

## 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 (4<sup>th</sup> 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.