondent, the court may consider imposition of a prosecution bond pursuant G.S. 1-109 in an amount exceeding $200.
6. Should respondent succeed, despite this order, in filing any document with the court without the required approval, the clerk of court shall notify the court and is authorized to remove the document from the file and strike references to it.

7. A violation of this order by respondent Citizen, or by any person acting on behalf of or in concert with respondent, shall be considered contempt and may be sanctioned accordingly. In addition, to the extent that Rule 11 of the Rules of Civil Procedure apply to any filing by respondent, the court may impose sanctions allowed by that rule, including the imposition of attorney's fees. The court also may impose any other sanction available to it through statute, rule or the inherent authority of the court.
8. This order shall remain in effect until vacated by the court. At any time beginning one year from the entry of this order, respondent may petition to have it modified or vacated.
9. A copy of this order shall be delivered to the clerk of court.
10. A copy of this order shall be sent to each litigant in any pending matter involving respondent.
11. The sheriff of Justice County shall serve this order on respondent Citizen by personal delivery and shall submit a return of service to the court.

SO ORDERED, this _____ day of August 2012.

_____
I.M. Thelaw
Judge of Superior Court

This entry was contributed by Ann Anderson on November 15, 2017 at 9:00 am and is filed under Judicial Authority

Gatekeeper Orders in North Carolina Courts: What, When, and How

What is a gatekeeper order?

A person's right of access to the courts for redress of grievances is fundamental to the fabric of American society. The U.S. Supreme Court has said that it is "the right conservative of all other rights, and lies at the foundation of orderly government." *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 817 (2004) (quoting *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142 (1907)). It is protected not just under the 14th Amendment to the U.S. Constitution, *Cromer*, 390 F.3d at 817, but also by the North Carolina Constitution, which declares that "the courts shall be open." N.C. Const., Art. I, § 18.

But there are times when individuals abuse this right by making repeated and often frivolous filings that unduly burden the court system, cause needless expense to the parties, and sometimes amount to harassment of litigants and court personnel. In these situations, North Carolina's courts have authority to put a stop to the behavior. Judges are authorized to enter "gatekeeper orders"—sometimes called "pre-filing injunctions"—that ***restrict a person from filing new actions or other papers without first getting court approval***. *See generally Estate of Dalenko v. Monroe*, 197 N.C. App. 231 (2009).

When are gatekeeper orders authorized?

Courts have "inherent authority" to "do all things that are reasonably necessary for the proper administration of justice." *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987). The authority of a court to enter a gatekeeper order is part of this inherent authority. But because gatekeeper orders limit the exercise of a protected right, they must be used very carefully. As our Supreme Court has stated, "Doing what is 'reasonably necessary for the proper administration of justice' means doing *no more* than is reasonably necessary." *Matter of Alamance Cty. Court Facilities*, 329 N.C. 84, 99 (1991). Gatekeeper orders may best be viewed as a last resort when other sanctions (such as attorney fee orders under Rule 11 or G.S. 6-21.5) have failed. As discussed below, they must be narrowly tailored to avoid unduly abridging the litigant's rights.

Gatekeeper orders also have been authorized as an appropriate sanction under Rule 11 of the Rules of Civil Procedure, which prohibits any filing that is factually or legally insufficient or filed for an improper purpose. *Fatta v. M&M Properties Mgmt, Inc.*, 224 N.C. App. 18, 30-31 (2012). Note, however, that just *one* improper filing can trigger other types of Rule 11 sanctions—such as orders to pay attorney fees. It likely takes *more than one* improper filing to justify imposition of a gatekeeper order. In *Fatta*, the Court of Appeals affirmed a gatekeeper order based on a small number of improper filings, but the court seemed persuaded that the outrageous and abusive nature of the allegations in those filings justified the imposition of the order.

What is the process for entering a gatekeeper order?

There is little published case law in North Carolina regarding gatekeeper orders. Our appellate courts have not mandated a specific procedure applicable to all gatekeeper orders. At times the process is initiated on motion of an aggrieved party; other times the court may raise the matter on its own motion. As with any order imposing sanctions, the person to be enjoined *must be given proper notice of the potential sanction and an opportunity to be heard*. Once entered, the gatekeeper order should be filed with the clerk of superior court in all counties in which the order applies. It should also be served on the parties who have been subject to the abusive filings so they will be aware of the available relief if the order is violated.

What must the order include?

To demonstrate that the order is "necessary for the proper administration of justice," it should be detailed and specific. There is no published North Carolina case that sets out a list of requirements for every gatekeeper order, but federal opinions and unpublished North Carolina case law provide some guidance:

- **The order must include written findings of fact and conclusions of law to explain the basis for the injunction.** In *Wendt v. Tolson*, the North Carolina Court of Appeals remanded a gatekeeper order to the trial court where the judge failed to include them. 172 N.C. App. 594 (2005) (unpublished). North Carolina's courts have not adopted a fixed set of criteria about which the court must include findings. In one opinion, however, the Court of Appeals was guided by the federal Fourth Circuit, which requires a judge to:

weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.

Johnson v. Bank of America, N.A., 225 N.C. App. 265 (2013) (unpublished) (quoting *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818 (4th Cir. 2004)).

- **The order should be narrow enough to curb the abuse without improperly abridging the person's rights.** For example:
    - If the vexatious filings have all targeted a specific set of parties, the gatekeeper order should only restrict filings targeting those parties (and, as appropriate, their associates);
    - If the filings have all been made in the courts of a single county or district, the court should consider carefully whether it is necessary to prohibit filings outside that geographic area;

    - If the filings all relate to the same set of facts or circumstances, the order should not prohibit filings unrelated to those facts or circumstances. In *Cromer*, 390 F.3d at 819, the federal Fourth Circuit Court of Appeals vacated a gatekeeper order prohibiting the litigant from making filings in *any* future case, finding that such an order was an "overbroad restriction."
    - For case examples, see:
        - *Fatta v. M&M Properties Mgmt, Inc.*, 224 N.C. App. 18, 30-31 (2012). Affirming a superior court order only restricting filings in the relevant county.
        - In re Vicks, 772 S.E.2d 265 (N.C. App. 2015) (unpublished). Affirming a superior court gatekeeper order (issued as a Rule 11 sanction) that restricted filings related to the foreclosure at issue against the foreclosure petitioner and its attorneys or staff.
        - *Johnson v. Bank of America, N.A.*, 225 N.C. App. 265 (2013) (unpublished). Affirming a gatekeeper order in which the restriction was limited to filings in Durham County and related to the matter at issue.
        - Lee v. O'Brien, 151 N.C. App. 748 (2002) (unpublished). Affirming a district court gatekeeper order preventing filings in Wake County District Court.
- **The order should include a method by which the person may make *proper* filings in the future.** This most often takes the form of a requirement that any future filing has been either: (1) reviewed by a specified judge of the relevant court prior to filing; *or* (2) reviewed by a licensed NC attorney who certifies that the filing is not in violation of Rule 11 of the Rules of Civil Procedure (*i.e.*, not factually or legally insufficient or filed for an improper purpose). Typically such an order will require the litigant to attach a copy of the review or certification when presenting the filing in the clerk's office.
    - Variations on this procedure have been noted with approval in:
        - Fatta v. M&M Properties Mgmt, Inc., 224 N.C. App. 18, 30-31 (2012). Affirming a superior court order that allowed future filings upon review of a licensed NC attorney.
        - In re Vicks, 772 S.E.2d 265 (N.C. App. 2015) (unpublished). Affirming a superior court order that allowed future filings upon review by a licensed NC attorney.
        - Johnson v. Bank of America, N.A., 225 N.C. App. 265 (2013) (unpublished). Affirming an order that allowed future filings certified by a superior court judge of the county.
        - Lee v. O'Brien, 151 N.C. App. 748 (2002) (unpublished). Affirming a district court order allowing future filings only upon approval of district court judge of the county.

Caution: Courts should be careful about requiring attorney review without providing the option of judge review. Generally speaking, an individual's court access should not depend on the hiring of an attorney. Although such orders have been affirmed in prior cases (*Fatta* and *Vicks*, above), the litigants did not specifically raise that argument in those appeals.

What must the Clerk of Court do when a gatekeeper order is entered?

Ideally the gatekeeper order will provide at least a cursory instruction to the clerk in the event the order is ignored. In the past, some orders have instructed the clerk not to accept any filings that violate the orders. This type of mandate may be impractical because, in effect, it requires desk clerks to recognize such orders at intake. A better approach is for the judge to authorize the clerk's office not to file the documents *if the clerk recognizes the impropriety of the document at the time it is presented*. The order may, however, instruct the clerk to take the paper and inform the appropriate court that the litigant attempted to file the document.

So, what if a document that violates the order was filed without the clerk's knowledge? Some orders authorize a clerk to contact the appropriate court and seek leave to strike the filing. Some authorize the clerk to strike the filing without leave of court, but require the clerk to notify the court of the filing and the clerk's action.

May the Clerk of Court enter a gatekeeper order on the Clerk's own authority?

Clerks of court are not authorized to enter gatekeeper orders in their *administrative* capacity. A gatekeeper order is an adjudication of the rights of a particular person; the authority to enter one lies with a judicial officer and requires a judicial proceeding. But what about in cases where a clerk is performing his or her judicial function, such as in an incompetency case or a partition action? To date our case law does not answer this question. Much of the clerk's judicial authority is non-exclusive and derives from the superior court, so the clerk may not be vested with the same inherent power as the trial judge. Perhaps, however, there is a stronger argument that a clerk has inherent authority to enter gatekeeper orders in actions in which the clerk has *exclusive, original jurisdiction*, such as certain estate proceedings under Chapter 28A. If that is the case, it would follow that the scope of a clerk's gatekeeper order should be limited to the specific matter over which that exclusive, original jurisdiction exists.

Rule 11. Signing and verification of pleadings.

(a) Signing by Attorney. – Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) Verification of pleadings by a party. – In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party, or if there are several parties united in interest and pleading together, by at least one of such parties acquainted with the facts and capable of making the affidavit. Such affidavit may be made by the agent or attorney of a party in the cases and in the manner provided in section (c) of this rule.

(c) Verification of pleadings by an agent or attorney. – Such verification may be made by the agent or attorney of a party for whom the pleading is filed, if the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by such agent or attorney, he shall set forth in the affidavit:

(1) That the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in his possession, or

(2) a. That all the material allegations of the pleadings are true to his personal knowledge and

b. The reasons why the affidavit is not made by the party.

(d) Verification by corporation or the State. – When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (1967, c. 954, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 55.)

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge. – Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) Involuntary dismissal; effect thereof. – For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) Dismissal of counterclaim; crossclaim, or third-party claim. – The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

(d) Costs. – A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the

plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10; 1977, c. 290.)

§ 6-21.5. Attorney's fees in nonjusticiable cases.

In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section. (1983 (Reg. Sess., 1984), c. 1039, s. 1; 2006-259, s. 13(l).)

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious. (1973, c. 614, s. 1; 1983, c. 417, s. 2.)

§ 1D-45. Frivolous or malicious actions; attorneys' fees.

The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious. (1995, c. 514, s. 1.)

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.

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

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 an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.

In the decades that have followed *Nebraska Press Ass'n*, North Carolina courts have adopted the exacting three-part test set out in Justice Powell's concurring opinion:

[A] prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. … [A]ny restraint must comply with the standards of specificity always required in the First Amendment

context.

Id. at 571-2. North Carolina's courts apply this test not just to restraints on media, but also to restraints on parties and their attorneys. In Sherrill v. Amerada Hess Corp., 130 N.C. App. 711 (1998), the Court of Appeals applied it to invalidate a court order prohibiting any party or their attorney from communicating with "any media representative or other [non-party] person or entity" about the case until its resolution." And in a 2007 case, the court applied it to invalidate an oral court order prohibiting the parties and counsel from talking to the press. Beaufort County Bd. of Educ. v. Beaufort County Bd. of Com'rs, 184 N.C. App. 110, 117–118 (2007).

In addition to constitutional restraints on gag orders, a North Carolina statute prohibits bans on reporting about matters that occurred in open court. G.S. 7A-276.1 provides that:

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal[.]

Punishment for statements made about a case

So, prior restraints on speaking about a case are presumed unconstitutional and subjected to heavy scrutiny. But what happens when a report about the case includes something false, prejudicial, or even dangerous? Can the reporting person be punished? What about an attorney who makes such statements?

Media and others who publish reports

One basis for a court to hold a person in criminal contempt of court is

willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false.

G.S. 5A-11(a)(5), (b). Obviously there is a lot involved in making this determination: A court would have to make affirmative factual determinations of falseness, willfulness, gross inaccuracy, danger, and knowledge. And the statute goes on to make clear that no one may be held in contempt for anything covered by G.S. 7A-276.1, discussed above.

Special ethics rules for lawyers: Rules 3.6 and 3.8(f)

The First Amendment protections applied in *Sherrill* and *Beaufort County*, discussed above, apply to lawyers as well. But it is important to note that lawyers are also governed by ethics rules that

aim to prevent them from making public statements that would materially prejudice the case. For violating these rules, the lawyer could be disciplined by the State Bar or in the inherent authority of a trial court judge.

Rule 3.6(a) of the Rules of Professional Conduct, which governs "trial publicity" states that

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.

The rule goes on to list a number of things the lawyers *can* say without violating this prohibition. Rule 3.6(c) also includes an important provision allowing attorneys to counter the effects of negative trial publicity:

[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.

A separate ethics rule also restricts statements by prosecutors. Rule 3.8, which lists the "special responsibilities" of prosecutors, requires that they

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.

Rule 3.8(f). This prohibition does not restrict 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." *Id.*

As some of you may recall, in 2007 the State Bar disciplinary committee found that former District Attorney Mike Nifong's statements to the press during the Duke Lacrosse scandal were in violation of both Rule 3.6 and 3.8(f). This and other misconduct led to his disbarment.

[Note: There are statutes—notably in the juvenile welfare context—that require public entities to keep certain information about a matter confidential. See, for example, G.S. 7A-302(a1). These restrictions serve a protective purpose of their own and are independent of any restraints on

speech that may be imposed by a court.

GAG ORDERS

Michael Crowell
UNC School of Government
April 11, 2008

A gag order is a directive from the court to lawyers, parties, witnesses, police, court officials or perhaps even the news media not to speak or write publicly, or at least to limit what they can say, about a pending case.

Gag orders are prior restraints on speech and are presumed unconstitutional. 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 intended purpose of preventing jurors from being influenced, *i.e.*, the order actually can be effective.

The United States Supreme Court views gag orders on lawyers and parties differently than attempts to restrict the news media, allowing courts greater leeway to limit what the attorneys and other participants in a trial may say. The North Carolina appellate courts, however, have applied the same standard to all gag orders. Thus, gag orders are not favored in North Carolina, are uncommon, and are difficult for a trial judge to justify.

Regardless of any order from the court, lawyers are obligated by Rule 3.6 of the Rules of Professional Conduct not to make statements that "have a substantial likelihood of materially prejudicing" the trial. Reminding lawyers of that obligation may serve the same purpose as a gag order.

Supreme Court cases – The basic law on gag orders comes from three Supreme Court decisions, *Sheppard v. Maxwell*, 384 US 333 (1966); *Nebraska Press Association v. Stuart*, 427 US 539 (1976); and *Gentile v. State Bar of Nevada*, 501 US 1030 (1991).

The *Sheppard* case was one of the most notorious criminal trials of its time, a prominent Cleveland physician charged with murdering his wife. Sam Sheppard's conviction was reversed on the grounds that he did not receive a fair trial in denial of his due process rights because of the trial judge's failure to make any effort to protect him from massive prejudicial publicity. The Supreme Court admonished trial judges to guard defendants from such outside influences. Most of the possible protections noted by the court – extensive jury *voir dire*, change of venue, delayed trial, etc. – have nothing to do with restricting speech, but the court also suggested restricting news media access and participants' statements. Ten years later, however, the court in *Nebraska Press Association* reined in the trial court's attempts to restrict what the news media could report, setting the ground rules applied to gag orders today. Then in *Gentile* the court held that a lawyer's right to free speech could be restricted by a state bar disciplinary rule like North Carolina's Rule 3.6 prohibiting prejudicial statements.

The *Sheppard* case – For Sam Sheppard, the pervasive negative media coverage began immediately after he was charged and it continued unabated throughout the entire proceedings. Three months before trial Sheppard was examined for five hours, without a lawyer, in a public inquest held in a high school gym. The trial itself occurred two weeks before an election at which the prosecutor and judge were candidates. Newspapers published the names of all prospective jurors, many of whom received anonymous calls and letters. All witnesses and jurors were identified and photographed each time they went to court. Reporters were seated inside the bar in the courtroom and allowed to look through exhibits. Newspapers editorialized frequently and radio stations staged debates during the trial. The judge refused to

question jurors on whether they had heard a broadcast calling Sheppard a perjurer and comparing him to Alger Hiss. The media reported "testimony" about Sheppard's affairs, his Jekyll-Hyde personality, and other matters even though the witnesses never appeared at trial. Although the jurors were sequestered, they were allowed to make telephone calls. The judge denied all motions for change of venue or continuances.

In reversing Sheppard's conviction the court emphasized that trials are to be decided in the courtroom, not outside. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. State of California*, 314 US 252, 271 (1941). "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. State of Colorado ex rel. Attorney General*, 205 US 454, 462 (1907).

The trial judge erred in *Sheppard*, the Supreme Court said, by thinking he lacked power to exercise any control over the media. "The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court." 384 US at 358. The judge could have limited the number of reporters in the courtroom, kept them outside the bar, prohibited them from handling and photographing exhibits. He also could have insulated witnesses and jurors and controlled the release of information by police officers, witnesses and lawyers. In the portion of the opinion relevant to gag orders, the court said, "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. . . ." 384 US at 361. The court later noted, though, that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." 384 US at 362.

0ther steps the trial court could have taken to reduce outside influence were continuance of the trial until publicity waned, a change of venue, and sequestration of the jury. If publicity during the trial threatened the fairness, the judge could consider a new trial.

Nebraska Press Association v. Stuart – The in *Nebraska Press Association* case arose from the murder of six members of the Kellie family in Sutherland, Nebraska, a town of 850. Because of the extensive coverage by local, regional and national news media, the trial judge prohibited all participants from releasing any information about expected testimony or evidence and also barred the news media from reporting before the trial the defendant's confession, statements he had made to others, the contents of a note he had written the night of the crime, certain medical testimony from the preliminary hearing, and the identity of the victims of sexual assault, even though some of that information already had been revealed in an open hearing. The judge found that the restrictions were necessary to assure a fair trial; the Supreme Court reversed.

Stating that "adverse publicity does not inevitably lead to an unfair trial," the court quoted *Sheppard* on the important role of the press in the justice system: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." 427 US at 554, 560 (the latter quoting *Sheppard*, 384 US at 350).

While the record in *Nebraska Press Association* supported a conclusion that pervasive publicity could impair the defendant's right to a fair trial, there were no findings that measures short of a gag order would be insufficient. As previously outlined in *Sheppard,* the trial judge should have considered a change in venue, postponement of the trial, searching questions of potential jurors, strong instructions to the jury, sequestration of jurors, closing pretrial proceedings, and limiting what lawyers, police and witnesses could say. Moreover, the court

said, it was unlikely that the gag order actually entered would have any effect, taking into account the word-of-mouth communication which occurs in such a small town and considering that the trial court's territorial jurisdiction stopped at the county line.

Nebraska Press Association resulted in the test described at the beginning of this paper. A gag order may not be imposed unless the record shows that (1) publicity is likely to affect a fair trial, (2) lesser alternatives are not sufficient to address the threat, and (3) the order will be able to affect the problem.

***Gentile* and restrictions on lawyers** – In *Gentile v. State Bar of Nevada* the court looked at restrictions limited to lawyers. There, the defendant's lawyer held a press conference six months before the trial, saying that the charges against his client were the result of police misconduct and a coverup. The lawyer was responding to extensive prejudicial publicity and was careful to avoid further comments. In that context, the Supreme Court found that the lawyer could not be sanctioned, but the court held that the First Amendment did not prohibit discipline for a lawyer whose remarks created a "substantial likelihood of material prejudice." 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." 501 US 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.*

Despite the *Gentile* decision, North Carolina appellate courts have applied the *Nebraska Press Association* test to all gag orders, even those for lawyers. As noted above, though, Rule 3.6 of the Rules of Professional Conduct bars attorneys who are participating in a case from making statements "that the lawyers 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." One exception to the rule is that a lawyer may speak publicly to protect a client from undue prejudicial publicity initiated by someone else.

The North Carolina cases – There is little North Carolina appellate case law on gag orders. The most important decision, *Sherrill v. Amerada Hess Corporation*, 130 NC App 711 (1998), reiterates the United States Supreme Court's holding in *Nebraska Press Association* and imposes the same high standard for restrictions on public comments, even if the order applies only to lawyers. *Sherrill* was a civil dispute between homeowners and the defendants over oil spills and leaks. The trial court on its own prohibited the lawyers from any communication with the news media or any entity not a party to the proceedings, finding that such communication would be detrimental to a fair trial. The Court of Appeals allowed the news media to appeal and reversed the trial court, holding:

> One who undertakes to show the necessity for 'prior restraint' or rebut the presumption of unconstitutionality of such an order must show: (1) a clear threat to the fairness of the trial; (2) such threat is posed by the actual publicity to be restrained; and (3) no less restrictive alternatives are available. Furthermore, the record must reflect findings by the trial court that it has considered each of the above factors and contain evidence to support such findings. Finally, any 'prior restraint' order must comply with the specificity requirements of the First Amendment.

130 NC App at 719-20.

The *Sherrill* rule was reiterated recently in *Beaufort County Board of Education v. Beaufort County Board of Commissioners*, ___ NC App ___, 645 SE2d 857 (2007), a funding dispute between the school board and county commissioners. On his own the trial judge prohibited the lawyers and parties from any discussion of the case with the news media. The order was not put in writing; there were no findings of fact; and no consideration was given to less restrictive alternatives. When media lawyers brought *Sherrill* to the attention of the trial judge he further endeared himself to the Court of Appeals by making disparaging remarks about appellate judges ("it's troublesome to me that a lot of decision-making goes on that's made by

people who have never been there and done that"). The Court of Appeals held that the gag order "utterly failed to meet any of the required standards set forth in *Sherrill*."

Once again, in the *Beaufort County Board of Education* case the challenge to the gag order was brought by the news media rather than either of the parties. Unlike some other jurisdictions, the North Carolina appellate court did not consider whether a different standard, less stringent than *Nebraska Press Association*, might apply when the challenge is brought by a nonparty to the litigation.

North Carolina statute, rule – North Carolina has one statute and one rule which directly address media coverage of court proceedings. The statute is G.S. 7A-276.1 and it bars courts from entering orders which restrict publication or broadcast of testimony, evidence, argument, rulings, etc., that occur in open court. Such an order is declared by the statute to be void and of no effect, and no one may be held in contempt for violating it.

The same statute prohibits orders sealing or restricting the publication or broadcast of any public record. Nevertheless, the Court of Appeals held in *Virmani v. Presbyterian Health Servs. Corp.*, 127 NC App 629 (1997), *aff'd in part an rev'd in part on other grounds*, 350 NC 449 (1999), that a trial court has inherent authority to close a proceeding and seal documents when necessary to assure a fair trial. In that case, the court thought it necessary to prevent public disclosure of the evaluations of a doctor by a hospital's medical peer review committee. The court also held that the local newspaper had no right to intervene in the case to argue for opening the proceeding, but the General Assembly reversed that part of the decision by enacting G.S. 1-72.1, declaring the right of any person to file a motion for access in a civil case.

The rule addressing media coverage of court proceedings is Rule 15 of the General Rules of Practice for Superior and District Courts. The rule generally authorizes the photographing, broadcasting and televising of judicial proceedings, subject to the trial judge's

permission. The rule, though, specifically prohibits electronic media coverage of certain kinds of proceedings – *e.g.*, adoption proceedings, divorce cases, hearings on motions to suppress – and specifically prohibits the photographing of jurors, police informants, minors, undercover agents, relocated witnesses and victims of sex crimes and their families.

Summary – North Carolina law does not favor gag orders. They are prior restraints on free speech and are presumed unconstitutional. To be upheld an order must include findings, supported by the record, that there is clear threat to the fairness of the trial; that the threat comes from the publicity being restrained; and that no lesser alternative will suffice. North Carolina applies the same test regardless of whether the news media or lawyers and other participants in the trial are being restricted. The State Bar's rules of conduct, however, prohibit any lawyer from uttering statements that have a substantial likelihood of materially prejudicing a proceeding. The Rules of Practice also prohibit photography or other electronic coverage of certain kinds of proceedings and of jurors and certain categories of witnesses.