# Access to the Judicial Process

North Carolina's courts are, with very few exceptions, open public forums for the resolution of disputes. Article 1, Section 18, of the N.C. Constitution puts it succinctly: "All courts shall be open." Indeed, both the Supreme Court of the United States and the N.C. Supreme Court have ruled that criminal and civil court proceedings are presumptively open to the public under the First Amendment to the U.S. Constitution.[1] Accordingly, most criminal and civil trials and appeals in North Carolina's state courts are open to the public, including the press. Criminal and civil trials in federal district courts in North Carolina's three federal judicial districts are also open to the public and the press, but unlike state courts, federal courts do not permit camera coverage under any circumstances.

This chapter discusses when courtrooms can be closed, which judicial records are available for public review, how to respond to a motion to close a courtroom or seal a document, and the rules governing the use of cameras and recording devices in courtrooms. This chapter also covers the law concerning orders prohibiting the news media from publishing information seen or heard inside a courtroom (prior restraints), after-the-fact punishments for court coverage and restraints on trial participants talking with reporters (gag orders).

[1] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 693 (N.C. 1999).

This chapter is not intended to be an exhaustive review of every circumstance a journalist may face in seeking access to the courts. If you should have any questions involving specific factual scenarios, we encourage you to contact the NCPA Hotline (919-833-3833), the NCAB Hotline (919-839-0300) or your organization's counsel.

# The history and policy behind open courts

Our nation has a tradition of open judicial proceedings stemming from practices in England that pre-date the Norman Conquest.[2] The fact that our courts are open to all who want to observe what transpires there is a source of great strength to our judicial system and to the citizens it serves. For citizens to maintain confidence in their court system, it is essential that they be able to observe it in action. Moreover, the U.S. Supreme Court has noted, there is a "therapeutic" value to the community that flows from open proceedings:

> Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and a desire to have justice done . . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.[3]

The Court's observation also holds true in civil cases.

Even in today's world of bloggers and "citizen-journalists"—where anyone with a cell phone can report breaking news—the traditional news media play an important role in this process by informing citizens of the workings of public institutions and by acting as surrogates for the public.[4] News media organizations, whether print or electronic, focus every day on explaining the "who, what, when, where, how and why" to citizens who cannot attend trials and other court proceedings. Perhaps most important, the news media—acting on behalf of the public—are a vital check on the judicial and executive branches of the government, providing accountability for how the laws are executed and enforced.

# When can a courtroom be closed to the public?

In a series of cases decided during the 1980s, the U.S. Supreme Court concluded that the First Amendment gives the public and the press a presumptive right to attend *criminal* trials.[5] To

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[2] For a good summary of the historical background of open judicial proceedings, *see Richmond Newspapers*, 448 U.S. at 564-69.

[3] Press-Enterprise Co. v. Superior Court of Riverside Cnty., 464 U.S. 501, 508-09 (1984).

[4] *See Richmond Newspapers,* 448 U.S. at 572-73.

[5] *See* Press-Enterprise Co. v. Superior Court of Riverside Cnty., 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court of Riverside Cnty., 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-07 (1982); *Richmond Newspapers*, 448 U.S. at 580-81. More recently, the U.S. Supreme Court has confirmed the right of access to jury selection proceedings by reversing a Georgia

protect this presumptive right, the Court ruled that trials (including preliminary hearings, jury selection, opening statements, witness examination and closing arguments) may not be closed unless and until the trial judge enters an order containing specific written findings. Those findings must demonstrate:

- 1) that closure is absolutely necessary to protect a "compelling" governmental interest;
- 2) that no less restrictive measure short of closing the courtroom will suffice to protect that interest; and
- 3) that the closure is "narrowly tailored" so that its scope and duration are as limited as possible.[6]

Although the U.S. Supreme Court has yet to address whether the public has a First Amendment right to attend *civil* court trials, the Court has noted that civil trials have historically been open to the public.[7] Several lower federal courts, including the U.S. Court of Appeals for the Fourth Circuit (the federal circuit that includes North Carolina), have held that certain civil trials are presumptively open under the First Amendment.[8] Accordingly, most court-closure cases have not distinguished between criminal and civil cases.

The First Amendment right of access applies to all federal and state court proceedings in North Carolina. In addition to the federal constitutional right of access, a state constitutional right flowing from Article I, Section 18, of the N.C. Constitution also applies to proceedings in state courts. Article I, Section 18, of the N.C. Constitution states, "All courts shall be open."[9] The N.C. Supreme Court has held that this language guarantees the public a qualified constitutional right to attend civil court proceedings.[10]

In 2001, the N.C. General Assembly passed legislation that codified the public's right of access to civil proceedings in state courts.[11] Pursuant to that statute, any member of the public seeking access to a civil court proceeding or a judicial record in that proceeding may file a motion with the court to determine his or her right of access.[12] By law, the court must schedule a hearing on

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Supreme Court decision that found no error in a lower court ruling that emptied a courtroom during jury selection in a criminal case. *See* Presley v. Georgia, 558 U.S. __, 130 S. Ct. 721, 38 Media L. Rep. (BNA) 1161 (2010).

[6] *See* Press-Enterprise Co. v. Superior Court of Riverside Cnty., 464 U.S. 501, 510 (1984).

[7] *See Richmond Newspapers*, 448 U.S. at 580 n.17.

[8] *See, e.g.,* Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180-81 (4th Cir.1988); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1070-71 (3d Cir.1984); In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1308-16 (7th Cir. 1984).

[9] N.C. CONST. art. I, § 18.

[10] *See* Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 693 (N.C. 1999).

[11] *See* N.C. GEN. STAT. § 1-72.1.

[12] *Id.* at § 1-72.1(a). *See also* Goldsmith v. Henderson Cnty. Bd. of Pub. Educ., 32 Media L. Rep. (BNA) 1353 (N.C. Super. Ct. 2003) (applying Section 1-72.1 and holding that it provided media movants with standing to challenge entry of protective order).

the motion before any other proceedings can move forward in the case relating to the matter for which access is sought. In considering a motion under the statute, the court must take account of "such facts, legal authority, and argument as the movant and any other party to the action desire to present," and the court's ruling "shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review."[13] Any party or the movant may immediately appeal any ruling made pursuant to the statute.[14]

Thus, in state court cases, reporters possess two constitutional bases for arguing against closure—a presumptive right under the First Amendment and the state constitution—as well as a statutory basis. In sum, civil court proceedings in North Carolina may be closed only if the trial judge makes specific findings of fact demonstrating that, after considering alternatives to closure, closure is necessary to protect a "compelling countervailing public interest."[15] Unless such an overriding interest exists, civil court proceedings must be open to the public.

Both federal and state courts in North Carolina have recognized that the general rule mandates open court proceedings. For example, in the 1994 trial of Larry Demery for the murder of James Jordan, the father of basketball star Michael Jordan, Superior Court Judge Gregory Weeks denied the defendant's motion to close the court. Judge Weeks found that the "unambiguous provisions of the state constitution establish an absolute right on the part of the press and public to attend this criminal trial; accordingly, the closure motion must be denied."[16] Similarly, in 1995 Laura Hart McKinney, a Winston-Salem screenwriter, moved to close the courtroom during her testimony in a hearing related to the criminal prosecution of O.J. Simpson. Despite the commercial value of the information that necessarily would be disclosed, most notably her tape-recorded interviews with Los Angeles police officer Mark Fuhrman, Superior Court Judge William Wood recognized the N.C. constitutional provision relating to open courtrooms and denied the motion to close the courtroom.[17] In 2001, a Wake County Superior Court judge denied a motion to close a courtroom during a hearing in a civil case. The case, *Corrigan v. White*,[18] involved a lawsuit filed by several young women who alleged that they had been the victims of sexual misconduct at a Raleigh shopping mall. The judge said he found no "compelling, countervailing interests sufficient to justify closure of the courtroom."[19]

In 2003, the trial court in *Goldsmith v. Henderson County Board of Public Education* applied the 2001 access statute, granting a newspaper's motion to unseal certain documents and denying the plaintiff's motion to close the courtroom while the parties sought the court's approval of a

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[13] *Id.* § 1-72.1(c).

[14] The statute got its first real test in *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnt.y Bd. of Comm'rs*, 645 S.E.2d 857, 35 Media L. Rep. (BNA) 2018 (N.C. Ct. App. 2007), which is discussed in more detail below.

[15] *See Virmani*, 515 S.E.2d at 693.

[16] *See* State v. Demery, 22 Media. L. Rep. (BNA) 2383, 2384 (1994).

[17] *See In re* Subpoena of Laura Hart McKinney, Forsyth County Superior Court, Case No. 95M18, N.C. Court of Appeals, Case No. P95-318.

[18] 29 Media L. Rep. (BNA) 1636 (2001).

[19] *Id.* at 1638.

settlement agreement.[20] The case involved sex abuse allegations relating to minor students.

In 2011, the N.C. Court of Appeals affirmed a lower court ruling that had declined to close proceedings in a family law dispute.[21] In that case, *France v. France*, the parties had sought to close proceedings on the basis of a confidentiality provision in a separation agreement. The court concluded that the parties did not meet their burden of overcoming the constitutional presumption of openness and that the contract provision alone was not enough to meet this requirement.[22] Nor was it sufficient, the court held, for the parties to argue that closure was justified because matters related to their minor child were at issue where there were other, more narrow means to protect the privacy interests of the minor short of closing the entire proceeding.[23]

The following are the major exceptions to the general rule mandating open court proceedings:

***Commitment hearings.*** The N.C. Court of Appeals has held that there is no right of access to involuntary civil commitment proceedings.[24] However, commitment hearings for people found not guilty by reason of insanity in criminal cases are public and must be held in the court where the original trial took place.[25]

***Conferences***. Bench conferences between the judges and lawyers, conferences between lawyers and their clients, and the like are, for practical reasons, generally not intended for the public. However, whatever one does hear in the courtroom can be reported.

***Grand jury proceedings.*** Grand jury proceedings are conducted in private pursuant to federal and state law.[26] This is appropriate because the purpose of a grand jury is to determine whether there is sufficient evidence to charge an individual with having committed a crime and to begin a criminal case. Note that while it is a crime for a grand juror, prosecutor or other official to release information that is presented before the grand jury, it is not a crime for the news media to publish such information.

***Juvenile proceedings.*** Historically, juvenile proceedings generally have been closed to the public and the news media as a matter of public policy.[27] The theory of this policy is that the undisciplined child should be treated, insofar as possible, in a fashion that promotes his or her ability to reform and become a useful, law-abiding citizen. However, reforms in North Carolina's juvenile code have made juvenile proceedings in North Carolina courts presumptively open to the

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[20] Goldsmith v. Henderson Cnty. Bd. of Pub. Educ., 32 Media L. Rep. (BNA) 1353 (N.C. Super. Ct. 2003).

[21] France v. France, 705 S.E.2d 399 (N.C. Ct. App. 2011).

[22] *Id.* at 408.

[23] *Id.*

[24] *See In re* Belk, 420 S.E.2d 682 (N.C. Ct. App. 1992).

[25] *See* N.C. GEN. STAT. § 122C-268.1(g).

[26] *See* Press-Enterprise Co. v. Superior Court of Riverside Cnty., 478 U.S. 1, 8-9 (1986); N.C. GEN. STAT. § 15A-23(e).

[27] *See* C. THOMAS DIENES, ET. AL., NEWSGATHERING AND THE LAW § 3-3(a) (1997).

public. The court must find "good cause" to close a proceeding.[28] No proceeding can be closed if the juvenile requests that it be open.[29]

When truly heinous crimes of violence are committed by juveniles, the news media may well have an obligation to the community to report not only the nature of the crime but also the name of the juvenile accused of committing it. Such an action would obviously be contrary to the general goal of allowing juveniles to reform their conduct in relative anonymity so they can mature and develop unshackled by youthful mistakes and indiscretions. The law is clear, however: Under the First Amendment, if a reporter lawfully obtains the name of a juvenile charged with commission of a crime, the reporter may publish such information without sanction by the state.[30]

In *Smith v. Daily Mail Publishing Co.*,[31] the U.S. Supreme Court held unconstitutional a West Virginia law making it a crime to publish the name of a youth charged as a juvenile offender without obtaining the written approval of the juvenile court. The case involved a 14-year-old charged with murder. Two newspapers that had learned the juvenile's identity through the use of routine reporting techniques—the monitoring of the police band radio frequency and interviews with police, witnesses and an assistant prosecutor at the scene of the killing—were indicted by a grand jury for publishing the juvenile's name. The Supreme Court held that the indictment could not stand because the asserted state interest in protecting the anonymity of juvenile offenders to further their rehabilitation was insufficient to outweigh the constitutional prohibition against prior restraints on speech.[32]

***Sex crime cases.*** State law provides that in cases involving charges of rape, attempted rape, sex offense or attempted sex offense, the trial court may, during the testimony of the victim, "exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case."[33] Again, however, the media are free to publish what they lawfully learn.

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[28] *See* N.C. GEN. STAT. § 7B-2402.

[29] *See id.*

[30] *See* Florida Star v. BJF, 491 U.S. 524, 542 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105-06 (1979); Oklahoma Publ'g Co. v. Dist. Court, 430 U.S. 308, 311-12 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975). The same is true in state court. *See In re* Minor Charged, 24 Media L. Rep. (BNA) 1064 (N.C. 1995) (vacating portion of trial court order prohibiting disclosure or publication of the identity or photograph of a minor charged with a crime where that information and photograph had been lawfully obtained).

[31] 443 U.S. 97 (1979).

[32] The Court had previously applied this principle in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), holding that a state could not impose civil sanctions on the news media for the accurate publication of the name of a rape victim obtained from public records. *See also* Florida Star v. BJF, 491 U.S. 524 (1989) (reversing civil damage award for publication of truthful information lawfully obtained).

[33] *See* N.C. GEN. STAT. § 15-166.

In *State v. Burney,*[34] the N.C. Supreme Court affirmed a closure order over the objection of a criminal defendant who claimed that such an order deprived him of his constitutional right to a "public trial." In that case, the trial court cleared the courtroom during the testimony of a 7-year-old victim. Significantly, no member of the public or news media objected to being excluded or attempted to intervene for the purpose of arguing against the decision to close the courtroom. The N.C. Supreme Court said in its opinion, "Defendant cannot demand a new trial upon the assertion of an alleged violation of the constitutional rights of [the news media] under these particular facts."[35]

In *State v. Kelly*, the notorious child sex abuse case known as "the Little Rascals case,"[36] a state Superior Court judge ruled that the state could not close the courtroom during the testimony of approximately 20 alleged victims. Superior Court Judge Marsh D. McLelland denied a prosecutor's motion to close the courtroom to "all unnecessary persons" during the testimony of the victims. The state argued that testifying in open court would traumatize the children. However, the judge ruled that the state constitution provides an absolute right of access to criminal trials and that the state "made no offer of proof in support of the 'overriding interest' asserted in this case."[37]

***Potential for violence.*** State law provides that a judge may limit access to the courtroom when necessary to ensure the safety of all present and to ensure an orderly trial, provided that the order limiting access must be entered on the record.[38] This law was adopted in 1977 as a result of several acts of violence that occurred in courtrooms in the early 1970s. It is rarely used, and, if it were invoked, it probably would not call for exclusion of all persons. In light of U.S. Supreme Court decisions, the closure order would have to be narrowly drawn.

***Proceedings involving medical peer review records.*** In *Virmani v. Presbyterian Health Services Corp.*[39] the N.C. Supreme Court held that the public does not have a right to access court hearings that concern confidential information relating to medical peer review records.[40] The court reasoned that the presumptive right of access was outweighed by the "compelling public interest in protecting the confidentiality of the medical peer review process in order to foster effective, frank and uninhibited exchange among medical peer review committee members."[41]

***Trade secrets.*** A court generally can order the courtroom closed while trade secrets are

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[34] 276 S.E.2d 693 (N.C. 1981).

[35] *Id.* at 698.

[36] 19 Media L. Rep. (BNA) 1283 (N.C. Super. Ct. 1991).

[37] *Id.* at 1285.

[38] *See* N.C. GEN. STAT. § 15A-1034.

[39] Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675 (N.C. 1999).

[40] *See id.* at 693.

[41] *See id.* at 694.

discussed.[42] Closure may be justified when there is no reasonable alternative to closure and substantial damage to property rights in trade secrets would occur without closure.[43]

***Victim's compensation.*** Hearings to determine whether a crime victim can be compensated for his or her injuries take place before administrative law judges. The state statute governing such hearings provides that the administrative law judge may exclude from a hearing all persons not directly involved in the hearing during the taking of medical and law enforcement information as evidence.[44]

# What court documents are public?

The state and federal constitutional commitments to open courts mean that, with few exceptions, any person, including reporters, can review and copy court records as well as observe court proceedings. In the federal system, as noted below, most court records are available to the public online. Except when a case is being tried, you will find most state court records in the clerk of court's office. Venturing into the clerk's office for the first time can be a daunting experience. Each clerk of court has his or her own system of keeping files and indexes in order. But once you learn the system, you generally can find what you need. The clerk's staff can be your best ally.

State law prohibits state courts from sealing or restricting access to the contents of any judicial record that is required under other state laws to be open to public inspection.[45] If such orders are issued, a person violating them cannot be held in contempt of court.[46] There are, however, some exceptions to the general rule that court records are public records.

The following is a list of various types of court records that generally are available for inspection by the public and the media, followed by a list of judicial records that are not public:

***Appellate court materials.*** The opinions issued by the N.C. Supreme Court and the N.C. Court of Appeals are public records and are available for inspection and copying in the respective clerks' offices in Raleigh. The opinions are also available on the North Carolina Courts website at *http://appellate.nccourts.org/opinions/*.

The Court of Appeals typically hands down its decisions on the first and third Tuesdays of each month. The opinions are filed with the clerk the Thursday before and usually are available for review by 9 a.m. Tuesday.

In each case these courts hear, the Supreme Court and the Court of Appeals receive briefs containing the legal arguments and a record containing the evidence and other matters from the lower court. These documents, which are public records, can help a reporter learn details about a

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[42] *See* N.C. GEN. STAT. § 66-156; DIENES, *supra* note 27, § 3-2(c).

[43] *See* DIENES, *supra* note 27.

[44] *See* N.C. GEN. STAT. § 15B-12(h).

[45] *See id.* § 7A-276.1.

[46] *See id.*

case that do not show up in the opinion, such as the age of a victim or the type of car driven in a getaway. They also set forth the legal positions of the parties. State law specifically states that records maintained by clerks of court are open to inspection.[47] These filings may be located and downloaded at *http://www.ncappellatecourts.org/search.php*.

***Casefolders and documents.*** With the case number (see the section on computerized indexes below), you can pull the case folder that contains the actual court documents such as the complaint and answer. These are public records unless sealed by court order. The procedures for challenging sealing orders are described below.

***Civil discovery.*** In civil cases, the discovery process by which litigants develop evidence and facts relevant to the issues is largely conducted in private unless disputes regarding the discovery process require the court to get involved. The law regarding the rights of the public and press to have access to civil discovery, whether by attending oral depositions or by obtaining copies of written discovery responses or of documents produced by parties, has yet to be fully fleshed out. Generally, however, discovery materials that have been filed with the court are more accessible to the news media than unfiled materials.

For example, the Fourth Circuit has held that the First Amendment guarantees a right of access to certain filed discovery materials.[48] The court said the press and public have a First Amendment right of access to documents submitted to the court as attachments to a summary judgment motion in a libel case. The court held that once documents are made part of such a motion they "lose their status of being 'raw fruits of discovery.'"[49] However, if documents filed with the court do not play any role in the adjudicative process, access to such documents may be limited.[50]

The right of access to unfiled civil discovery materials is far more limited. The news media are often denied the right to challenge protective orders issued by the court to seal such materials, [51] especially if they intervene late in the process, after the parties have litigated in reliance on the protective order. And even when the courts agree to hear the news media's arguments, many courts refuse media requests for access because "1) discovery is a private process traditionally closed to the public; 2) the court has no power to compel a party to produce unfiled discovery materials because they are concerned with private matters; and 3) First Amendment interests in discovery are limited and can be overcome when there is 'good cause,' such as ensuring a fair trial or protecting one's privacy."[52]

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[47] *See id.* § 7A-109(a).

[48] *See* Rushford v. New Yorker Magazine, 846 F.2d. 249, 253 (4th Cir. 1988).

[49] *See id.* at 252.

[50] *See* United States v. Blowers, 3:05-CR-93-V, 2005 WL 3116090 (W.D.N.C. Oct. 17, 2005) (citing *In re* Policy Management, 67 F.3d 296, 1995 WL 541623 at *4 (4th Cir. 1995) (unpublished decision)).

[51] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31-35 (1984).

[52] *See* Hosoon Chang, Access to Civil Discovery Materials, 25-26 (August 1991) (Unpublished paper presented to the Association for Education in Journalism and Mass Communication).

***Computerized indexes.*** For the most part, computers have replaced all of the paper indexes that used to list cases by the names of the parties. For older cases, you may have to resort to the books that list the names of parties in alphabetical order. The computers also list judgments by the defendants' names. Again, the computer will have only those judgments that have been filed since the computers were installed. You must go to the old books of indexes for earlier information. The computers and indexes only provide a reference point—the case number. You can use that number to locate the case file. For civil and criminal actions in federal court (including bankruptcy), court filings are generally available on PACER (Public Access to Court Electronic Records), which is located at *http://www.pacer.gov/psco/cgi-bin/links.pl*.

***Criminal histories.*** An individual's record of criminal charges in a given county can be derived from clerk's office records. A criminal record check through the clerk's office only shows those instances where a person has been charged within the county in which you are searching. The files will detail whether the case has come to trial, whether a defendant was found guilty or acquitted or whether the case was dismissed. A central computer system, called the Police Information Network (PIN), compiles statewide criminal statistics, but access to the network is limited to law enforcement officers and others whose duties relate to the administration of justice.[53]

***Government settlements.*** Whenever a state or local government agency settles a lawsuit, the documents revealing the terms of the agreement and all documents that were made or used in the settlement are public records.[54] This is true even in cases involving minors.[55] The documents considered part of the settlement record include correspondence, settlement agreements, consent orders, checks and bank drafts.[56]

***Grand jury indictments and presentments.*** An indictment charging an individual with a crime is a public record. Likewise, a presentment—the document in which the grand jury directs the prosecutor to pursue possible charges—is a matter of public record.[57] Evidence considered by a grand jury is not considered public record.[58]

***Search warrants.*** After law enforcement officers have executed a search warrant, they are required to make a report to the court on the results of the search. The clerk's office keeps those reports on file. You can review the probable cause statement in which the officer sets forth

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[53] *See* N.C. GEN. STAT. §§ 114-10, 114-10.1

[54] *See id.* § 132-1.3; *see also* Letter to Carmichael, Op. N.C. Att'y Gen. (1997), *available at http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/338.aspx*.

[55] *See, e.g.*, Junius Wilson v. North Carolina, No. 5:94-CV-878-BR-3, Order (E.D.N.C. Jan. 22, 1996) (granting newspaper's motion to intervene and unsealing orders of approval and settlement agreement in high-profile case involving plaintiff who was a mental patient and government defendants); Goldsmith v. Henderson Cnty. Bd. of Pub. Educ., 32 Media L. Rep. (BNA) 1353 (N.C. Super. Ct. 2003).

[56] *See id*; *see generally* Mark J. Prak, *Settlements and their Constitutional Implications*, THE CONSTITUTIONALIST 8.2 (N.C. Bar Ass'n., Raleigh, N.C.).

[57] *See* N.C. GEN. STAT. § 15A-628(c).

[58] *See id.* § 15A-623(e).

reasons he or she believes a person is involved in criminal activity. The warrant also tells what has been searched, why the place needed to be searched and what has been seized.[59]

***Evidence admitted at trial.*** Generally, evidence admitted at trial is released into the "public domain." Thus, private documents lose their non-public status when introduced in evidence.[60] However, according to the N.C. Court of Appeals in *Times-News Publishing Co. v. North* Carolina,[61] such evidence can revert to its nonpublic status—for instance, if evidence is transmitted to the district attorney's office for purpose of reinvestigation and retrial.[62]

***Videotaped trial exhibits.*** Federal courts in North Carolina generally have allowed news organizations to review and copy video and audio tapes that are introduced into evidence. However, the issue has not been litigated in either the state or federal courts in North Carolina, so there are no court opinions on the status of a reporter's constitutional and common law right of access to such materials.

Courts in other jurisdictions vary widely on whether reporters are allowed to inspect and copy audio and video evidence presented in a trial. When courts grant access, they generally do so on the grounds that the presumptive First Amendment right of access does not depend on the form of the judicial record and that the right to copy is part of the right to inspect records.[63] Many courts, however, assume that news media access to taped evidence is more likely to infringe on a defendant's constitutional right to an impartial jury than access to printed documents.[64]

# What court records are not public?

Although the court records described below are not public records, the news media usually cannot be held liable for disseminating information contained in these records. Generally, court employees and others who have official access to judicial records are the ones who break the law when they release them. Should you come into possession of the kinds of records described below, you should check with your employer's attorney.

***Adoption records.*** Only a final order of adoption or a final order dismissing an adoption proceeding is public record. The remaining information, such as names of natural parents, is confidential.[65]

***Commitment records***. Generally the public and the news media are not entitled to review court information about individuals who are committed to institutions for the mentally ill.

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[59] *See id.* §§ 15-11, 15A-257.

[60] *See* News & Observer Publ'g Co. v. Poole, 412 S.E.2d 7, 12 (N.C. 1992).

[61] 476 S.E. 2d 450 (N.C. Ct. App. 1996).

[62] *See id.* at 453.

[63] *See, e.g.*, United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981).

[64] *See id.* at 826-28.

[65] *See* N.C. GEN. STAT. § 48-9-102.

However, when an individual is found "not guilty by reason of insanity" and is later sent to an institution, copies of the documents introduced in evidence at the automatic commitment hearing are available for public inspection.[66]

***Civil discovery.*** See the discussion earlier in this chapter in the section regarding records that are open to the news media and the public.

***Juvenile records***. These records are withheld from public inspection by the clerk of court. A reporter can gain access to them if an appropriate member of the youth's family, i.e., a custodial parent, gives permission.[67]

***Medical reports.*** When a prosecutor, defendant or judge raises a question about a defendant's capacity to proceed at a trial and a report is subsequently made about his or her health, the report is confidential and not a public record unless it is admitted into evidence.[68]

***Presentence reports.*** When a presentence report is prepared for a defendant convicted in state court, the report and the oral presentation of the report are not public.[69] In federal courts, however, prosecutors often file the presentence reports in the court record, and the public has access to them.

***Probation reports.*** All information obtained by a probation officer is confidential and cannot be disclosed unless a judge or the secretary of correction orders disclosure.[70]

***Settlements (non-government).*** Settlement agreements in private cases ordinarily are not part of the court record. However, in some rare instances they become part of the court file, such as when a judge must approve a settlement involving a minor, an incompetent person, or a person who has some sort of legal disability.

Increasingly, lawyers who settle cases and make the settlement part of the court record want to seal the record so the public cannot have access to the substance of the settlement. This trend is opposed by the North Carolina Advocates for Justice and by news organizations because the sealing of court documents allows the public courts to be turned into private dispute resolution forums. The effect is to keep from the public information that could help citizens, such as settlements for injuries stemming from the use of defective or dangerous products.

It is even harder for the news media to gain access to settlements that do not become part of a court record. Because trials are the exception rather than the rule, many important facts and issues involved in legal proceedings are never aired in open court. When cases are settled, the parties frequently agree to maintain the terms of the settlement and other information developed during discovery as confidential. Such confidentiality agreements may provide significant negotiating leverage to a party to a lawsuit. For example, a person who is injured as the result of

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[66] *See id.* § 122C-268.1(f). (g).

[67] *See id.* § 7B-3000.

[68] *See id.* § 15A-1002(d).

[69] *See id.* § 15A-1333.

[70] *See id.* § 15-207.

a defective product and who has discovered particularly damaging documents in the manufacturer's file may obtain a greater monetary settlement by agreeing to keep the settlement amount secret and to return the documents to the manufacturer. This is particularly true if other injured persons might have similar claims against a defendant. There is a strategic value to the defendant in keeping publicity about problems with its products out of the public's view. For the most part, these private agreements become matters of contract between the parties. Court approval generally is not required for the parties to a lawsuit to voluntarily resolve their claims and dismiss their case. Thus, in many cases, even those without a confidentiality agreement, the public is simply unaware of the terms on which the case was resolved.

# When can a judge seal a court file?

As discussed above, it is generally undisputed that, like court proceedings, court records are presumptively open to the public and news media. This is not to say, however, that all testimony and documents will necessarily become public.

Courts may, where good cause is demonstrated, issue orders (1) that evidence be received by the court only on the condition that it be "sealed," i.e., made unavailable to the press or public; (2) that information acquired during a lawsuit by parties or their lawyers not be disclosed; or (3) that confidentiality agreements entered into by parties in connection with the settlement of legal disputes be enforced. To some extent, all of these actions impinge upon the free flow of information to the public and, thus, upon the First Amendment. The justification for the existence of such mechanisms is the government's interest in the effective operation of the court system. Rule 26(c) of the N.C. Rules of Civil Procedure and its federal counterpart state that courts are empowered to "make any order that justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense."[71]

Constitutionally, whether a court can order a court file sealed is arguably governed by the same standard concerning courtroom closure orders discussed earlier in this chapter. That is, under the First Amendment, which controls in both federal and state courts, a judge must find that sealing a certain document is absolutely necessary to protect a "compelling" governmental interest; that no less restrictive measure short of sealing the document will suffice to protect that interest; and that the order is "narrowly tailored" so that its scope is as limited as possible.[72]

As detailed above, at least with respect to state court civil proceedings, the public also has a statutory means of demanding access to judicial records and obtaining a prompt hearing from the court when access is denied.[73]

In addition to statutory and First Amendment arguments against sealing judicial records, the news media can also assert a common law right of access. In *Nixon v. Warner Communications*,[74]

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[71] N.C. R. Civ. P. 26(c); Fed. R. Civ. P. 26(c).

[72] *See* Press-Enterprise Co. v. Superior Court of Riverside Cnty., 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court of Riverside Cnty., 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-07 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980).

[73] *See* N.C. Gen. Stat. § 1-72.1.

[74] 453 U.S. 589, 608 (1978).

the U.S. Supreme Court recognized a common law right to inspect and copy judicial records and documents. However, this right of access to court records is not absolute. A judge has the discretion to seal documents if the public's right of access is outweighed by competing interests.[75] In federal courts located in the Fourth Circuit, it is well established that prior to entering an order sealing documents, the court must (1) give the public notice of any request to seal a document and a reasonable opportunity to challenge it; (2) consider less restrictive alternatives to sealing; and (3) if a decision is made to seal a document, articulate its reasons supported by specific factual findings and the reasons for rejecting alternatives to sealing.[76] "These procedures 'must be followed when a district court seals judicial records or documents.'" [77]

In fact, the Fourth Circuit has held that a lower court had improperly sealed a $36 million settlement agreement in a case involving drinking water contamination.[78] Despite the media's demonstrated interest in the case, no public notice of the motion to seal the agreement was given, there was no opportunity for interested parties to object to the motion, the lower court failed to consider less restrictive alternatives to sealing and the lower court did not identify any specific reasons justifying its decision to seal the agreement.[79]

In *Virmani v. Presbyterian Health Services*,[80] the N.C. Supreme Court held that, in addition to the rights of access created in First Amendment and common law, there also is a qualified right to access court records under the N.C. Constitution. That is, a court may seal court records only if the trial judge makes specific findings of fact demonstrating that, after considering alternatives to sealing, sealing is necessary to protect a "compelling countervailing public interest."[81]

In *Corrigan v. White*, a civil case involving accusations of sexual misconduct at a shopping mall, the N.C. Court of Appeals vacated lower court orders sealing the court record and allowing the parties to proceed using pseudonyms. On remand, a Superior Court judge cited both *Virmani* and *State v. Kelly*. The judge said that although the plaintiffs were minors, denials of access to information about the case would not be allowed because while "almost all criminal or civil allegations of wrongdoing are embarrassing to defendants . . . there is no evidence that the issues raised by this case are of quantifiably different nature or caliber from others routinely heard in North Carolina's public courts in open court proceedings."[82]

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[75] *See id.* at 597-608.

[76] *See In re* Charlotte Observer, 882 F.2d 850, 853-54; *In re* Knight Publ'g Co., 743 F.2d 231, 234-35 (4th Cir. 1984).

[77] *See* Ashcraft v. Conoco, 218 F.3d 288, 301 (4th Cir. 2000) (quoting Stone v. Univ. of Md. Medical Sys. Corp., 855 F.2d 178 (4th Cir. 1988)); *see also* Ashcraft v. Conoco, 218 F.3d 282 (4th Cir. 2000).

[78] *See id.*

[79] *See id.*

[80] 515 S.E.2d 675, 693 (N.C. 1999).

[81] *See id.*

[82] Corrigan v. White, 29 Media L. Rep. (BNA) 1637,1638 (N.C. Super. Ct. 2001).

As discussed above, in *Goldsmith v. Henderson County Board of Public Education* the trial court granted a newspaper's motion to unseal documents relating to a sex abuse scandal involving a public school teacher, holding that the parties had failed to overcome the presumption of openness demanded by the First Amendment.[83]

In 2008, a trial court judge in Orange County ordered that search warrant materials related to the murder of UNC student body president Eve Carson be released.[84] The search warrant materials had been previously sealed by the court to protect the safety of confidential informants in the early stages of investigation, but the judge later granted a local newspaper's motion to release the materials. That motion was granted in spite of one of the defendant's concerns about pre-trial publicity.

In 2009, however, the N.C. Court of Appeals affirmed an order sealing three search warrants and related materials in another high-profile murder case in Cary, N.C.[85] The court's decision to seal the material was based in large part on North Carolina's public records laws and the countervailing interest that the release would jeopardize the right of the state to prosecute a defendant or the right of a defendant to a fair trial or would undermine an ongoing investigation.[86]

Courts do not find a constitutional or common law right of access to be applicable to every type of record. Courts often seal documents in commercial disputes that involve trade secrets and that are unrelated to any larger public concerns. Courts will, on request of a party who demonstrates good cause, act to prevent the disclosure of valuable commercial information.[87]

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[83] Goldsmith v. Henderson Cnty. Bd. of Pub. Educ., 32 Media L. Rep. (BNA) 1353 (N.C. Super. Ct. 2003).

[84] State v. Lovette, No. 08-CRS-51242 (N.C. Super. Ct. 2008); State v. Atwater, No. 08-CRS-51241 (N.C. Super. Ct. 2008).

[85] *In re* Coope*r*, 683 S.E.2d 418, 426-28 (N.C. Ct. App. 2009).

[86] *Id.* at 426. Federal courts in the Fourth Circuit have occasionally taken a narrower view of efforts to seal search warrants. *See* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65-66 (4th Cir. 1989) (holding that search warrants are subject to a common law right of access, not a First Amendment right, but that sealing is only allowed where it is "essential to preserve higher values and is narrowly tailored to serve that interest"). In *Baltimore Sun*, the court identified two rationales for sealing: (1) to protect the identity of the informer; and (2) to protect the ability of the government to conduct confidential investigations. *See also In re* Search of Premises Known as: L.S. Starrett Co., No. 1:02M137, 2002 WL 31314622, 31 Media L. Rep. (BNA) 1712 (M.D.N.C. 2002) (denying company's motion to seal entire search warrant because "[t]he important public interest in access to the search warrant process overrides the privacy and reputation rights of Starrett and its employees").

[87] For an example of a true trade secret, see, for example, *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985). In that case, a federal district judge characterized the formula for Coca-Cola as "one of the best kept secrets in the world." In the context of a contract dispute between the parent company and an independent bottler, the court found that the formula was relevant to resolve the issue of whether several Coca-Cola products were identical and thus governed by a contract. Accordingly, the court was prepared to enter a protective order to ensure that the formula was disclosed only to individuals connected with the case. This was certainly appropriate. Nevertheless, the Coca-Cola company refused to make its formula available even though the court was willing to enter a protective order. The judge then ordered that, for the purpose of the case, every possible adverse inference would be drawn against the Coca-Cola company with respect to the formula evidence. *See* Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 110 F.R.D. 363, 366, 369

However, the sealing of evidence relating to the safety of products such as drugs and automobiles or information relating to human health hazards such as toxic waste leaks or medical malpractice presents greater public concerns and thus may constitute a greater infringement on the core interests protected by the First Amendment. This issue creates a conflict for our courts. On one hand, courts are public institutions. On the other hand, however, civil cases are brought to resolve disputes between private parties—unless governmental entities are involved. Accordingly, there is a tension between the court system and the news media over the extent to which evidence developed in the preparation of civil cases and the terms on which such cases are finally resolved should be made public.[88]

# Can you publish a sealed document?

When a court issues an order sealing a document, publication of such a document can result in contempt of court. If you obtain a document that is under seal, you should immediately consult with your attorney before publishing information from that document. In general, it is permissible to publish information contained in a sealed document if that information has been lawfully obtained. This principle has been repeatedly recognized by the U.S. Supreme Court.[89] Thus, if a reporter lawfully receives information that is under seal, the First Amendment will

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(D. Del. 1986).

[88] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). In that case, a newspaper that was a defendant in a libel and invasion of privacy suit claimed that it could not, consistent with the First Amendment, be forbidden from publishing information about the plaintiff–the leader of a religious group–that the newspaper had obtained through the civil discovery process. The U.S. Supreme Court rejected that argument. As part of the civil discovery process, the newspaper had asked the trial court to compel production of information about the membership and finances of the religious organization. The court ordered production of the material but granted the religious group's request for a protective order prohibiting the newspaper from disseminating or otherwise using the information for any purpose other than trial preparation. The order did not prohibit the newspaper from publishing information about the religious group that it obtained through means other than the judicial discovery process. The newspaper challenged the court's protective order as a prior restraint on publication that violated the First Amendment. In a unanimous opinion, the U.S. Supreme Court upheld the protective order and rejected the newspaper's position. The Court noted that civil discovery rules often allow extensive intrusion into the affairs of both litigants and third parties. Information is often required to be produced that is not relevant to the case or even admissible at trial. The Court reasoned that permitting a party to obtain and publish information that could not otherwise be lawfully obtained would be unreasonable. The Court observed that historically pre-trial discovery had not been a component of civil trial and concluded that the balance should be struck in favor of upholding the protective order because, unlike a "classic prior restraint," this protective order allowed the newspaper to publish information it gleaned from independent sources. Thus protective orders and decisions to seal documents must be narrowly tailored, and they should not be granted absent a showing of good cause. Orders entered merely as the result of the consent of the parties may be subject to challenge on the grounds that they violate the First Amendment.

[89] *See* Florida Star v. BJF, 491 U.S. 524 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829 (1978). It should be noted, however, that the U.S. Supreme Court has carefully left open the question of whether truthful publication may ever by punished consistent with the First Amendment. *See* Florida Star v. BJF, 491 U.S. at 532-33, and cases cited therein.

generally protect him from liability for the publication of such information. That does not mean that the individual who leaked the information is immune. A clerk of court who leaked a sealed document, for example, *has* broken the law.

Newspaper liability was an issue raised in *Ashcraft v. Conoco, Inc.*[90] In that case, a deputy clerk of court mistakenly provided a sealed confidential settlement agreement, along with other court documents, to a reporter for the Wilmington Morning Star newspaper (now the Star News). At the time the reporter received the agreement, it was in an envelope that bore a statement that it was to be opened only by the court. The reporter did not see the statement but did observe the word "Opened," which appeared through a window adjacent to the back flap of the envelope. The reporter opened the envelope and reported on its contents. In a decision that was ultimately overturned, the federal District Court determined that the reporter had not lawfully obtained the settlement information and held her in criminal and civil contempt.[91]

In reversing the District Court, the Fourth Circuit held that, among other infirmities, the District Court had erred because there was insufficient evidence to support the conclusion that the reporter had acted "willfully, contumaciously, intentionally, [and] with a wrongful state of mind."[92] As stated by the Fourth Circuit,

> [A] citizen who requests public documents from an officer of the court, who herself evidences diligence in safeguarding the confidences of the court, and is given an envelope that once was sealed but has been previously opened and is at the time open and denominated as such, is entitled to presume that the envelope and its contents are publicly available material, at least absent proof of knowledge otherwise. No citizen is responsible, upon pain of criminal and civil sanction, for ensuring that the internal procedures designed to protect the legitimate confidences of government are respected.[93]

# How should a reporter respond to a court order limiting access to court proceedings?

The simple answer to this question is call your editor and, if the editor is not available, your lawyer, as quickly as possible. One practical lesson of the courtroom closure cases is that if you are covering a case and a closure motion is made, you should stand, identify yourself, explain that you and your employer object to closure of the courtroom, and request an opportunity to have counsel appear and present legal argument in opposition to the closure motion. If you fail to object, you may waive your right of access. Once the objection is made, you must then get on the telephone to both your editor and your lawyer—quickly!

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[90] *See* 218 F.3d 288 (4th Cir. 2000).

[91] *See* Ashcraft v. Conoco, Inc., 26 Media L. Rep. (BNA) 1620, 1625-26, 1998 WL 404491 (E.D.N.C. 1998).

[92] *See* Ashcraft v. Conoco, Inc., 218 F.3d 288, 299 (4th Cir. 2000).

[93] *See id.* at 302.

More specifically, if a motion is made to close a court proceeding, you should stand, identify yourself and make the following statement to the judge:

> Your honor, I respectfully request the opportunity to register on the record an objection to the motion to close this proceeding to the public, including the press. Our legal counsel has advised us that standards set forth in N.C. General Statutes § 1-72.1 and in U.S. and N.C. Supreme Court decisions regarding the constitutional right of access to judicial proceedings recognize the right to a hearing before the court is closed. Therefore, I respectfully request such a hearing and a brief continuance so I can call our counsel to come to explain our position.

It is essential to act quickly to avoid waiving the right to access. For example, in 2010, the presiding judge in Chatham County announced that he would close a hearing regarding a John Edwards sex tape. Unfortunately, the media representatives who were present did not invoke their right to object and move for access to the closed proceeding as it unfolded. It was reported that the judge heard the matter in chambers for an hour before emerging and announcing his ruling.[94] In contrast, during the state's first hearing applying the Racial Justice Act, Senior Resident Superior Court Judge Greg Weeks announced an intention to hear testimony from Judge E. Lynn Johnson in a closed courtroom. Reporters for the Fayetteville Observer and WTVD objected and asked to be heard. Judge Weeks agreed and conducted a hearing with one media lawyer in the courtroom and another participating via the reporter's phone, and ultimately Judge Weeks ruled that the testimony would be taken in open court.[95]

Those contrasting cases provide an important opportunity for reporters and editors to learn about the special procedural rights they enjoy in North Carolina to challenge the closing of a courtroom or the sealing of a court record.

# Are cameras allowed in courtrooms?

Reporters have always been able to take their pens, pencils and notebooks with them into the courtroom to assist them in covering proceedings. As technology advanced, reporters made use of new tools such as still cameras, movie cameras and radio microphones to cover trials. In 1925, the trial of Tennessee school teacher John Scopes for teaching evolution was broadcast live on radio by WGN in Chicago.[96] Also, the notorious murder trial of Nathan Leopold Jr. and Richard Loeb was covered by still and motion picture cameras located in the courtroom.[97] Beginning in 1935, however, in the wake of the extensive media coverage surrounding the trial of Bruno

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[94] Michael Biesecker, *Former Edwards aide must turn over tape*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 6, 2010, *available at* http://www.newsobserver.com/2010/02/06/322882/edwards-story-swirls-through-a.html.

[95] Paul Woolverton, *Ruling blocks judge's answer in Racial Justice Act hearing*, FAYETTEVILLE OBSERVER (Fayetteville, N.C.), Feb. 8, 2012, *available at* http://www.fayobserver.com/articles/2012/02/07/1155820?sac=fo.crime

[96] *See* Alan Wurtzel, *Free Press/Fair Trial: Broadcast Access to Courtroom Proceedings* 3 (1978).

[97] *See* Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14 (June/July 1979).

Hauptmann for the kidnapping and murder of Charles Lindbergh's baby, reporters' ability to use cameras to cover court proceedings began to be restricted.[98] The American Bar Association recommended, and many states adopted, rules restricting the use of television cameras, still cameras and broadcast recorders and microphones in courtrooms.[99]

In 1965, the U.S. Supreme Court held that Texas financier Billy Sol Estes had been denied his right to a fair trial because the court proceedings were televised.[100] According to news reports, the Estes courtroom was cluttered with cameras, cables, wires and microphones. Legal scholars debated the scope of the Supreme Court's opinion. Some contended the Court had ruled that the mere presence in the courtroom of broadcast cameras and equipment automatically amounted to a denial of due process of law to a criminal defendant. Others, including some members of the Court, suggested that the requirements of due process might not be offended if technology made cameras less obtrusive. Justice Tom Clark wrote, "When the advances in these arts permit reporting by the printed press or by television without their present hazards to a fair trial, we will have another case."[101] The legal debate continued for years, during which broadcast reporters and newspaper photographers were generally unable to use cameras, microphones and recorders to cover court proceedings.

North Carolina first adopted a ban on television cameras, still cameras and broadcast microphones and recorders in 1970.[102] In 1973 the Code of Judicial Conduct adopted by the N.C. Supreme Court also contained a prohibition against judges allowing television, radio and still photographic coverage of court proceedings.[103]

In 1981 the "other" case that Justice Clark had referred to 16 years earlier found its way to the U.S. Supreme Court. It began when Florida adopted rules to allow a pilot program to evaluate television coverage of court proceedings. Two men charged with burglary appealed their convictions, asserting that television coverage of their trial had denied them a fair and impartial trial. In *Chandler v. Florida,*[104] the U.S. Supreme Court unanimously affirmed their convictions. Rejecting the defendants' argument that televising a criminal trial inherently denies the defendant due process, the Court said that "no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast news media inherently has an adverse effect on [the judicial process]."[105] The Court was careful to note, as had Justice Clark in *Estes* in 1965,

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[98] *See* State v. Hauptmann, 115 N.J.L 412, *cert. denied*, 296 U.S. 649 (1935).

[99] *See* Albert E. Blashfield, *The Case of the Controversial Canon*, 48 A.B.A.J. 429, 430 (1962); Estes v. Texas, 381 U.S. 532, 595-96 (1965) (Harlan, J., concurring).

[100] *See Estes*, 381 U.S. at 578.

[101] *Id.* at 540.

[102] GENERAL RULES OF PRACTICE 15.

[103] CODE OF JUDICIAL CONDUCT, Canon 3A(7).

[104] 449 U.S. 560 (1981).

[105] *Id.* at 561.

that if circumstances changed in the future, the legal rule might change as well.

After *Chandler* many states, including North Carolina, began to adopt rules allowing radio, television and still photographic coverage of court proceedings.[106] Some states permit coverage of appellate proceedings only or limit trial coverage to civil cases. Others permit coverage of both criminal and civil trials and appeals.

***N.C. courts.*** In 1987, in response to petitions from the North Carolina Association of Broadcasters, the Radio Television Digital News Association of the Carolinas and the North Carolina Press Association,[107] the N.C. Supreme Court adopted experimental rules designed to permit electronic coverage of court proceedings in trial and appellate courts. The state Supreme Court extended and modified the experimental rules between 1982 and 1988. Finally, on June 25, 1990, the N.C. Supreme Court adopted permanent rules allowing cameras in the courtroom—Rule 15 of the General Rules of Practice for the Superior and District courts. In recognition of this fact, Cannon 3A(7) of the North Carolina Code of Judicial Conduct was amended to state:

> A Judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

From the perspective of the news media and the public, North Carolina court proceedings are now presumptively open to broadcast and still photographic coverage. To be sure, a judge may exercise his or her discretion to forbid such coverage for any reason. But in light of Rule 15's statement that "Electronic media and still Photographic coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state . . . ,"[108] it is reasonable to infer that the burden should be on the party proposing that a judge exercise his discretion to prohibit such coverage to demonstrate why such an action should be taken.

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[106] A number of lower courts have resolved the question of whether there is a constitutional right of broadcast and photographic access to courtrooms adversely to the media. *See, e.g.*, Conway v. United States, 852 F.2d 187 (6th Cir. 1988); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986); United States v. Kerly, 753 F.2d 617 (7th Cir. 1985); Westmoreland v. CBS, Inc., 752 F.2d 16, 24 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. Hastings, 695 F.2d 1278 (11th Cir.), *cert denied, sub nom*. Post-Newsweek Stations Florida, Inc. v. United States, 461 U.S. 931 (1983); Combined Commc'ns Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982); Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975); United States v. Yonkers, 10 Media L. Rep (BNA) 2188 (S.D.N.Y. 1984). However, the U.S. Supreme Court has yet to squarely address the issue of whether the First Amendment right of access to judicial proceedings requires that cameras be permitted in court. *But cf.* Estes v. Texas, 381 U.S. at 588 (Harlan, J., concurring) (dicta suggesting no such right); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 610-11 (1978) (dicta to the effect that there is no constitutional right to have testimony recorded and broadcast).

[107] NCAB is a trade association of radio and television stations in North Carolina. RTDNAC is a trade association of news directors employed at such stations. NCPA is a trade association of newspapers published in North Carolina.

[108] *See* GENERAL RULES OF PRACTICE 15(b) (2011).

Under the current North Carolina rules, reporters must simply exercise good judgment and common sense in securing prior permission of the court for television, radio or still photographic coverage. Pooling of resources is required to minimize the number of cameras and microphones.[109] The state's media trade associations are responsible for appointing coverage coordinators in all of North Carolina's 100 counties to assist in arranging for photographic or electronic coverage.[110] Thus, the reporter's first contact should be the coordinator assigned to the county in which the case is located. A reporter can get a list of coordinators from the NCAB or NCPA.

Under the rules, coverage of certain types of cases and proceedings is prohibited. Proceedings involving adoptions, juveniles, probable cause determinations, child custody, divorce, temporary and permanent alimony, motions to suppress evidence, trade secrets, *in camera* presentations and proceedings before magistrates and clerks of court may not be covered.[111] In addition, the rules forbid coverage of jurors and the following types of witnesses: police informants, minors, undercover agents, relocated persons, and victims and families of victims of sex crimes.[112]

All reporters should familiarize themselves with the rules because violations are punishable as contempt of court. Also, reporters and camera crews should lay competitive concerns aside to ensure that judges are not called upon to arbitrate disputes between reporters or competing newspapers or stations. Rule 15 is reprinted at the end of this chapter.

***Federal courts.*** The rules permitting the use of cameras in North Carolina's state courts have no parallel in the federal courts. Broadcast coverage of federal court proceedings has long been forbidden by Canon 3A(7) of the Code of Judicial Conduct for the United States Courts, by Rule 53 of the Federal Rules of Criminal Procedure and by the local rules of most federal courts.

In 1990, the Judicial Conference of the United States voted to suspend Canon 3A(7) to permit a three-year experimental program to allow television, radio and still photographic coverage of civil cases in a select handful of federal courts.[113] At the conclusion of the three-year experiment, the Judicial Conference voted to refuse camera access to federal trials. However, the Judicial Conference did vote to allow individual federal courts of appeals to determine, in civil cases, whether they would permit cameras in the courtroom.

In recent years, the Congress has considered several bills that would allow federal judges the option of allowing cameras and microphones in federal district courts.[114] In 2010, for example, a bill that would generally allow electronic media coverage of U.S. Supreme Court proceedings passed the Senate Judiciary Committee. The bill has not yet been adopted, however.

Also in 2010, the Judicial Conference authorized another three-year pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and

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[109] *See id.* Rule 15(e).

[110] *See id.* Rule 15(d).

[111] *See id.* Rule 15(b)(2).

[112] *See id.* Rule 15(b)(3).

[113] *See, e.g.,* HARVEY L. ZUCKMAN, ET. AL., MODERN COMMUNICATIONS LAW 150-52 (1999).

[114] *See, e.g.,* Federal Courts Improvement Act of 2000, H.R. 1752, 106th Cong.

publication of such video recordings. The pilot is limited to civil cases, and camera access requires approval from the presiding judge and consent by the parties to the case. Unless the presiding judge decides not to make the recordings publicly available, they will subsequently be posted on *www.uscourts.gov*. The pilot program, which began in June 2011, involves only 14 federal courts, none of which is located in North Carolina.[115]

Accordingly, at this time, broadcast coverage of trials is forbidden in federal courts in North Carolina. At the appellate level, the Fourth Circuit has generally refused all requests by the news media to use cameras and other recording devices in the courtroom (other than for ceremonial purposes). The U.S. Supreme Court has taken a similarly dim view of televising proceedings in that court, and there is no indication that this view will change anytime soon. The Court has, however, taken steps to make oral argument transcripts available the same day as the argument on the Court's website (*http://www.supremecourt.gov/default.aspx*) and has agreed to allow audio recordings of oral arguments in certain cases to be released soon after the argument.

# Can a judge order you not to publish what you saw or heard about a case?

It is well established that the core purpose of the First Amendment is to prohibit prior restraints upon the dissemination of information by the press. A prior restraint is a governmental restriction on publication before it occurs—including court orders prohibiting the news media from publishing information obtained in court. In creating and debating the First Amendment, the purpose of the framers of the Constitution was simple and direct: to avoid the system of prior restraints on publication practiced in England.[116] In North Carolina, as in many other states, the state constitution also makes clear that the government may not forbid citizens from speaking and publishing.[117] The N.C. Constitution states: "Freedom of speech and of the press are two of the great bulwarks of liberty and, therefore, shall never be restrained, but every person shall be held responsible for their abuse."[118] As recognized by the Fourth Circuit, in the context of publishing what a reporter sees or hears inside or outside of a courtroom, once the "cat is out of the bag," restraints on publication are impermissible.[119] It is simply not possible to unring a bell, or so the saying goes.

Notwithstanding the history and constitutional texts noted above, the prohibition against prior restraints on publication is not absolute. Both the U.S. Supreme Court and the N.C. Supreme Court have held that prior restraints are presumptively unconstitutional and that the party who asks a court to issue such an order bears a very heavy burden of justifying the imposition of such

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[115] *See History of Cameras in the Federal Courts, available at http://www.uscourts.gov/Multimedia/Cameras/history.aspx*.

[116] *See* Near v. Minnesota, 283 U.S. 697, 713-23 (1931).

[117] *See, e.g., In re* Minor, 463 S.E.2d 72 (N.C. 1995).

[118] N.C. CONST. art. I, § 14.

[119] *See In re* Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990).

a restraint.[120] Indeed, the U.S. Supreme Court has never upheld a prior restraint upon speech.[121] Nevertheless, the Supreme Court has indicated that among the very narrow range of situations that might justify a prior restraint on publication are those in which publication would jeopardize a criminal defendant's constitutional right to a fair trial.[122]

The U.S. Supreme Court first addressed the question of whether prior restraints on publication could be used to protect the right of a criminal defendant to a fair trial in *Nebraska Press Association v. Stuart* in 1976.[123] In that case, a state trial judge, in anticipation of a criminal defendant's trial for the highly publicized murders of six people, entered an order that forbade newspapers, broadcasters, national networks and wire services from disseminating accounts of confessions made by the defendant and other information tending to implicate the defendant as the killer. The order was issued at the request of both the state's attorney and the defendant. In granting the order, the trial judge reasoned that the "mass coverage by news media" and the "reasonable likelihood of prejudicial news . . . would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial."[124]

In reversing the state Supreme Court's decision upholding the trial judge, the U.S. Supreme Court held that in order to justify an order forbidding the publication of information regarding a

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[120] *See* Nebraska Press Ass'n, 427 U.S. at 558; State v. Williams, 304 N.C. 394, 443-44 (1981). *See also Near*, 283 U.S. at 716 ("the protection even as to previous restraint is not absolutely unlimited"; hypothesizing "exceptional" cases such as publication of information relating to troop ship locations in time of war).

[121] The restraint imposed on CNN in connection with the drug trafficking trial of former Panamanian dictator Manuel Noriega generated much attention among the media and their advocates. In that case, CNN obtained tapes of telephone conversations between Noriega and his attorney and broadcast them. Noriega moved that CNN be ordered not to broadcast the tapes further. The federal trial judge handling the case granted an order temporarily restraining CNN from broadcasting the tapes until he could hold a hearing on the matter on the grounds that because the tapes concerned potentially privileged conversations between Noriega and his attorneys and because the tapes were not before him he could not perform the three-step analysis required by *Nebraska Press Ass'n v. Stuart. United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990). CNN then reportedly refused to turn over the tapes to the judge for review, continued broadcasting them and appealed unsuccessfully to the 11th Circuit Court of Appeals. *See In re* Cable News Network, Inc., 917 F.2d 1543 (11th Cir.1990). The U.S. Supreme Court refused to review the case. *See* Cable News Network, Inc. v. Noriega, 498 U.S. 976 (1990); s*ee also* United States v. Noriega, 752 F. Supp. 1045 (S.D. Fla.1990). Viewed in proper perspective, the Noriega case involves nothing more than the unremarkable requirement that in order to determine the merits of a particular controversy, a court must be able to make some judgment about the facts at issue. *But see* New York Times Co. v. United States, 403 U.S. 713, 715-17 (Black, J., concurring) (for an eloquent statement of the view that even a moment's delay in considering the contentions of the party seeking imposition of a prior restraint violates the First Amendment). Where a party elects, rightly or wrongly, not to participate in making the facts clear for the court, it may very well find the court reluctant to exercise discretion in its favor.

[122] *See Nebraska Press Ass'n*, 427 U.S. at 565-67; c*f. Florida Star v. BJF*, 491 U.S. 524, 532-33 (1989).

[123] 427 U.S. 539 (1976).

[124] *Id*. at 542.

criminal case, a three-part test must be satisfied:

> 1) The nature and extent of pre-trial publicity must be such that it would necessarily impair the criminal defendant's right to a fair trial;
>
> 2) There must exist no less restrictive alternative measures that would mitigate the effects of such publicity; and
>
> 3) The record must show that the issuance of a court order restraining the media from publishing the information would effectively prevent the harm.

The Supreme Court made clear that it was not fashioning an absolute ban on prior restraints. However, it went on to discuss the particular order and noted that the state court judge had failed to consider alternatives such as postponing the trial, changing the location of the trial and carefully questioning prospective jurors to ferret out persons unable to treat all parties fairly. Moreover, much of the information the judge sought to keep from being published had already been communicated by word of mouth in the tiny community of 850 persons where the crimes occurred.

Prior restraint orders are always of dubious constitutionality because the three-part test set out in *Nebraska Press Association v. Stuart* can almost never be satisfied.[125] Orders silencing the news media are rarely approved on appeal because there are generally alternatives a court can employ to ensure a fair trial and the burden and quality of proof required of a party seeking a prior restraint is very high.[126]

Moreover, in North Carolina, our General Assembly has adopted a law that specifically prohibits the entry of any court order that would prohibit the publication or broadcast of "any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding."[127] This statute provides that if any such order is entered, it may be ignored.[128]

# Can reporters be punished after the fact for their court coverage?

In addition to prohibitions on prior restraints, it is well established that the First Amendment also prohibits subsequent punishment of the press for the publication of accurate information on a matter of public concern that was lawfully obtained.[129] In *Landmark Communications, Inc. v.*

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[125] For instance, in *Schmitt v. The United Methodist Retirement Homes, Inc.*, 95 CVS 04877 (April 11, 1996), Superior Court Judge Narley L. Cashwell vacated an order prohibiting the release of videotapes as a prior restraint.

[126] For observations regarding means by which trial judges can effectively control court proceedings, thus avoiding the need for imposing prior restraints on the media, see *Sheppard v. Maxwell*, 384 U.S. 333, 350-63 (1966).

[127] N.C. GEN. STAT. § 7A-276.1.

[128] *See id.*

[129] *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

*Virginia*,[130] the U.S. Supreme Court held that subsequent criminal punishment can be just as dangerous to the news media's ability to inform the public as prior restraints.[131] Accordingly, in general, journalists cannot be punished after the fact for their court coverage, and any statute that purports to do so is constitutionally suspect.

# Can a judge order trial participants not to talk to reporters?

On occasion courts will issue orders forbidding lawyers, witnesses, jurors and other participants in a case from speaking to the news media. It is well settled that courts possess the power to issue such "gag orders" on trial participants in appropriate circumstances.[132] Nevertheless, such orders are limited by the First Amendment and may be challenged if they are overbroad and not based on specific findings of fact.[133] In every case involving a jury, the members of the jury will be forbidden from speaking to others—including reporters—about the case until it is over. After a case is over, jurors are allowed to speak to lawyers, reporters and others about the case if they so desire.

In 2007, the N.C. Court of Appeals vacated an oral order entered by a trial court in Beaufort County that prohibited the parties in a lawsuit between two public bodies and their attorneys from speaking to the press.[134] The order was not reduced to writing and did not contain the required findings of fact or conclusions of law, and the news media moved to dissolve the order.[135] The Court of Appeals found that the gag order—and the trial court's ill-advised conduct—wholly failed to meet the standards required by law.[136]

A North Carolina trial court has also permitted the news media to intervene to modify a protective order that limited the ability of parties to talk to the news media in a case where one of the parties to the lawsuit was a public agency.[137] On the motion of a newspaper publisher, the court acted to modify the protective order between the parties so that it would not limit the ability

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[130] *See id.*

[131] *See id.* at 841-42; *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 100-06 (1979).

[132] *See* Central South Carolina Chapter, Soc'y of Prof'l Journalists v. Martin, 556 F.2d 706 (4th Cir. 1977); *In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971). *See also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 n.18 (1984); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 601 (1976).

[133] *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-104 (1981); c*f. In re* Knight Publ'g Co., 743 F.2d 231 (4th Cir. 1984).

[134] *See* Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs, 645 S.E.2d 857, 35 Media L. Rep. (BNA) 2018 (N.C. Ct. App. 2007).

[135] *Id.* at 862.

[136] *Id.* at 863.

[137] Goldsmith v. Henderson Cnty. Bd. of Pub. Educ., 32 Media L. Rep. (BNA) 1353 (N.C. Super. Ct. 2003).

of any of the parties or their representatives from discussing the facts of the case with any member of the public or with the news media.[138]

In addition to gag orders entered in particular cases, Rule 3.6 of the Revised Rules of Professional Conduct of the North Carolina State Bar, governing all attorneys, restricts what attorneys and their employees may say to reporters about cases in which they represent a client. These rules represent specific restrictions on the content of lawyers' speech and are generally intended to prohibit interference with the ability of the court to determine facts and dispense justice. The rules are enforced by the North Carolina State Bar, and a lawyer may be disbarred for violating them.[139] Reporters should factor these restrictions into their analysis of lawyers' responses to questions and should not leap to unwarranted conclusions based on their perception of a lawyer as "evading" certain questions.

Although North Carolina's rule regulating lawyers' statements to the news media has not been challenged on First Amendment grounds, a similar rule in Nevada has been. In *Gentile v. State Bar of Nevada*, the U.S. Supreme Court held the Nevada rule was capable of being applied in a constitutional manner but that the rule was unconstitutional as applied to the lawyer in the particular case.[140]

The *Gentile* case involved a criminal defense lawyer who, six months prior to his client's criminal trial, held a press conference to proclaim his client's innocence. The attorney stated his opinion that the actual perpetrator of the crime was a police officer and that the government was attempting to "cover-up" wrongdoing. The attorney's client was later found not guilty.

The Supreme Court's 5-4 decision raises, but does not definitively resolve, the questions presented by the tension between a lawyer's duty as an officer of the court, his or her duty to his or her client and his right to free speech under the First Amendment. For example, the five justices in the majority subscribed to the opinion that restrictions on the speech of a lawyer representing a party in a judicial proceeding are evaluated under a less demanding constitutional standard than prior restraints on speech by the news media or the public. Justice Sandra Day O'Connor, who provided the fifth vote for this position, stated:

> [A] state may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise would be constitutionally protected speech . . . . This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies.[141]

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[138] *Id.*

[139] An excellent analysis and comment on the implications of these ethical rules for criminal defense lawyers is contained in R.W. Smith, *Criminal Defense Counsel And the News Media* (N.C. Bar Raleigh, N.C., Nov. 17, 1990).

[140] 501 U.S. 1030 (1991).

[141] *Id.* at 1082-83 (O'Connor, J., concurring). The standard the majority would apply is a balancing test in which the state's interest in regulating the legal profession is weighed against the attorney's First Amendment right of free speech. Thus in *Gentile,* five justices concluded that the "substantial likelihood of material prejudice" standard contained in the Nevada rule did not necessarily violate the attorney's right to

Accordingly, North Carolina's rule regulating lawyers' statements to the news media is, in most cases, likely constitutional.

# Conclusion

As detailed above, courts in North Carolina are generally open to the public, including the press. The public's right of access is protected by the First Amendment and the N.C. Constitution. However, there are certain instances in which a courtroom may be permissibly closed or court records sealed from public view. If a judge issues a closure order, reporters are encouraged to object and to call their editors and lawyers immediately.

In addition to a right of access to judicial proceedings, the First Amendment also generally prohibits any restriction on the news media from publishing information seen or heard inside a courtroom. Moreover, the First Amendment protects the news media from being punished after the fact for court coverage. Notwithstanding the news media's right to report on court proceedings, on occasion courts will issue orders forbidding lawyers, witnesses, jurors and other participants in a case from speaking to the news media. Such orders are generally permissible unless they are overbroad and not based on specific findings of fact.

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freedom of speech. Four other justices differed and, in an opinion by Justice Anthony Kennedy, contended that "wide-open balancing of interests is not appropriate" where the subject matter of a lawyer's speech is comment "critical of the government and its officials." Justice Kennedy went on to argue that state regulations imposing prior restraints on speech by attorneys in pending cases should be judged by the more demanding standard for prior restraints set forth in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). The question of the legal standard to be applied was actually unnecessary to the Court's holding in *Gentile* because the Court held the rule unconstitutional as applied. The statements made by the justices with respect to the applicable standard for evaluating state regulations on speech by lawyers are thus, technically, dicta. The dicta are, however, instructive because they indicate that the issue is a matter of controversy that remains for future resolution.

End Notes