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.