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FILE NUMBER_____

December 19, 2007

Janette M. Bloom, Clerk
Supreme Court Clerk's Office
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701

Re: ADKT 410: Proposed District Court Rule Amending the Nevada Rules of Civil Procedure by Commission to Review the Preservation, Access and Sealing of Court Records.

Dear Ms. Bloom:

The Rubber Manufacturers Association (RMA) for more than 85 years has been the national trade association of the finished elastomer products industry in the United States. Its members include companies that manufacture various elastomer products, including tires, hoses, belts, seals, molded and extruded goods, and other finished elastomer products.

The formulae, products, designs and the other statutorily defined information which constitutes proprietary or "trade secret" information is the lifeblood of the RMA members of this 120,000 employee/$21 billion annual sales industry.

Preservation of the privacy of such information is especially important in the present highly competitive global economy where even an "old" secret purchased at great intellectual and monetary expense over many years retains present economic value from not being known to the public or competitors. For that reason, on behalf of its members, we respectfully provide the following comments, express our concerns and urge further refinement of this proposed draft rule to regulate preservation, access and sealing of court records.

These comments, concerns and suggested refinements are based upon the analysis and collective experience of the members and the undersigned on behalf of those members. They are submitted in writing with the requisite eight copies pursuant to the Court's order of November 28, 2007.

07-28441

It is perhaps appropriate to begin with minor phraseology changes or additions which will clarify the intended meaning of the draft rule. Suggested changes or the language subject to the comment appears in italics.

At the outset, in the published draft at § 1(a), the second sentence appears to have a duplication of words or typographical error:

> This rule applies to all court records in civil cases, regardless of the physical form of the court record, *the method of the record*, the method of recording the court record, or the method of storage of the court record.

Second, some slight definitional clarifications will support a clearer rule less susceptible to abuse.

The Proposed Rule at § 2(a) provides that

> "Court file" means all the pleadings, orders, exhibits, discovery filed with the court, and all other papers filed with the clerk of the court under a single or consolidated case number(s).

Adding one word will eliminate the danger of both inadvertent disclosure and waiver (a danger recognized by, e.g., the Amendments to Fed.R.Civ.Proc. 26) and intentional acts of misconduct by a purposeful mis-filing:

> "Court file" means all the pleadings, orders, exhibits, discovery *properly* filed with the court, and all other papers filed with the clerk of the court under a single or consolidated case number(s).

Third, to better tie the definitions together and confirm the intent of the rule, the Proposed Rule at § 2(b) should be modified to read as follows:

> (b) "Court record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court *in a court file* in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, ~~degree~~ *decree*, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. "Court record" does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda,

drafts, or other working papers; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered in connection with a judicial proceeding, *nor does it include documents or information provided to the court for inspection or in camera review unless made a part of the court record by order.*

The first suggested change supports the language of the second sentence of § 2(b) while the second suggested change clarifies the rule applicable where the trial court's action or requested action requires actual inspection or review of documents or information. Without this clarification, trial courts could not perform in camera review of information or documents for a discovery motion (for example) without requiring the party with the documents or information to make the information part of the court record even before any ruling that the information must be produced in the action. [Quotation marks are also added around the second reference to "Court record" to be consistent with the first; and the apparent typographical error "degree" is changed to the intended "decree".]

Section 3(b) of the proposed rule establishes an unfortunate and probably unintended semantic dichotomy. The language of the listed "privacy and safety" factors that may "be weighed against the public interest" suggests that the listed "privacy and safety factors" (as well as other unlisted factors) do *not* include public interest components where the intent is clearly the opposite: there *is* a public interest in access to court records and there *is* a public interest in the preservation of the privacy, proprietary, and intellectual property rights exemplified by the listed factors. One obvious example is the privileged trade secret and proprietary rights strongly recognized by the Legislature in the evidentiary privilege found at NRS 49.325 and the expansive definition of "trade secret" found at NRS 600A.030(5) whose protection is mandated at NRS 600A.070 and further provided for in NRCP Rule 26(c)(7). This recognition is even more important today because the competitive global economy includes foreign players whose legal systems lack America's trade secret protections leaving them with obvious incentives to take advantage of information made public and thereby avoid their own intellectual and monetary expense by seizing the fruits of that expenditure by others.

The rule should squarely recognize that the illustrative factors identified in § 3(b)(1) through § 3(b)(8) are themselves public interest factors and that our

new rule should not be interpreted to dilute the legal protections already afforded proprietary and trade secret information.

Changing factor (b)(7) slightly would also further this intent:

> (7) The sealing or redaction is necessary to protect intellectual *proprietary* or property interests ~~and/or~~ *such as* trade secrets pursuant to relevant provisions of NRS Chapter 600A; or

A further matter of concern is the limitation that sealing or redaction not have the purpose or effect of concealing a "public hazard". § 3(c). The Proposed Rule contains no definition of "public hazard" and supports the fear that an isolated injurious result could lead to wholesale production of proprietary or trade secret material: e.g., disclosure of a pharmaceutical formula or process where one adverse reaction has occurred.

Two words added to § 3(d) are necessary to address the circumstances where the time and expense of redaction from voluminous documents would be an unreasonable alternative:

> (d) Limitation. A court record shall not be sealed under this section when redaction will adequately *and reasonably* resolve the issues before the court pursuant to subsection (b) above.

The proposed rule in § 4(b) raises another thorny issue: the rule apparently would grant standing to any "third party" who otherwise has no interest in the controversy before the court to challenge any sealing or redacting of confidential and legally protected material. Generally, of course, our law requires an actual justiciable and existing controversy between parties whose interests are adverse *and* that the parties seeking relief have a legal interest in the controversy. See, e.g., *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443 (1986).

Under this "third party" language, the likely appearance of a new breed of the "vexatious litigant" recognized by the Court in *Jordan v. State, DMV*, 121 Nev. 44, 110 P.3d 30 (2005) seems ordained. The language should be altered to clarify that any challenge may be brought only by one who possesses a legally recognized interest.

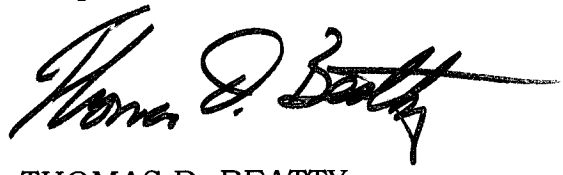
The proposed rule poses further practical issues and burdens which should be recognized and, where possible, ameliorated by change.

First, the proposed rule will obviously necessitate one further motion being filed (although perhaps without a hearing) in virtually all products liability cases at least.

Second, the proposed rule in § 5 for retention of jurisdiction has the result of extending into the indefinite future – theoretically, forever – a producing party's need and burden to respond to any third party request. Thus, years after a matter has been resolved, the former litigant would be required to respond and appear for hearing. This seems especially onerous, particularly where provision is made in § 4(c) for circumstances where the affected producing party may not even receive actual notice and the protected material becomes public by default.

We hope that the Court will consider these comments, concerns and suggestions for clarification and we would be pleased to offer further elaboration, assistance or to respond to any request for further information.

Respectfully submitted,



THOMAS D. BEATTY
on behalf of RMA

TDB/ls

Courtesy copy: The Honorable Brent Adams, District Court Judge, Chairman, Commission on Access, Preservation and Sealing of Court Records

The Honorable James Hardesty, Justice, Commission Liaison

The Honorable A. William Maupin, Chief Justice

cc: Laurie T. Baulig, Sr. Vice President and General Counsel, RMA