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Fed. Judges Say They Need Autonomy On Sealing Orders

By **Andrew Strickler**

Law360 (September 26, 2019, 11:07 PM EDT) -- Two federal court leaders testified Thursday on Capitol Hill, defending courts' authority to keep case documents out of the public's view and set restrictive policies on courtroom recordings.

In testimony before a U.S. House Judiciary subcommittee, U.S. District Judges Richard W. Story and Audrey G. Fleissig of the Judicial Conference of the United States made the case that individual judges are in the best position to weigh litigants' interests against public access and judiciary transparency concerns.

Judge Story, of the Northern District of Georgia, said most trial judges are "very circumspect" about agreeing with litigants' requests to seal court records or issue protective orders, despite concerns that such orders can keep the public in the dark on issues of broad societal concern.

"There are so many competing interests to be considered in every case, the best approach is to allow trial judge to have discretion concerning sealing documents," Judge Story said to members of the Subcommittee on Courts, Intellectual Property, and the Internet.

The House hearing was the second of three designed to examine the "21st Century" court system, including ethics rules, accountability and transparency.

It was inspired in part by a Reuters investigation series finding that, over the last two decades, judges sealed evidence relevant to public health and safety in roughly half of the 115 biggest product defect cases consolidated in a multidistrict litigation. The investigation also pointed to judges' decisions to seal materials in opioid-related cases as a factor in keeping lawmakers, regulators and the public in the dark and prolonging the epidemic.

When asked about concerns that sealing orders can cloak information vital to the public, Judge Story acknowledged that some judges lean toward expediency, and don't always provide on the record the required justification for keeping presumptively "public" information filed in court away from the public.

"The truth of the matter is that, under the press of business, when a judge in a busy trial court is presented with a consent order from parties [regarding a discovery protective order], that order may be entered and perhaps not looked at closely," said Judge Story, a member of the Judicial Conference of the United States's Committee on the Judicial Branch.

Another witness, Jodi Schebel of product liability defense firm Bowman and Brooke LLP, backed that expedited approach, saying that protective orders should be used "as a matter of course" to protect corporations' intellectual property and other interests just as they would be used to cloak an individual's sensitive information.

"A party should not lose those rights merely because it is involved in litigation," she said.

Judge Story and Judge Fleissig, of the Eastern District of Missouri, were also pressed by committee members about their views on video and audio recordings, and the federal court's slow pace in making courts more accessible though streaming video and real-time audio.

Currently four federal appellate courts — the Second, Third, Seventh and Ninth Circuits — provide video of some or all appellate arguments. The Second, Fourth, Ninth and D.C. Circuits permit live audio. All such access is prohibited in the trial courts.

Rep. Jerrold Nadler, D-N.Y., chair of the House Judiciary Committee, said that in most federal courts, "real time" access to proceedings is no more available today than it was in the 19th century.

"The ability to stream from any place and from any almost any device has become so pervasive and inexpensive, that this is the immediacy that the public has come to reasonably expect from their government," he said. "The federal judiciary's progress has been slow-paced in this area."

At one point, Nadler asked Judge Fleissig why circuit courts were free to set their own policies regarding video and audio, but that trial courts were not.

Judge Fleissig, a member of the conference's committee on court administration and case management, said judicial leaders were moving toward an overarching policy, even if the process was moving more slowly than many would like.

She also noted that two previous pilot programs conducted to evaluate the effect of cameras in courts came back with "mixed results," and a decision by the Judicial Conference that the disruption outweighed the benefits to the public.

"We believe it is important for each circuit to make its own determination about how it is going to approach this important subject," she said. "They each approach it differently, which permits us over time to see how it has worked in each of the circuits in real life."

In another part of her testimony, Judge Fleissig characterized recent moves for the court's electronic

document system, known as PACER, to be made free as unrealistic and potentially dangerous to the courts.

The court's case and document systems "can never be free because they require $100 million per year just to operate," she said. "That money must come from somewhere. No additional taxpayer appropriations has been proposed. The remaining alternative are to drastically increase the fees for litigants seeking to file cases or slash spending on essential court operations."

--Editing by Emily Kokoll.