Can a judge remove case records before a trial?

Rules govern the closure of records

In late March, a reporter called me to question a situation where a criminal jury trial was about to start in a case where the defendant had a past history of criminal convictions that were documented in Case.net. The reporter discovered that, in an effort to prevent the potential jury panel from doing some "freelance" research on the case it was about to hear, the judge had removed all of the cases, past and present, regarding this defendant from Case.net.

I did a little research about this situation and discovered that, apparently, this is a common practice among judges in the state when criminal jury trials are scheduled. That caught me totally by surprise.

First, I went to the Supreme Court's operating rules regarding operation of the courts. In Operating Rule 4.24, the Court has dictated certain records are considered "confidential," inaccessible to the public (either as a paper file or on Case.net). The list of what is closed is long, and it includes some obvious matters such as mental health records, victim impact statements in cases of sexually violent predators, juvenile court records, grand jury proceedings, paternity cases, and various other records of cases where confidentiality of some matters related to the defendant is a right under Missouri statutes.

Under this Rule, juror questionnaires are closed to all but the parties and then are totally closed after the trial. Search warrant applications, until the warrant is returned or expires, are also closed under this Rule (This is the basis for the provision in Missouri that search warrant returns are open records - one blessing of being a reporter in this state).

But, of course, there's one giant hole in this rule, large enough to suck into it any case filed in the State of Missouri. It also closes any other record closed by order of a court of record for "good cause shown." Who decides what constitutes "good cause" in these matters? The judge listens to the party moving to close the file and must determine if that is "good cause."

I argued one of these cases for a party seeking to unseal a court record a couple of years ago and I researched that issue. What I found was there must be a compelling government interest which justified this closure. One such interest, I suppose, would be ensuring the wheels of justice continue to operate smoothly and fairly to all coming before the court system. That must be balanced, of course, against the aforesaid compelling interest in the integrity and impartiality of the system.

When cases are sealed, the court is supposed to state the reasons for sealing the record in its order, citing specific findings and reasons for rejecting alternatives for closure. The point of this drawn-out process for closure is, as stated in a Missouri Supreme Court case, "It is simply beyond dispute that public records are freely accessible to ensure confidence in the impartiality and fairness of the judicial system, and generally to discourage bias and corruption in public service."

But this raises two questions in connection with the closure of Case.net records I mentioned at the start of this article. First, when both sides of a case come in and ask the court to close a file, who is there to represent the public interest in openness? Who makes those arguments before the court? I suppose the answer is, theoretically, the judge makes those arguments herself or himself in making this determination. That hardly seems like a sound idea when a judge is getting only one side of the argument.

I remember distinctly when I made my argument to open the closed file, the judge moved rather hastily to suggest to the two parties in the case that the file would be opened unless compelling arguments for closure were made. In my opinion, one should not have to hire a lawyer in order to get that kind of attention in a closed matter. I think this is a compelling example why missing the component of an advocate for openness in such matters can be so deadly.

Finally, let me circle back around to our initial discussion about criminal cases. I know attempting to argue that closure in criminal trials is bad will likely be a difficult argument to win. Judges are very focused on protecting the right to a fair trial at any cost. We struggle enough to get access for cameras to the courtroom and we are still treading carefully when we cover trials with Twitter or blogs. Judges understand newspaper deadlines. Immediate coverage via social media is an area where we must tread carefully. Given this, it will be difficult to convince a judge that closing Case.net records before a jury trial is ill-advised.

However, it is important for the court to remember that such drastic measures should be limited. If they aren’t doing a court order to close the file on Case.net, they should be. If they do close the file, there needs to be provisions to re-open the records on Case.net at the earliest possible moment in order to protect the public interest in transparency in the court system.