The New York Times

September 1, 2009

SIDEBAR

Shrinking Newsrooms Wage Fewer Battles for Public Access to Courtrooms

By ADAM LIPTAK

WASHINGTON

You don't see newspapers fighting to open court proceedings the way they used to, and people are starting to notice.

"The days of powerful newspapers with ample legal budgets appear to be numbered," a public defender in Georgia, Gerard Kleinrock, wrote in a recent Supreme Court brief. "Will underfunded bloggers be able to carry the financial burdens of opening our courtrooms?"

The brief concerned the case of Eric Presley, a Georgia man convicted of cocaine trafficking. The judge closed the courtroom during jury selection in Mr. Presley's case, on the theory that it was too small to accommodate both potential jurors and the public. Citing the public's lack of access to the jury selection, Mr. Presley appealed, and the Supreme Court will soon consider whether to hear his case.

Thanks to The Press-Enterprise, a newspaper in Riverside, Calif., the press and the public have nearly an absolute constitutional right to attend jury selection in criminal cases. In the 1980s, the paper fought ferociously to establish that principle, taking two access cases to the Supreme Court.

News organizations used to consider those kinds of lawsuits a matter of civic responsibility.

"For the last four decades, maybe longer, citizens have been able to rely on small, medium and large news organizations, mostly newspapers, to fight their access battles on their behalf," said Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press, which has filed a supporting brief in Mr. Presley's case.

These days, she said, "the access litigations have dried up."

It is notable, for instance, that the American Civil Liberties Union and other civil rights groups have taken the leading role in trying to shake loose information about the Bush administration's policies and actions, while news organizations have largely sat on the sidelines.

There are exceptions, of course. Jane E. Kirtley, who teaches media ethics and law at the University of Minnesota, singled out The Associated Press for its efforts. In general, though, she said, "we've shifted our emphasis from principle to survival."

Companies that still have ample resources do not always share a journalistic commitment to open government.

Consider the aftermath of a recent settlement in a lawsuit against Amtrak. After the railroad lost a $24 million jury verdict and while its appeal was pending, it agreed to pay an undisclosed sum to the plaintiffs, two trespassing teenagers who suffered severe electric burns after climbing onto a parked train.

As part of the settlement, the parties asked Judge Lawrence F. Stengel of Federal District Court in Philadelphia not only to vacate eight of his decisions in the case but also to "direct LexisNexis and Westlaw to remove the decisions" from "their respective legal research services/databases."

The judge agreed, and the database companies complied.

"In the infrequent event that we are ordered by the court to remove a decision from Westlaw," explained John Shaughnessy, a spokesman for the service, which is owned by Thomson Reuters, "we will comply with the order, deleting the text of the decision but keeping the title of the case and its docket number. We also publish the court's order to remove so there's a clear record of the action."

A LexisNexis spokeswoman said more or less the same thing.

Kathleen A. Bergin, who teaches at South Texas College of Law, said she found the companies' actions perplexing. "These are public acts issued by public officials," she said of the decisions, "and the public has an interest in them."

She added that the companies had a choice in the matter and made the wrong one. Judge Stengel, she said, was without power under the First Amendment to force the companies to comply with his request.

Professor Bergin and other bloggers have posted the decisions Judge Stengel sought to hide.

In Mr. Presley's case, the Georgia Supreme Court found nothing wrong with Judge Linda Warren Hunter's decision to close jury selection. Indeed, the court blamed Mr. Presley for not suggesting an alternative, saying that dreaming up other options — like, say, calling in prospective jurors in shifts — was not Judge Hunter's job.

The courts are split on whether judges must consider alternatives to closing the courtroom that are not presented to them. But a seasoned press lawyer, had one been present, would certainly have reeled off a bunch of obvious ones.

For her part, Judge Hunter, of DeKalb County Superior Court in Decatur, indicated that the First Amendment had no role to play in her decision. "It's up to the individual judge to decide, you know, what's comfortable and what's not comfortable and security," Judge Hunter said, explaining her reasoning from the bench.

Chief Justice Leah Ward Sears dissented from the decision of the Georgia Supreme Court.

"A room that is so small that it cannot accommodate the public," Chief Justice Sears wrote, "is a room that is too small to accommodate a constitutional criminal trial."

Under the majority's reasoning, she continued, conducting jury selection behind closed doors is permissible "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators."

The Press-Enterprise, the California paper that fought so hard to make sure jury selection is public, is in rough shape these days. It is "so strapped that it's quit distributing free copies of the paper to staff members in the city room," said Mel Opotowsky, a former managing editor of the paper and a founder of the California First Amendment Coalition.

But Mr. Opotowsky added with pride that the paper continues to fight for open courts. Alonzo Wickers IV, a lawyer for the paper at Davis Wright Tremaine, confirmed that.

"We've probably handled six access matters for them in the past 18 months," Mr. Wickers said. "The Press-Enterprise sees its role as not just reporting news but keeping the powers that be in check."