GAG ORDERS

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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.