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Reply to: Reno

December 17, 2007

FILED

VIA HAND DELIVERY

DEC 19 2007

Nevada Supreme Court Clerk's Office
Attn: Comments Pursuant to Court Order dated 11/28/2007
201 South Carson Street
Carson City, NV 89701

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

ADKT 410

Re: Comments on Proposed Rule Change Pertaining to Sealing and Redacting of Civil Cases

Dear Chief Justice Maupin and Members of the Nevada Supreme Court:

This letter is in response to this Court's Order dated November 28, 2007 seeking comments to the proposed rule change submitted by the Commission on Access, Preservation and Sealing of Court Records. As a starting point, I would like to applaud and commend the Commission for their hard work and efforts in drafting and recommending the proposed rule. I believe that the new rule will help to ensure openness in our courts to the general public, which is vital to our judicial system. The rule will also help to streamline and provide consistency across the State of Nevada for the sealing and redacting of civil cases in the district courts.

With that being said, I submit the following comments and suggestions for consideration. The current proposed rule does not address whether or not there will be retroactive application to pending civil cases in the district courts which were "sealed" prior to the enactment of the proposed rule. I submit that the proposed rule should either be amended to include retroactive application to these previously sealed and pending cases or your order adopting these rules should provide for retroactive application to pending cases. As the Nevada Supreme Court is aware, the impetus for the formation of the Commission on Access, Preservation and Sealing of Court records was the revelation that over one hundred (100) cases had been sealed, particularly in Clark County, since the year 2000. Several of these cases were "super sealed" – meaning that there was no information relating to these cases available to the public. For example, these cases do not appear on the district court docket sheets, websites or calendaring sheets. If the proposed rule is not amended to provide for retroactive application, the very cases that provided the catalyst for the creation of the Commission and the proposed rule will be completely immune from its application.

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Any amendment/order for retroactive application should require the district courts to reconsider the prior sealing orders entered in those cases in light of the requirements contained in the new rule. If, after reconsideration, the district court determines that the previously entered sealing orders should continue, the district court should be required to enter an order, consistent with Section 3(b) of the proposed rule, which requires the district court to make specific findings that explain why sealing or redacting is justified in the case. Amending the rule to require this retroactive application will ensure that these cases are on par with sealed cases filed after the enactment of the proposed rule.

I also submit that the proposed rule should be amended to include a provision which would require any case that was previously "super sealed" be "unsealed" to the extent necessary to bring the sealing order into compliance with the "sealing" parameters provided under the proposed rule. Thus, these cases should be brought out of the shadows and unsealed to require that certain basic information regarding the litigation be placed on the docket sheets of the district courts, such as the names of the litigants, the basis for the sealing order and who requested that the case be sealed. See Proposed Rule § 3(g).

I also urge that the section of the rule regarding requests to unseal litigation be clarified. Under the current language, a district court may refuse to "unseal" a previously sealed case if "other grounds provide a sufficient legal or factual basis for continuation of the court's order to seal." See Proposed Rule § 4(b). I submit that this language is too broad and could be more specifically defined. For example, under the current language, someone may argue that a previous stipulation between the parties to seal a case could constitute a "sufficient legal or factual basis for continuation of the court's sealing order." This is so in spite of the fact that the parties' agreement to seal is expressly rejected as a "compelling reasons" required for obtaining a sealing order in the first instance. See Proposed Rule § 3(b).

Therefore, this section should be amended to require the opposing party to the unsealing request or motion to meet the same standard required in order to obtain a sealing order. Thus, this provision should incorporate or reference the same "compelling reasons" provided in Section 3(b)(1)-(8) of the proposed rule for obtaining an initial sealing order. Moreover, the unsealing section should be amended to specify those circumstances which are "not" sufficient to continue a sealing order – such as the parties prior agreement to seal the case or mere inconvenience to the district court or the parties.



*Chief Justice Maupin and
Members of the Nevada Supreme Court
December 17, 2007
Page 3*

I respectfully request that the Nevada Supreme Court consider the proposed amendments that I have outlined herein. Should the members of the Court or the Commission have any questions or concerns regarding these comments and suggested amendments, please contact me directly.

Sincerely,


Pat Lundvall

PL/edm