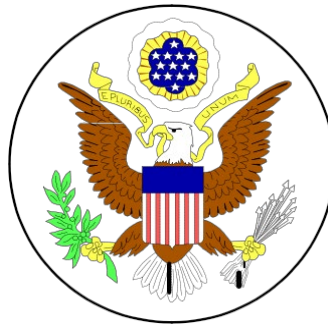


STATEMENT OF
THE HONORABLE RICHARD W. STORY
SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ON BEHALF OF
THE JUDICIAL CONFERENCE
OF THE UNITED STATES



BEFORE THE SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON PUBLIC ACCESS TO JUSTICE

SEPTEMBER 26, 2019

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

Good afternoon, I am Richard W. Story, United States Senior District Judge for the Northern District of Georgia. I am pleased to be here with Judge Fleissig, on behalf of the Judicial Conference of the United States. I currently serve as a member of the Judicial Conference's Committee on the Judicial Branch. The responsibility of the Branch Committee is to address problems affecting the Judiciary as an institution and affecting the status of federal judicial officers.

Thank you for inviting representatives of the Judiciary to testify today on the issue of public access to federal courts. As Judge Fleissig describes in her testimony, the Federal Judiciary has a long history of fostering transparency and accountability in the federal courts and of educating the public regarding the judicial process. With certain very limited exceptions, each step of that process is open to the public: from initial filings, to hearings and trials, to orders and opinions issued by the court, and to parts of the record relied upon by a judge. By conducting our judicial work in public view, public confidence in the courts is enhanced, and citizens learn first-hand how our judicial system works.

You have heard testimony about public access to court proceedings and case files. In addition, every federal court maintains a website with information about judges, local rules and procedures, calendars of events and proceedings, as well as information for jurors, litigants, and the general public. A list of these local court websites is available to the public on the Judiciary's official website at www.uscourts.gov. Let me describe some other ways in which the Federal Judiciary fosters public access to and understanding of the courts.

In many respects, the Federal Judiciary is more open than any other part of government – through jury service. Jurors do not merely observe a governmental function, they directly participate in it. The jury process is a fundamental element of our democratic process and constitutional order, enshrined in Article III of the Constitution and the Sixth and Seventh Amendments. Last year over 195,000 citizens were present for jury selection or orientation in our trial courts. While jury deliberations are not open to the public, the verdict that jurors reach is essential to the resolution of conflicts in our courts and, with few exceptions, are announced in open court. The Constitutional protection of rights and liberties in federal courts is the responsibility of both judge and jury.

Judges' decisions and the explanations for those decisions, are made public, in writing for all to see, free of charge. Appellate opinions and district court opinions are reported and are made available to the public online through court websites, PACER, and the Government Publishing Office's www.govinfo.gov website.

Federal courts hold a wide variety of public events that educate students and members of the public about court operations and our system of justice. Courts hold ceremonies throughout the year where United States citizenship is formally granted, and new Americans are officially welcomed into our citizenry. Many are held on or around September 17 to celebrate Constitution Day and Citizenship Day. These naturalization ceremonies are conducted in courthouses, community landmarks, and national parks, are open to the public, and may be attended by hundreds and sometimes thousands of people. I hope you have had the opportunity to participate in these inspiring ceremonies. I would encourage you to do so.

Throughout the year, federal courts open their doors to provide experiential learning, mark legal milestones, and celebrate heritage months with educational activities and multi-media

resources. Here is just a sampling of events the Federal Judiciary uses to maintain and enhance public understanding of the courts:

Open Doors to Federal Courts – This is a national initiative federal judges use to help the public understand what they do each day, and typically includes realistic simulations of court proceedings. Educators and attorneys work with federal judges in their courtrooms or team up with students in classrooms to apply Supreme Court precedents to fact patterns derived from recent events.

Law Day is celebrated on May 1 and throughout the entire month of May. Courts frequently use this as an opportunity to provide a variety of interactive classroom activities for this celebration.

Anniversary of the Federal Court System – Just two days ago we celebrated the 230th anniversary of a groundbreaking American innovation—the creation of a federal court system, separate from the individual state courts. The Judiciary Act of 1789, one of the first Acts of the First Congress, was signed into law by President George Washington on September 24, 1789.

Bill of Rights Day – This important day is observed on December 15 and throughout the month of December.

Heritage Months – We celebrate diversity and use law-related resources to explore the nation’s legal and cultural heritage such as African American History Month, Women’s History Month, Asian Pacific American Heritage Month, and Hispanic Heritage Month. These important civic events, conducted in courtrooms and in the community, present another great opportunity for enhancing public understanding of the federal courts.

You can learn more about court civic education resources and programs on the judiciary’s internet site at: <https://www.uscourts.gov/about-federal-courts/educational-resources>.

Public Access to Court Proceedings and Records is a Core Value of the Judiciary

As an initial point, I want to emphasize that the right of public access to court proceedings and records is fundamental. The interests of justice, free speech, and democracy depend on the public's awareness of the justice system and how courts serve the community. The Federal Judiciary – each federal court, and every federal judge – takes this public access right seriously, and actively endeavors in each case to ensure that the right is protected. Federal judges adhere to a presumption of openness whereby court proceedings, such as trials and hearings, are open to the public. That same presumption of openness applies to court records, which include the documents that litigants file in a case, as well as the written orders and decisions that judges issue over the course of their cases. Each case filed in federal court is assigned a case file number and entered into the record. Except in limited circumstances, the filed documents are available to any member of the public and can be accessed either at the courthouse or remotely through PACER.

The Public Right of Access is Not Absolute, and Has Tailored Exceptions

There are, however, circumstances when a party requests that a particular document, although filed and made part of the court record, is restricted from public access. As I will explain, this practice— “sealing”—is rooted in common law and ensures, in those circumstances where a compelling reason exists and a party requests, a judge can determine that a court record can be withheld from public disclosure when requested by a party. The tension here is obvious. On one hand, there is the public's interest and certain common law rights to access and inspect court records. But on the other hand, the law recognizes that there are situations where that right must yield to the compelling interest of a party to the case in protecting that information from

public disclosure, such as the protection of personal information, trade secrets, and the names of minors, and to limit adverse publicity that would endanger the ability to hold a fair trial.

For instance, there may be good reason to seal documents in a patent case, where the parties will exchange voluminous and proprietary information regarding their processes and sales. This information, if disclosed, could easily place the parties at a disadvantage with competitors who are not parties to the case. Thus, the information is typically exchanged pursuant to a protective order, and if pertinent to a court filing, may be excerpted (or sealed) in the public court filings. While mindful of the public's right of access to the courts, judges must balance that right against the litigants' right to a fair forum. A litigant should not have to jeopardize its competitive position in the marketplace in order to adjudicate a patent suit. If the case goes to trial, the judge will be able to determine what information from the discovery is in fact relevant, and the relevant information will routinely be disclosed in the public court proceeding.

The federal court system operates as a decentralized entity. Each federal court, while subject to federal rules of procedure and statutes, also has the ability and authority to create its own local rules. Beyond that, each judge has a certain level of discretion when hearing an individual case. This allows judges to take a tailored approach to each case they hear - taking into account the particular facts and circumstances with which they are presented. This is important. Every case is unique and must be treated accordingly.

Sealing is a tool used by judges when a party states that a need for confidentiality exists. A judge has the discretion to weigh the party's request for confidentiality against the public's right of access. On occasion, however, there are good reasons for courts to grant a litigant's request to keep parts of some proceedings confidential. Sometimes, refusing to protect confidential interests of a party may thwart settlement and prolong litigation, thus increasing

costs of the parties, and perhaps, affecting the recovery of the plaintiff. Ultimately, the appellate process provides an integral check on judges' decisions to seal material in cases, ensuring that district judges consider and articulate why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the restriction on access is no broader than necessary. Let me begin, now, by making an important distinction between sealing and protective orders.

Protective Orders Under Federal Rule of Civil Procedure 26(c) Represent a Distinct, But Important, Case Management Tool

Though the two are often conflated, a very important distinction exists between orders to seal court records and “protective orders” entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26. The starting point for every civil case is the “complaint”—which is the document where a plaintiff sets forth the facts and legal claims for relief and identifies the individuals or entities, i.e., the defendants, against whom those claims are asserted. In most cases, each defendant will file an “answer,” wherein the defendant responds to the allegations in the complaint and sets forth any defenses to the plaintiff’s claims. These documents, known as the “initial pleadings,” are filed with the court and made part of the public record of the case. The parties then exchange information and documents about the allegations and defenses in the case through a process called “discovery.” It is important to remember that the primary mission of the Judicial branch is to provide a fair and efficient forum for the resolution of real controversies between both public and private parties.

The information the parties exchange during discovery is not filed with the court at this preliminary stage of the litigation -and for good reason. To foster the truth-seeking process, the rules, by design, permit broad discovery information. Thus, the discovery is often voluminous.

The parties exchange information that might be privileged and might not prove relevant to their case and information that may not ever be used in any court filing or court proceeding. To encourage the exchange of information, it is not uncommon for a district court to find “good cause” to enter a protective order that limits the use or disclosure of materials and documents obtained in discovery. Federal Rule of Civil Procedure 26(c) allows a court to issue a protective order “for good cause... to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” These protective orders prevent a party from disclosing information obtained through discovery for any purpose other than the litigation. This generally helps move the litigation forward to a merits-based resolution without getting mired down in discovery disputes, since the parties have assurance that the materials they exchange with each other will not go beyond each other unless they wind up being utilized in the litigation. Ultimately, the more private nature of discovery practice helps parties expeditiously and efficiently obtain materials from opposing parties and winnow down the overall scope of issues and facts, without having to engage in the time consuming and expensive review that would be required if everything that passed between them would be opened up to the world. Likewise, parties sometimes enter into private confidential settlements that are never filed or presented to the court. In those instances when the blessing of the court is not required for settlement, the court has no control over the public’s access to information.

Over the years the Judicial Conference and its Standing Committee on Rules of Practice and Procedure have administered and updated the procedural rule, as needed, through their extensive rule-making processes. They have, however, consistently found that Rule 26(c) protective orders allow for the effective and fair administration of civil case discovery.

Sealing is an Important Case Management Tool at the Adjudicative Stage

In contrast to protective orders (or nondisclosure) during discovery, sealing during the adjudicative stage of a case is not governed by the Federal Rules of Civil Procedure. The line between the discovery stage and the adjudicative stage is crossed when the parties file documents with the court. Once the adjudicative stage is reached, whether a court record should be sealed is determined by the presiding judge upon request by a party. When a request for sealing is made, the judge weighs the need for confidentiality against the public's interest and right of access to court proceedings and records.

The burden of overcoming the public's right of access to court proceedings and records is placed on the party that seeks to seal them. The burden is a heavy one – only the most compelling reasons justify the non-disclosure of court records. A judge that grants a request to seal court records must set forth specific findings and conclusions that justify nondisclosure to the public—even if there is no objection to the motion to seal. The judge must specifically address: why the interests in support of nondisclosure are compelling; why the interests supporting access are outweighed in that instance; and why the restriction to access itself is no broader than necessary. In other words, even where a party can show a compelling reason why certain documents or portions of documents should be sealed, the seal itself must be narrowly tailored to serve that reason.

Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.

Even when a document is sealed, courts continue to take the public's right of access into account. The specific requirements of binding case law vary somewhat from one district or

circuit to the next. Based on a review of cases, courts generally look to these following principles when sealing a record (or closing a proceeding):

- 1) Absent authorization by statute or rule, permission to seal may be given by a judicial officer. A clerk's office may not seal a record on its own, and the parties, even if in agreement, cannot create a seal.
- 2) Motions to seal are publicly docketed in a typical case. This provides notice to the public, the media, and interested parties who can intervene and be heard on the matter;
- 3) Courts routinely permit non-parties to intervene for the purpose of challenging the motions;
- 4) There must generally be a public record of courts' decisions to seal. This public record should include what is sealed and why, consistent with the reason for sealing;
- 5) Sealing is to be no more extensive than necessary. Courts are careful to seal only the portions of the record that require sealing;
- 6) The record needs to be complete and accurate in order to facilitate appellate review, including what is sealed and why;
- 7) The record is to be unsealed when the need for sealing expires.

Judges Exercise Their Sealing Authority in a Relatively Small Number of Cases

I want to emphasize that sealing court filings is the exception, not the rule, in civil litigation. The vast majority of court records are open and readily available to the public. In fact, in most cases, a motion to seal is never filed. And even in those cases where one is filed, it is not always granted. Rather, judges throughout the Federal Judiciary are acutely aware of their responsibility and duty to protect the public's access to all aspects of judicial proceedings—

including access to court records—and approach motions to seal with the public’s interest in mind. And when a motion to seal is filed, judges have a responsibility to scrutinize carefully and dutifully the request and adhere to the appropriate legal standards to reach a decision that the judge believes is justified by the facts and circumstances presented in the case. Bearing these standards in mind, it is judges who should determine how best to manage the sealing practices in their courtrooms. They are uniquely positioned to make such decision based on the facts of that particular case, governing case law, and a district’s local rules and practices.

Non-Parties May Intervene

Additionally, non-parties may intervene in litigation to argue to a presiding judge for the disclosure or against the sealing of particular documents in a case.

Sealing Constitutes a Key Component of Judges’ Discretionary Authority over Complex Litigation and Discovery Processes

Today’s environment of voluminous electronic discovery reinforces the need to maintain broad judicial discretion for evaluating and granting motions to seal and protective orders. The current Rules of Civil Procedure regarding protective orders give judges discretion over discovery disputes between the parties, while allowing them to focus on the Judiciary’s primary responsibility of ensuring a fair and impartial adjudicatory process. Considerations surrounding parties’ sealing requests during the adjudicative stage vary, as they must, from one case to the next and maintaining judicial discretion is paramount. Discretionary authority in these areas ensures that judges can weigh parties’ constitutionally-protected rights to privacy and confidentiality with the public’s interests in disclosure and access. A district’s local rules also

lend a degree of consistency in courts' sealing practices and serve as an important check against the possibility of improper standards being applied to a court's sealing analysis.

Decisions to Seal are Appealable

A judge's decision to seal is subject to appeal. Some courts of appeals have determined that they have jurisdiction to hear interlocutory appeals of trial court decisions to seal, to not seal, or to unseal judicial records. Other courts of appeals review district court sealing orders by mandamus. Appellate courts have emphasized that when entering orders that inhibit the flow of information between courts and the public, district courts must articulate, on the record, their reasons for doing so or face reversal of their sealing orders. The strength and thoroughness of the appellate process ensures that there are reviews of and checks on district court orders to seal. Third-party intervention and local rules help ensure that, even before an appeal is filed, courts' sealing decisions are not made in a vacuum.

Ultimately, sealing practices must be flexible enough to allow each individual judge to manage his or her case in a way that adequately reflects the particular facts of the case, to satisfy the requirements of applicable case law, and to comport with standards of local practice. The Federal Judicial Center (FJC), which serves to research ways to improve judicial administration and to educate the federal judicial branch, has already published manuals concerning the sealing of documents – both pursuant to protective orders and at the adjudicative stage. As individual judges, we will always seek opportunities to increase our awareness of the legal and operational issues surrounding public access, and seek to develop and apply best practices on how to approach the restrictions we apply.

Conclusion

Thank you for the opportunity to present a few thoughts on this issue. Let me close where I began. The Federal Judiciary – each federal court and every federal judge – takes the public’s interest and rights to access seriously, and actively endeavors in each case to ensure that the public’s interest and rights are protected. The exercise of judicial power requires judges to balance the public’s interest and rights to access against countervailing and compelling interests for protecting information from public disclosure. I am happy to continue that conversation with you and answer questions from the Committee.