

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 NEW HORIZON KIDS QUEST III,
4 INC., a Minnesota corporation;
5 DOES 1 through 10, inclusive; and
6 ROE CORPORATIONS 1 through
 20 inclusive,

7 vs.

8 EIGHTH JUDICIAL DISTRICT
9 COURT OF THE STATE OF
10 NEVADA IN AND FOR THE
11 COUNTY OF CLARK; THE
 HONORABLE SUSAN SCANN,
 DISTRICT JUDGE,

12 and

13 ISABELLA GODOY, a Minor, by
14 and through her mother,
15 VERONICA JAIME,

16 Respondents.

Supreme Court Case No. 69920

 Electronically Filed
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A-14-707949-C Tracie K. Lindeman
 Clerk of Supreme Court

17 **RESPONDENTS, ISABELLA GODOY, a Minor, by and through her mother,**
18 **VERONICA JAIME'S ANSWERING BRIEF**

19 **KRAVITZ, SCHNITZER,**
20 **& JOHNSON, CHTD.**

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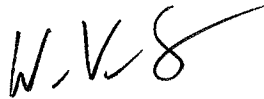
NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Respondent Isabella Godoy, a Minor, by and through her mother, Veronica Jaime have been represented throughout this litigation by the law firm of Kravitz, Schnitzer & Johnson, Chtd.

DATED this 13th day of May, 2016.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.



MARTIN J. KRAVITZ, ESQ.

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*Isabella Godoy, a Minor, by and through her
mother, Veronica Jaime*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. STATEMENT OF ISSUES PRESENTED**

4 Whether District Court manifestly abused its discretion in ruling that
5 disqualification of Plaintiff's counsel, Jordan P. Schnitzer, Esq., was not
6 warranted pursuant to Nevada Rules of Professional Conduct ("RPC") Rule 1.9.
7

8 **II. STATEMENT OF THE CASE**

9 **A. The Present Litigation**

10
11 This case arises from a minor-child on minor-child sexual assault, resulting
12 from inadequate staffing and supervision, at Petitioner's ("Kid's Quest") facility.
13 Kid's Quest has a history of prior sexual and physical assaults at this particular
14 location, as well as its other national locations. The case was initiated by Kravitz,
15 Schnitzer and Johnson ("KSJ"), through its managing partner, Martin Kravitz
16 ("Mr. Kravitz"). [Petitioner's Appendix ("PA") at APP 199].
17
18

19 Upon accepting the case, Mr. Kravitz performed a search, both through
20 court pleadings and the internet, to determine whether prior similar incidents had
21 occurred at Kid's Quest's facilities. *Id.* Mr. Kravitz found two recent claims of
22 prior minor-child on minor-child sexual assaults that had resulted in litigation. *Id.*
23 One occurred in Las Vegas and the other in Minnesota. *Id.*
24

25 In an attempt to obtain more information and facts about the prior similar
26 incidents, Mr. Kravitz contacted the attorneys for the respective Plaintiffs. *Id.* Mr.
27
28

1 Kravitz found that neither attorney from the prior cases could produce any
2 information or documentation due to a confidentiality agreement forced upon
3 them by Kid's Quest. *Id.* As a result, Real Party In Interest ("Plaintiff") sought
4 the previously conducted discovery from the prior two incidents. *Id.*
5

6
7 Furthermore, Mr. Kravitz's investigation revealed that the law firm of Hall,
8 Jaffe and Clayton ("HJC") defended Kid's Quest in prior litigation filed in Clark
9 County, *Blue v. New Horizon Kids Quest* ("Blue"). *Id.* Mr. Kravitz was aware one
10 of KSJ's attorneys, Jordan Schnitzer, Esq. ("Mr. Schnitzer"), was previously
11 employed with HJC. [PA at APP 200]. Mr. Kravitz asked Mr. Schnitzer whether
12 he ever worked on the case. *Id.* Mr. Schnitzer had not. *Id.* Mr. Kravitz inquired into
13 whether Mr. Schnitzer had gained any confidential or privileged information
14 regarding Kid's Quest while associated with HJC. *Id.* Mr. Schnitzer had not. *Id.*
15 On the contrary, Mr. Schnitzer had absolutely no knowledge about the *Blue* case.
16 *Id.* Accordingly, Mr. Kravitz determined it was permissible for Mr. Schnitzer to
17 work the present litigation, and no further screening was necessary. *Id.*
18

19
20
21 Mr. Schnitzer has worked on the present case, but Mr. Kravitz is the lead
22 attorney. *Id.* Mr. Schnitzer has billed less than half of the total hours spent on the
23 case. *Id.* Mr. Schnitzer has never provided any confidential information regarding
24 Defendant. *Id.* Mr. Schnitzer has never provided any information regarding
25 Defendant that he did not obtain through the course of litigation this case. *Id.*
26
27
28

1 Mr. Schnitzer was an associate during his association with HJC. [PA. at
2 APP 202]. He was assigned a list of cases which he handled under the supervision
3 of an HJC partner, which was Steve Jaffe, Esq. (“Mr. Jaffe”), the large majority of
4 the time. *Id.* Mr. Schnitzer was not assigned the *Blue* litigation as one of his
5 “assigned” cases. *Id.* Mr. Schnitzer did not perform any work in the *Blue* case.
6

7
8 The court pleadings of the *Blue* case demonstrate Michael Hall, Esq. (“Mr.
9 Hall), was the HJC partner who worked the *Blue* case. [PA at APP 199]. Mr.
10 Schnitzer contacted Mr. Hall after Kid’s Quest filed its Motion to Disqualify to
11 confirm Mr. Schnitzer’s involvement, or lack thereof, in the *Blue* case. [PA at
12 APP 202]. Mr. Hall confirmed that Mr. Schnitzer was not involved whatsoever in
13 defending Kid’s Quest in the *Blue* matter while at HJC. *Id.* Mr. Hall also
14 confirmed Mr. Schnitzer was never in contact with Kid’s Quest nor would Mr.
15 Schnitzer have obtained any confidential information. *Id.*
16
17

18
19 Additionally, Mr. Schnitzer does not recall sharing an assistant with Jill
20 Northway, Esq. (“Ms. Northway”), an attorney at HJC during Mr. Schnitzer’s
21 association therewith. *Id.* Mr. Schnitzer contacted Ms. Northway who likewise has
22 no recollection of ever sharing an assistant with Mr. Schnitzer. *Id.* In fact, Ms.
23 Northway expressed her belief that she and Mr. Schnitzer never shared an
24 assistant because she and Mr. Schnitzer were located on opposite sides of the HJC
25 office. *Id.*
26
27
28

[illegible]

On December 20, 2015, after the Parties had engaged in extensive discovery, Kid's Quest filed a Motion to Disqualify Plaintiff's Attorneys. [PA at APP 24-188]. On January 19, 2016, Plaintiff filed her Opposition to Defendant's Motion to Disqualify Plaintiffs' Counsel. [PA. at APP 189-225]. On January 25, 2016, Kid's Quest filed its Reply to Plaintiffs' Opposition to Motion to Disqualify Plaintiffs' Attorneys. [PA. at APP 226-267]. On January 26, 2016, Plaintiff filed her Supplement to Plaintiffs' Opposition to Defendant's Motion to Disqualify Plaintiffs' Counsel. [PA at APP 268-272].

¹ “A district court presented with a disqualification motion based on a former representation should (1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation.” *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007)(citing *Waid v. Eighth Judicial Dist. Court*, 119 P.3d 1219, 1223, 121 Nev. 605, 610, (2005)).

1 matter and the *Blue* case were “substantially related”. [PA at APP 276]. In
2
3 applying the three-part test, District Court found that Kid’s Quest did not satisfy
4 its burden in establishing the second prong, i.e. that it was reasonable to infer that
5 the confidential information allegedly given would have been given to a lawyer
6 representing a client in those matters. [PA at APP 277-78]. The transcript of the
7 District Court’s analysis reads as follows:
8

9
10 THE COURT: Well, that’s the substantial relationship.
11 Let’s see. And also under Yellow Cab, you have to
12 evaluate whether it is reasonable to infer—

13
14 MS. GALATI: Right.

15
16 THE COURT: -- that the confidential information would
17 have been given to a lawyer representing his client in
18 those matters and determine whether the information is
19 relevant. So it’s number two –

20
21 MS. GALATI: They’re exactly the same case, Your
22 Honor. The only thing that changes in the minor
23 perpetrator and the minor plaintiff. That’s the only thing
24 that’s different.

25
26 THE COURT: Okay, but that’s not the thing that I’m –
27 that’s not where I’m going. I’m saying evaluate whether
28 it’s reasonable to infer that the confidential information
allegedly given – and we don’t have any alleged
confidential information – would have been given to a
lawyer representing his client in those matters.

29 *Id.* (emphasis added).

1 The District Court then analyzed the issue pursuant to the Nevada Rules of
2 Professional Conduct Rule 1.9(b). [PA at APP 290]. The transcript states in
3 pertinent part:
4

5 MS. GALATI: Your Honor, whether Mr. Schnitzer
6 represented the defendant or not is not the issue. We're
7 not talking about a rule that says he represented them. I
8 never said that. Not a single piece of paper we ever filed
9 said that. So just because Mr. Hall says he didn't
10 represent him is not the issue before you. It's not the
11 issue at all; number one.

12 THE COURT: What about 1.9(b)(2)? "About whom the
13 lawyer had acquired information protected by Rules 1.6
14 and 1.9(c)."

15 MS. GALATI: Right. You have to –

16 THE COURT: So he hasn't.

17 MS. GALATI: You have to reflect back on what the law
18 says regarding the issue. The whole point –

19 THE COURT: Well, where does it say in either – where
20 does it say that there's a presumption?

21 MS. GALATI: Your Honor, the whole point of this rule –

22 THE COURT: You haven't answered my question.

23 MS. GALATI: Okay.

24 THE COURT: Point me to the specific language.

25 MS. GALATI: All right. The Restatement that I cited in
26 our brief says that where you're dealing with litigation it
27 involves a presumption. The *Waid* case –
28

1 THE COURT: Okay, that's the Restatement. I want to
2 know about the Nevada cases.

3 MS. GALATI: Okay. The Waid case that I've already
4 read deals with the substantially related matters and it
5 talks about the court not being allowed to inquire into
6 whether the lawyer actually acquired confidential
7 information. That's at page 610.

8 THE COURT: Well, in that case the lawyer represented
9 the party.

10 MS. GALATI: Right. But that doesn't mean that the
11 principal doesn't –

12 THE COURT: So that's not the same.

13 MS. GALATI: Okay. But it doesn't mean that the
14 principle doesn't apply. The principle is you can't ask
15 about whether there was confidential information
16 acquired because it essentially guts the rule and
17 essentially guts the privilege in the relationship.

18 THE COURT: Well, it says –

19 MS. GALATI: How can we protect the privilege in the
20 relationship if we're going to require a party to reveal
21 confidences?

22 THE COURT: But the rule says about whom the lawyer
23 had acquired information protected by the rules.

24 MS. GALAT: Right.

25 THE COURT: So we have no information that that
26 happened.

27 [PA at APP 290-291](emphasis added).
28

1 The District Court took Kid's Quest's Motion to Disqualify under
2
3 submission. [PA at APP 296]. On February 8, 2016, District Court denied the
4 Motion. [PA. at APP 298]. The District Court's written Order reads in pertinent
5 part:
6

7 5. RPC 1.9(a) does not apply in this case because Mr.
8 Schnitzer never represented Defendant in any capacity.

9 6. RPC 1.9(b) applies in this case, where the "firm with
10 which [Mr. Schnitzer] was associated had previously
11 represented [Defendant]."

12 ...

13 8. The fact that Mr. Schnitzer had no role in the Blue
14 case and never obtained any confidential information
15 ends this Court's inquiry.

16 ...

17 11. The cases cited by Kids Quest in support of their
18 position are distinguishable

19 12. In *Waid*, it was undisputed the attorney at issue had
20 represented the moving party in a prior litigation. *Waid*
21 *v. Eighth Judicial Dist. Court*, 121 Nev. 605, 608, 119
22 P.3d, 1221 (2005). The exact opposite is true here. It is
23 undisputed that Mr. Schnitzer never represented
24 Defendant.

25 13. In *Ryan's Express*, it was also undisputed that the
26 attorney at issue obtained confidential information. *Ryan's Express Transp. Servs. V. Amador Stage Lines,*
27 *Inc.*, 279 P.3d 166, 168 (Nev. 2012).

28 14. *Nev. Yellow Cab. Corp.* involved a case where the
attorney at issued had actually defended the party seeking
disqualification. *Nev. Yellow Cab Corp., v. Eighth*
Judicial Dist. Court of Nev. 123 Nev. 44, 46, 152 P.3d
737 738 (2007). Mr. Schnitzer never defended the
Defendant in this case.

1
2 15. Coles involved a case where the attorney did not
3 dispute that she “gained disadvantageous confidential
4 information” while employed at her prior firm. *Coles v.*
5 *Ariz. Charlie’s*, 992 F.Supp. 1214, 1216 (D. Nev. 1998).
6 Here, it is undisputed Mr. Schnitzer never gained any
7 confidential information.

8 16. Therefore, there is no conflict because Mr. Schnitzer
9 never represented Kids Quest and did not obtain any
10 confidential information about Kids Quest.

11 [Respondent Appendix (“RA”) at RA 7-8].

12 **III. STATEMENT OF LAW**

13 “A Writ of Mandamus is available to compel the performance of an act that
14 the law requires as a duty resulting from an office, trust, or station or to control an
15 arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second*
16 *Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* N.R.S.
17 34.160. As such, “[m]andamus is an extraordinary remedy which will not lie to
18 control discretionary action, unless discretion is manifestly abused or is exercised
19 arbitrarily or capriciously.” *Mineral County v. State Dep’t of Conservation and*
20 *Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (citations omitted).

21
22 Arbitrary and capricious means “willful and unreasoning action, without
23 consideration and in disregard of facts or circumstances...but where there is room for
24
25
26
27
28

1 two opinions and action is exercised honestly and upon due consideration, the action
2
3 is not arbitrary and capricious.” *Herman v. State of Wash. Shorelines Hearings B.D.*,
4
5 204 P.3d 928, 934-35 (Wash. Ct. App. 2009) (citations omitted). Mandamus is an
6
7 extraordinary remedy, and whether a petition will be considered is within the Nevada
8
9 Supreme Court’s sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674,
677, 818 P.2d 849, 851 (1991).

10
11 Further, “a writ of mandamus is proper only when there is no plain, adequate
12
13 and speedy legal remedy... [t]he right to appeal is generally an adequate legal
14
15 remedy that precludes writ relief.” *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222,
224, 99 P.3d 840, 841 (2004).; *see also* N.R.S. 34.170. The party petitioning for a
16
17 writ of mandamus bears the burden to demonstrate the Nevada Supreme Court’s
18
19 intervention, by way of extraordinary relief, is warranted. *See We the People Nev. v.*
20
21 *Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008); *see also Pan*, 120 Nev. at
228, 99 P.3d at 844.

22 23 **IV. ARGUMENT**

24
25 This Court should deny the Petition because the District Court properly
26
27 found no basis to disqualify Mr. Schnitzer pursuant to both the legal framework
28
provided in *Waid* and *Nev. Yellow Cab Corp.* and the Nevada Rules of

1 Professional Conduct as they are now formulated.²

2
3 Kid's Quest asserts that the District Court abused its discretion in denying
4 its Motion to Disqualify because it found the *Waid* and *Nev. Yellow Cab Corp.* are
5 no longer authoritative after the enactment of the RPC. However, the District
6 Court held *Waid* and *Nev. Yellow Cab Corp.* were factually distinguishable and
7 the legal framework contained therein inapplicable to its analysis. Accordingly,
8 the viability of the law contained in the two aforementioned cases was not
9 authoritative to the District Court's ruling, and the issue is moot.
10
11

12 If this Court is inclined to examine the viability of *Waid* and *Nev. Yellow*
13 *Cab Corp.*, the holdings of those are obsolete and the present matter should be
14 analyzed pursuant to the newer RPC. Furthermore, the District Court properly
15 applied the law and appropriately found disqualification of Mr. Schnitzer to be
16 unwarranted because he is not in possession of any confidential information
17 related to Kid's Quest.
18
19

20 Alternatively, even if this Court somehow finds *Waid* and *Nev. Yellow Cab*
21 *Corp.* are still authoritative, the District Court properly applied the law of these
22 cases in holding that disqualification of Mr. Schnitzer is inappropriate because the
23 present case and *Blue* case are not substantially related. Accordingly, Kid's Quest
24
25

26 ² The Nevada Rules of Professional Conduct are relatively new, having
27 replaced the older Nevada Supreme Court Rules dealing with Professional
28 Conduct.

1 cannot prove District Court abused its discretion in Denying Kid's Quest's Motion
2
3 to Disqualify and this Court should deny the Petition.

4 **A. This Court Should Not Consider The Viability Of *Waid* or *Yellow Cab***
5 ***Corp.* Because The Issue is Moot**

6 In considering a writ petition, this Court gives deference to a district court's
7
8 factual determinations but reviews questions of law de novo. *Aspen Fin. Servs. v.*
9 *Eighth Judicial Dist. Court of State*, 313 P.3d 875, 878 (2013) (citing *Gonski v.*
10 *Second Judicial Dist. Court*, 126 Nev. , , 245 P.3d 1164, 1168 (2010)).
11 Construction of a statute is a question of law subject to de novo review. *Id* (citing
12 *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006)). If a statute is clear
13 and unambiguous, the Court is to apply its plain meaning. *Id*.

14
15 Kid's Quest asserts that the District Court manifestly abused its discretion
16
17 by ignoring and/or indicating *Waid* and *Yellow Cab Corp.* "do not apply to this
18
19 matter because they relate to the prior rules of professional conduct and this case
20
21 deals with RPC 1.9 and RPC 1.10." See Petition at 18. It is unnecessary for this
22
23 Court to determine the viability of *Waid* or *Yellow Cab Corp.*, because the District
24
25 Court never held them invalid. [RA at RA 8].

26 The District Court found all cases cited by Kid's Quest, including *Waid* and
27
28 *Yellow Cab Corp.* were factually distinguishable because all of the cases involved
situations where an attorney actually possessed confidential information of the
former client. [RA at RA 8]. The District Court found Mr. Schnitzer had not

1 represented and did not obtain confidential information of Kid's Quest. *Id.*

2
3 Therefore, neither *Waid* nor *Yellow Cab Corp.* were controlling. *Id.* Specifically,
4 the District Court, held, *inter alia*:

5 11. The cases cited by Kids Quest in support of their
6 position are distinguishable

7 12. In *Waid*, it was undisputed the attorney at issue had
8 represented the moving party in a prior litigation. *Waid*
9 *v. Eighth Judicial Dist. Court*, 121 Nev. 605, 608, 119
10 P.3d, 1221 (2005). The exact opposite is true here. It is
11 undisputed that Mr. Schnitzer never represented
Defendant.

12 13. In *Ryan's Express*, it was also undisputed that the
13 attorney at issue obtained confidential information.
14 *Ryan's Express Transp. Servs. V. Amador Stage Lines,*
15 *Inc.*, 279 P.3d 166, 168 (Nev. 2012).

16 14. Nev. *Yellow Cab. Corp.* involved a case where the
17 attorney at issued had actually defendant the party
18 seeking disqualification. *Nev. Yellow Cab Corp., v.*
19 *Eighth Judicial Dist. Court of Nev.* 123 Nev. 44, 46, 152
20 P.3d 737 738 (2007). Mr. Schnitzer never defended the
21 Defendant in this case.

22 15. *Coles* involved a case where the attorney did not
23 dispute that she "gained disadvantageous confidential
24 information" while employed at her prior firm. *Coles v.*
25 *Ariz. Charlie's*, 992 F.Supp. 1214, 1216 (D. Nev. 1998).
26 Here, it is undisputed Mr. Schnitzer never gained any
27 confidential information.

28 16. Therefore, there is no conflict because Mr. Schnitzer
never represented Kids Quest and did not obtain any
confidential information about Kids Quest.

Id.

1
2 This Court must give deference to those factual findings by the District
3 Court. *Aspen Fin. Servs.*, 313 P.3d at 878. The District Court's finding that *Waid*
4 and *Yellow Cab Corp.* are factually distinguishable to the present case did not
5 hinge upon the viability of each case after the enactment of RPC 1.9 and 1.10.
6 Consequently, the issue Kid's Quest raises is moot. *Bisch v. Las Vegas Metro.*
7 *Police Dep't*, 302 P.3d 1108, 1113 (2013) ("a moot case is one which seeks to
8 determine an abstract question which does not rest upon existing facts or rights.").
9 Accordingly, this Court need not address the issue of the viability of *Waid* or
10 *Yellow Cab Corp.* after the enactment of the RPC. Therefore, the Petition should
11 be denied.
12

13
14
15 **B. Attorney Disqualification Is Now Governed By The Nevada Rules Of**
16 **Professional Conduct**

17 In considering a writ petition, this Court gives deference to a district court's
18 factual determinations but reviews questions of law de novo. *Aspen Fin. Servs. v.*
19 *Eighth Judicial Dist. Court of State*, 313 P.3d 875, 878 (2013) (citing *Gonski v.*
20 *Second Judicial Dist. Court*, 126 Nev. , , 245 P.3d 1164, 1168 (2010)).
21 Construction of a statute is a question of law subject to de novo review. *Id* (citing
22 *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006)). If a statute is clear
23 and unambiguous, the Court is to apply its plain meaning. *Id.*
24
25
26

27 If this Court is inclined to examine the issue, *Waid and Nev. Yellow Cab*
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1 Corp. are no longer viable after the adoption of the RPC.

2
3 i. *The Nevada Rules of Professional Conduct Repealed And Replaced*
4 *Supreme Court Rule 159 And 160*

5 The Order of this Court, dated February 6, 2006 (ADKT 370), repealed
6 Nevada Supreme Court Rules 150 through 203.5 and adopted the RPC (Effective
7 May 1, 2006); *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882, 885
8 (2014). Accordingly, conflicts of interests arising from former representation are
9 governed by RPC 1.9., and imputed conflicts of interests are governed by RPC
10 1.10. *Id.*

11
12 Kid's Quest asserts that "*Waid and Nev. Yellow Cab Corp.* are still good
13 law, and the district court abused its discretion by failing to both consider and
14 apply the law of disqualification established therein." Petition at 19. Specifically,
15 Kid's Quest asserts it was an abuse of discretion for the District Court to conduct
16 a factual inquiry of whether Mr. Schnitzer acquired confidential information
17 pursuant to RPC 1.9(b). *Id.* at 22-23. Kids Quest assertsas such an inquiry is
18 prohibited under *Waid. Id.*

19
20 This argument is without merit. *Waid and Nev. Yellow Cab Corp.* analyzed
21 attorney disqualification pursuant to Nevada SCR 159 and 160. As set forth
22 above, effective May 1, 2006, the RPC repealed and replaced SCR 159 and 160.
23 Mr. Schnitzer's involvement in this case occurred after the adoption of the RPC.
24
25 *State v. Eighth Judicial District Court of the State*, 321 P.3d at 885. Thus, Kid's
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1 Quest is asking this Court to analyze this matter under obsolete rule which is
2 prohibited by Nevada law. *Starr v. Rousselet*, 110 Nev. 706, 712, 877 P.2d 525,
3 529 (1994)(noting a case that analyzed and interpreted a statute that had
4 subsequently been repealed and replaced had no application to the Court's
5 analysis of its successor).

6
7 Furthermore, RPC 1.9(b) requires the court to conduct a factual inquiry as
8 to whether the attorney subject to disqualification actually possesses confidential
9 information. RPC 1.9(b) Comment 5 on ABA Model Rule 1.9, which is identical
10 to RPC 1.9, states:

11
12 [5] Paragraph (b) operates to disqualify the lawyer only
13 when the lawyer involved has actual knowledge of
14 information protected by Rules 1.6 and 19.9(c). Thus, if
15 a lawyer while with one firm acquired no knowledge
16 or information relating to a particular client of the
17 firm, and that lawyer later joined another firm,
18 neither the lawyer individually nor the second firm is
19 disqualified from representing the client in the same
20 or a related matter even though the interests of the
21 two clients conflict.

22 [RA at RA 11-12]. (emphasis added).³

23 The State Bar of Nevada Standing Committee on Ethics and Professional
24 Responsibility issued Formal Opinion No. 39 on April 24, 2008, which echoes

25
26 ³ *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 413, 2014 ("An official
27 comment written by the drafters of a statute and available to a legislature before the
28 statute is enacted has considerable weight as an aid to statutory construction.")

1 Comment 5 of ABA Model Rule 1.9. [PA at APP 219-226]. The Standing
2
3 Committee on Ethics noted:

4 If the laterally moving lawyer had no role in the case at
5 the former firm, and did not otherwise acquire
6 confidential information material to the matter, the
7 moving lawyer is not personally disqualified from
8 representing Client B while in the new firm, Red &
Green.

9 [PA at APP 220].

10 The same opinion emphasized this point a second time:

11 [S]uppose the laterally moving lawyer had no direct role
12 in case A v. B while the lawyer was with former firm,
13 White & Brown – but did possess confidential
14 information from the former firm so as to be personally
15 disqualified under 1.9(b)- - and then moves to Red &
16 Green, which represents Client B in the same or related
17 case. In that situation, the lawyer's new firm, Red &
Green if the personally disqualified lawyer is ethically
screened from the case.

18 **Finally, if the lawyer changing firms had neither a**
19 **role in the A v. B, nor the possession of confidential**
20 **information about the case, then neither screening**
21 **nor client consent is required for the lawyer and the**
new firm to represent the opposite party in the case.

22 [PA at APP 224](emphasis added).

23 Thus, in order for Rule 1.9(b) to apply and mandate disqualification, the
24 attorney in question must actually possess confidential information or knowledge,
25 which necessitates a factual inquiry from the court.
26

27 Defendant asserts Rule 1.9(b) does not permit a fact finding inquiry because
28

1 it is the derivative of SCR 160, which this Court has previously interpreted to
2 prohibit a fact inquiry. Petition at 23-25. As a preliminary matter, the tenants of
3 statutory construct preclude Defendant from referencing the predecessor of Rule
4 1.9(b) because Kids Quest has never asserted its language ambiguous. *Richardson*
5 *Constr., Inc. v. Clark County Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23
6 (2007)(“The construction of a statute should give effect to the Legislature's intent”
7 and “[i]n determining the Legislature's intent, we may look no further than any
8 unambiguous, plain statutory language.”). As such, Kids Quest’s argument should
9 be disregarded.
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12

13 Nevertheless, Kids Quest’s position is simply incorrect. SCR 159 focused
14 on conflicts arising from former representation. *Waid*, 121 Nev. at 609, 119 P.3d
15 at 1222. This Rule was repealed and replaced by RPC 1.9. *Nev. Yellow Cab Corp.*,
16 123 Nev. at 50, 152 P.3d at 741. SCR 160 is the predecessor of RPC 1.10
17 regarding imputed disqualification of firms. *Id*; *Ricks v. Dabney (In re Jane*
18 *Tiffany Living Trust 2001)*, 124 Nev. 74, 80, 177 P.3d 1060, 1064 (2008).
19 Accordingly, Rule 1.9(b) is not a derivative of SCR 160. Rule 1.9(b), and its
20 precursor SCR 159, address distinct situations involving potential disqualification
21 from RPC 1.10 and its precursor, SCR 160. Accordingly, the language of SCR
22 160, and any related case law, is irrelevant to any legal analysis under Rule 1.9(b).
23 As such, Defendant’s argument fails to demonstrate an abuse of discretion by the
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1 District Court.

2
3 ii. *Disqualification of Mr. Schnitzer Is Unwarranted Pursuant to Nevada Rules*
4 *of Professional Conduct Rule 1.9(b)*

5 The District Court has broad discretion in attorney disqualification matters,
6 and this Court will not overturn its decision absent an abuse of that
7 discretion. *Waid*, 121 Nev. at 609, 119 P.3d at 1222. Where the district court has
8 exercised its discretion, a writ of mandamus is available only to control an
9 arbitrary or capricious exercise of discretion. *See Round Hill Gen. Imp. Dist. v.*
10 *Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

12 Attorney "[d]isqualification is an extreme remedy that will not be imposed
13 lightly." *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1256, 148 P.3d
14 694, 701 (2006). Parties should not be allowed to misuse motions for
15 disqualification as instruments of harassment or delay. *Brown v. Eighth Judicial*
16 *Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000).

19 The RPC were modeled after the ABA Model Rules. *State v. Eighth*
20 *Judicial Dist. Court of the State*, 321 P.3d at 885. The ABA Model Rule 1.9 was
21 designed to reflect the reality of modern litigation practice. *Edwards v. 360*
22 *[degrees] Communs.*, 189 F.R.D. 433, 439, 1999 U.S. Dist. LEXIS 16808, *20
23 (D. Nev. 1999)(citing ABA Model Rule 1.9 Comment [4]. As a Nevada District
24 Court noted:
25
26

27 The ABA Model Rules further support the functional
28 analysis approach on the grounds that "it should be

1 recognized that today many lawyers practice in firms,
2 that many lawyers to some degree limit their practice to
3 one field or another, and that many move from one
4 association to another several times in their careers. If
5 the concept of imputation were applied with unqualified
6 rigor, the result would be radical curtailment of the
7 opportunity of lawyers to move from one practice setting
8 to another and of the opportunity of clients to change
9 counsel."

10 *Id.*(emphasis added).

11 RPC 1.9 states in pertinent part:

12 (a) A lawyer who has formerly represented a client in a
13 matter shall not thereafter represent another person in the
14 same or a substantially related matter in which that
15 person's interests are materially adverse to the interests of
16 the former client unless the former client gives informed
17 consent, confirmed in writing.

18 (b) A lawyer shall not knowingly represent a person in
19 the same or a substantially related matter in which a firm
20 with which the lawyer formerly was associated had
21 previously represented a client:

22 (1) Whose interests are materially adverse to that person;
23 and

24 (2) About whom the lawyer had acquired information
25 protected by Rules 1.6 and 1.9(c) that is material to the
26 matter;

27 (3) Unless the former client gives informed consent,
28 confirmed in writing.

29 *Id.*

30 Kids Quest concedes that Mr. Schnitzer never represented Defendant. [PA
31 at APP 290 line 9-14]. As such, it is undisputed this matter does not fall within the
32 purview of Rule 1.9(a).

1 Rule 1.9(b) is the proper framework to analyze this case as “the firm with
2 which [Mr. Schnitzer] was associated had previously represented [Kids Quest].”
3 RPC 1.9(b). Rule 1.9(b) precludes disqualification only if (1) the interests of the
4 former and current clients are adverse and (2) “[a]bout whom the lawyer had
5 acquired information protected by Rules 1.6 and 1.9(c) that is material to the
6 matter...”. *Id.*

7
8 The District Court did not abuse its discretion in finding Kids Quest did not
9 present any evidence to demonstrate Mr. Schnitzer had actual knowledge of
10 confidential information. Indeed Kids Quest had the opportunity and burden to
11 demonstrate Schnitzer acquired confident information or represented the client.
12 *Robbins v. Gillock*, 109 Nev. 1015, 1017-1018, 862 P.2d 1195, 1197 (1993). Kids
13 Quest presented no bills showing Schnitzer’s involvement, nor did it present an
14 affidavit from one of its corporate officers stating that they had ever even spoken
15 to Schnitzer in the *Blue* case. Instead, Kids Quest filed its Motion knowing that he
16 was not involved at all in the *Blue* case. [PA at APP 67-70, 257]. In fact, Kids
17 Quest relied upon the following unsupported “inferences, deductions and rational
18 presumptions” rather than actual facts to support its argument:

19
20
21 (1) HJC, was a small 12-attorney firm, when HJC
22 represented Defendant in Blue.

23
24 (2) While at HJC, Mr. Schnitzer and Ms. Northway
25 (who represented Defendant in Blue) shared the same
26 assistant.
27
28

1
2 (3) Mr. Schnitzer was at HJC when it defendant 2
3 depositions in Blue involving Defendant's employees.

4 (4) Ms. Peterson's (Defendant employee) deposition
5 was taken in Blue when Mr. Schnitzer was at HJC and
6 Plaintiff/Mr. Schnitzer listed Ms. Peterson as a witness in
7 this case.

8 (5) Mr. Schnitzer does not deny he had access to the
9 HJC files.

10 (6) Mr. Schnitzer did not state he did not know or hear
11 about the Blue case.

12 Petition at 28-29.

13 Kids Quest produced no admissible evidence to support any of the
14 aforementioned inferences. Specifically, Kids Quest's first, third, and fourth
15 representations are premised upon an uncredited attorney rating and rankings
16 internet print-off about Mr. Schnitzer and the affidavit of Troy Dunkley. [PA at
17 APP 63-65, 67-70, 78]. The internet print-off of Mr. Schnitzer is inadmissible
18 hearsay and may not be considered by this Court. NRS 51.035. Similarly Mr.
19 Dunkley's affidavit lacks foundation as to the veracity of the statements contained
20 therein and is inadmissible. NRS 50.025

21
22 Kids Quest's second representation is premised upon emails allegedly sent
23 by Crystal Hernandez-Smith which contain a signature block indicating she was
24 the assistant of Mr. Schnitzer and Jill Northway. [PA at APP 250-256]. This
25 "evidence" is inadmissible hearsay and should not be considered by this Court.
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1 NRS 51.035.

2
3 Similarly, Kids Quest's fourth and fifth representations are premised upon
4 Mr. Schnitzer's affidavit and statements that are allegedly missing. [PA at APP
5 202-203]. Specifically, Kids Quest is asserting that since Mr. Schnitzer did not
6 make specific statements, the inverse of those statements must be true. However,
7 Kids Quest has the burden to show Mr. Schnitzer should be disqualified. *Robbins*
8 *v. Gillock*, 109 Nev. at 1015, 1017-1018, 862 P.2d at 1197. As a result, Mr.
9 Schnitzer did not have to make any affirmative statements to defeat the Motion to
10 Disqualify. Regardless, Mr. Schnitzer swore under oath that did not obtain any
11 confidential information. [PA at APP 202]. That ends this Court's inquiry
12 because Kids Quest has no evidence to the contrary. RPC 1.9(b).

13
14
15
16 Regardless, Kids Quest's allegations, even if accepted as true, do not
17 establish Mr. Schnitzer acquired confidential information while associated with
18 HJC. Specifically, there is no admissible evidence (1) Ms. Northway, or her
19 assistant, shared confidential information with Mr. Schnitzer, (2) Mr. Schnitzer
20 prepared for or participated in defending Defendant in the two depositions (3) Mr.
21 Schnitzer prepared Ms. Peterson for her deposition (4) defended Ms. Peterson's
22 deposition; or (5) Mr. Schnitzer accessed or otherwise reviewed the *Blue* file.

23
24 In fact, Mr. Schnitzer's sworn testimony states, among other things, he:

25
26 [Mr. Schnitzer] never worked the case involving
27 Defendant while at Hall, Jaffe and Clayton;
28

1
2 [Mr. Schnitzer] never had discussions regarding
3 Defendant while at Hall, Jaffe and Clayton (“HJC”);
4 [Mr. Schnitzer] never learned any information at all
5 about Defendant while at Hall, Jaffe, and Clayton;

6 [Mr. Schnitzer] contacted [his] former employer, HJC,
7 specifically Michael Hall, Esq... [who] confirmed to
8 [Mr. Schnitzer] that [Mr. Schnitzer] never had anything
9 to do with the case involving Defendant... [and] there
10 were no billing entries for [Mr. Schnitzer] on the case
11 involving Defendant;

12 [Mr. Schnitzer] gained no information whatsoever, let
13 along confidential information, concerning Defendant at
14 HJC;

15 [Mr. Schnitzer] [has] no recollection of sharing an
16 assistant with Ms. Northway; and

17 [Mr. Schnitzer] contacted Ms. Northway and she
18 confirmed she had no recollection of sharing an assistant
19 with [Mr. Schnitzer] [and] she believes [they] never
20 shared an assistant because [their] offices were on
21 opposite sides of the building.

22 [PA at APP 202].

23 As such, not only has Kid’s Quest failed to produce any evidence to
24 demonstrate Mr. Schnitzer is in possession of confidential information of Kid’s
25 Quest, the record demonstrates the exact opposite when coupled with the affidavit
26 of Michael Hall. [PA at APP 257]. Therefore, the District Courts findings cannot
27 be disturbed. *Aspen Fin. Servs.*, 313 P.3d at 878.

28 Kid’s Quest attempts to dodge the lack of evidentiary support of its position

1 and asserts that Mr. Schnitzer's Affidavit is self-serving and unreliable because it
2 contains false information that Mr. Schnitzer swore under penalty of perjury was
3 true. Specifically, Kid's Quest asserts paragraph 7 of Mr. Schnitzer's Affidavit is
4 false. Petition at 29. The statement presented in paragraph 7 of Mr. Schnitzer's
5 Affidavit was Mr. Schnitzer's true understanding of Mr. Hall's communication
6 with Defendant. Subsequently, Mr. Schnitzer became aware that he
7 misunderstood Mr. Hall and filed a supplemental Affidavit clarifying this issue.
8 [PA. at APP 268-272]. As such, this is simply a red-herring from Defendant to
9 distract this Court from the fact that it has not presented evidence to prove Mr.
10 Schnitzer is in possession of Kid's Quest's confidential information as required by
11 Rule 1.9(b)(2).

12 Additionally, Kid's Quest asserts that Mr. Schnitzer's Affidavit lacks
13 corroborating facts. Petition at 29. As previously stated, **it is Kid's Quest's**
14 **burden to prove disqualification of Mr. Schnitzer is appropriate.** *Robbins v.*
15 *Gillock*, 109 Nev. at 1015, 1017-1018, 862 P.2d at 1197. It is not Mr. Schnitzer's
16 burden to present evidence that disqualification is inappropriate. Accordingly, Mr.
17 Schnitzer need not present corroborating facts.

18 Furthermore, Kid's Quest's argument that Mr. Schnitzer's Affidavit lacks
19 corroborating facts is simply untrue. Kid's Quest has presented an affidavit from
20 Michael Hall, Esq. that, among other things, provides (1) Mr. Hall acted as
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1 counsel for Defendant in the Blue case; (2) Mr. Hall represented to Defendant,
2 prior to Defendant filing the Motion to Disqualify, that he was fairly certain that
3 Mr. Schnitzer had not worked at all on the Blue case; and (3) Mr. Hall spoke with
4 Mr. Schnitzer and told Mr. Schnitzer that, to the best of Mr. Hall's recollection,
5 Mr. Schnitzer had done no work on the Blue case. [PA at APP 257]. As such, Mr.
6 Schnitzer's statements regarding his prior involvement, or lack thereof, in the
7 Blue case are corroborated by Kid's Quest's former attorney. Accordingly, Kid's
8 Quest's argument is baseless and does not establish District Court abused its
9 discretion in denying its Motion to Disqualify Mr. Schnitzer.
10

11
12 Simply stated, this Court should analyze the present case is under Rule
13 1.9(b), which permits disqualification only if Kid's Quest proves Mr. Schnitzer
14 acquired confidential information as a result of his association with HJC. RPC
15 1.9(b)(2). Kid's Quest produced no evidence and admittedly relies upon only
16 unsupported "inferences, deductions and rational presumptions." The District
17 Court properly found that Kid's Quest did not satisfy its burden under Rule
18 1.9(2)(b), and therefore, did not abuse its discretion in denying Defendant's
19 Motion to Disqualify.
20

21
22 *iii. Nevada Rules of Professional Conduct Rule 1.9(b) Does Not Recognize A*
23 *"Presumption Of Shared Confidences"*

24
25 Kid's Quest asserts that the District Court abused its discretion by failing to
26 understand and apply the presumption of shared confidences. Petition at 24.
27
28

1 Specifically, Kid's Quest asserts that the District Court, based upon this Court's
2 holding in *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 279 P.3d
3 166 (Nev. 2012), should have presumed Mr. Schnitzer had acquired confidential
4 information because HJC was provided confidential information and it was a
5 small firm.⁴ Petition at 25. Kid's Quest's reliance on *Ryan's Express* is
6 misplaced.

7
8 In *Ryan's Express*, the issue before this Court was the level of screening
9 measures necessary to cure disqualification imputed upon a firm pursuant to RPC
10 1.10. In formulating its opinion, this Court noted "[a] presumption of shared
11 confidence, wherein it is **presumed that an attorney takes with him or her any**
12 **confidences gained in a former relationship and shares them with the firm, is**
13 **imposed by the imputation provisions of RPC 1.10,1.11, and 1.12.**" *Id.* at note
14 2(emphasis added). Thus, a presumption of shared confidences is contingent
15 upon the subject attorney actually gaining confidences as a result of the former
16 representation. Furthermore, the presumption under Rule 1.10 is that the attorney
17 who has gained the confidential information is presumed to share it with the other
18 attorneys within the newly associated firm.

19 Here, there is no presumption of shared confidences for two reasons. First,
20 Kid's Quest has not demonstrated Mr. Schnitzer ever acquired confidential
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28 ⁴ No admissible evidence regarding the size of the firm exists.

1 information of Defendant. Consequently, the condition precedent to the
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3 presumption has not been satisfied and no presumption exists.

4 Second, the presumption, if applicable, would apply to disqualification
5 pursuant only to Rule 1.10. ⁵ *Id.* (“The ethical principles and public policy
6
7 considerations that lead us to impose a presumption of shared confidence and at
8 times **disqualify entire law firms**, however, do not come without a heavy cost.”)
9 (emphasis added). The presumption does not apply in potential disqualification
10 pursuant to Rule 1.9(b). In other words, if Mr. Schnitzer had actually acquired
11 confidential information at HJC, it might be presumed, pursuant to Rule 1.10, he
12 shared that confidential information with the other attorneys at KSJ after his
13 association into that firm. There is no rule set forth in *Ryan’s Express*, and Kid’s
14 Quest presented no legal authority otherwise, that presumes Mr. Hall shared
15 confidential information with Mr. Schnitzer while Mr. Schnitzer was associated
16 with HJC.
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20 On the contrary, the language of Rule 1.9(b)(2) clearly establishes that the
21 subject attorney must be in actual possession of confidential information before
22 disqualification thereunder is proper. RPC 1.9(b)(2); [RA at RA 10-12 infra at].
23 Defendant’s position clearly opposes the plain language of the rule and attempts to
24 substitute actual knowledge for the possibility of knowledge. *Bass-Davis v.*
25
26

27 ⁵ Defendant does not assert Mr. Schnitzer should have been disqualified pursuant
28 to Rule 1.11 or Rule 1.12, and therefore analysis thereunder is unnecessary.

1 *Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006)(“A rebuttable presumption is
2 a rule of law by which the finding of a basic fact gives rise to a presumed fact's
3 existence, unless the presumption is rebutted.”) Not only is Defendant's
4 argument totally unsubstantiated, it completely contradicts Nevada law.
5
6

7 Likewise, Kid's Quest asserts that this Court's holding in *Nev. Yellow Cab*
8 *Corp.* required the District Court to find a presumption of shared confidences and
9 disqualify Mr. Schnitzer. Petition at 25-26. Kid's Quest's reliance upon *Nev.*
10 *Yellow Cab Corp.* is unfounded for multiple reasons. In *Nev. Yellow Cab Corp.*,
11 the issues before this Court were whether the District Court properly found Denise
12 Osmond (“Osmond”), an associate of Vannah Costello Vannah & Ganz
13 (“VCVG”), was disqualified pursuant to SCR 159, and if so, whether the
14 disqualification was imputed upon VCVG pursuant to SCR 160. *Nev. Yellow Cab*
15 *Corp. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. 44, 49, 152 P.3d 737, 740
16 (2007).
17
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20 As set forth above, SCR 159 and SCR 160 are obsolete. The proper
21 framework to analyze disqualification of Mr. Schnitzer is set forth in Rule 1.9(b).
22 As such, the District Court's legal analysis of SCR 159 and 160, as provided in
23 *Nev. Yellow Cab Corp.* is irrelevant to this case. Regardless, Defendant's reliance
24 upon *Nev. Yellow Cab Corp.* is misplaced because this Court never found
25 disqualification of Osmond based upon SCR 159 due to a presumption of shared
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1 confidences. *Id.*

2
3 Specifically, this Court held the District Court did not abuse its discretion in
4 holding disqualification of Osmond was warranted under SCR 159 because, after
5 analyzing the case under the three-prong *Waid* test, it found the two matters were
6 substantially related. *Id.* at 52. More importantly, this Court never found a
7 presumption of shared confidences arose to satisfy any prong of the three-part
8 *Waid* test. Accordingly, *Waid* does not support Defendant's argument that SCR
9 159 permitted a presumption of shared confidences to arise to disqualify the
10 subject attorney.
11
12

13 Furthermore, *Nev. Yellow Cab Corp.* is factually distinguishable from the
14 present case. In *Nev. Yellow Cab Corp.*, this Court noted the District Court found
15 Osmond, among other things, had "participated extensively in [the prior]
16 representation" and "the district court could have reasonably inferred that Osmond
17 obtained confidential information...." *Id.* at 52. In the present case, Kid's Quest
18 concedes Mr. Schnitzer never represented it while he was associated with HJC.
19 [PA at APP 290, line 9-14]. Kid's Quest failed to present a scintilla of evidence
20 Mr. Schnitzer obtained any confidential information. The District Court here
21 found Mr. Schnitzer had no confidential information of Kids Quest.[RA at RA 7].
22
23 As such, *Nev. Yellow Cab Corp.* is factually distinguishable from the present
24 matter, and the District Court did not abuse its discretion in denying Kid's Quest's
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1 Motion to Disqualify.

2
3 **C. Defendant Fails To Demonstrate The District Court Abused Its**
4 **Discretion**

5 Alternatively, even if this Court somehow holds *Nev. Yellow Cab Corp.* and
6 *Waid* are still authoritative subsequent to the enactment of the RPC, the District
7 Court did not abuse its discretion in denying Kid's Quest's Motion to Disqualify.
8
9 As previously mentioned, the aforementioned cases discuss disqualification
10 pursuant to SCR 159. SCR 159 states in pertinent part:

11 Rule 159. Conflict of interest: Former client. A lawyer
12 who has formerly represented a client in a matter shall
13 not thereafter:

- 14 1. Represent another person in the same or a substantially
15 related matter in which that person's interests are
16 materially adverse to the interests of the former client
17 unless the former client consents, preferably in writing,
18 after consultation; or
19 2. Use information relating to the representation to the
20 disadvantage of the former client except as Rule 156
would permit with respect to a client or when the
information has become generally known.(Ea)

21 *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 609, 119 P.3d 1219, 1222
22 (2005)(citing SCR 159).

23
24 It is undisputed that Mr. Schnitzer never represented Kid's Quest. [PA at
25 APP 290, line 9-14]. Even if he did, the burden of proving whether two matters
26 are the same or substantially related falls on the party moving for disqualification
27 and that party must have evidence to buttress the claim that a conflict
28

1 exists. *Robbins v. Gillock*, 109 Nev. at 1015, 1017-1018, 862 P.2d at 1197. To
2
3 determine whether the matters are “substantially related” under *Waid*, the trial
4 court must: (1) make a factual determination concerning the scope of the former
5 representation, (2) evaluate whether it is reasonable to infer that the confidential
6 information allegedly given would have been given to a lawyer representing a
7 client in those matters, and (3) determine whether that information is relevant to
8 the issues raised in the present litigation. *Waid*, 121 Nev. at 610, 119 P.3d at
9 1223; *Nev. Yellow Cab Corp.*, 123 Nev. at 52, 152 P.3d at 742.

12 Here, the District Court applied the three-prong “substantially related” test
13 as set forth in *Waid* and *Yellow Cab Corp.* and found that Kid’s Quest had failed
14 to establish the second prong, i.e. that it is reasonable to infer that confidential
15 information allegedly given would have been given to a lawyer representing a
16 client in those matters. [PA at APP 277-279]. Specifically, District Court found:

19 THE COURT: Well, that’s the substantial relationship.
20 Let’s see. And also under Yellow Cab, you have to
21 evaluate whether it is reasonable to infer—

22 MS. GALATI: Right.

23 THE COURT: -- that the confidential information would
24 have been given to a lawyer representing his client in
25 those matters and determine whether the information is
26 relevant. So it’s number two –

27 MS. GALATI: They’re exactly the same case, Your
28 Honor. The only thing that changes in the minor
perpetrator and the minor plaintiff. That’s the only thing

1 that's different.

2
3 THE COURT: Okay, but that's not the thing that I'm –
4 that's not where I'm going. I'm saying evaluate whether
5 it's reasonable to infer that the confidential information
6 allegedly given – and we don't have any alleged
7 confidential information – would have been given to a
8 lawyer representing his client in those matters.

9 [PA at APP 277-278] (emphasis added).

10 It is clear that the District Court made a finding of fact that the three-prong
11 *Waid* test was not satisfied, and therefore the *Blue* case and the present litigation
12 are not substantially similar pursuant to SCR 159. Kid's Quest presented no
13 evidence Mr. Schnitzer acquired confidential information. In fact, Kid's Quest
14 concedes its Petition is based upon unsupported "inferences, deductions and
15 rational presumptions." Petition at 28-29. In other words, Kids Quest produced no
16 evidence to prove disqualification of Mr. Schnitzer is appropriate under any legal
17 framework. Accordingly, Kid's Quest fails to demonstrate District Court's ruling
18 was arbitrary or capricious, and therefore abused its discretion in denying Kid's
19 Quest's Motion to Disqualify. *Waid v. Eighth Judicial Dist. Court*, 119 P.3d 1219,
20 1222, 121 Nev. 605, 609 (2005).

21 Kid's Quest also asserts that the District Court abused its discretion in not
22 finding the present litigation and the *Blue* case "substantially related," pursuant to
23 the three-prong *Waid* test, because it is presumed confidential information was
24 shared with Mr. Schnitzer. Petition at 20-21. However, the legal authority cited
25 the three-prong *Waid* test, because it is presumed confidential information was
26 shared with Mr. Schnitzer. Petition at 20-21. However, the legal authority cited
27 the three-prong *Waid* test, because it is presumed confidential information was
28 shared with Mr. Schnitzer. Petition at 20-21. However, the legal authority cited

1 by Kid's Quest, *SHFL Entm't, Inc. v. DigiDeal Corp.*, 2013 U.S. Dist. LEXIS
2 6635, *21, 2013 WL 178130 (D. Nev. Jan. 15, 2013) and *Coles v. Arizona*
3 *Charlie's*, 973 F.Supp. 971, 974 (D. Nev. 1997), holds to the contrary.

4
5 The *SHFL Court* held **“[i]f the substantial relationship test is satisfied,**
6
7 there is a rebuttable presumption that the ‘attorney received confidential
8 information during prior representation.” *Id.* at 21 (emphasis added). Similarly,
9 the *Coles Court* found that “[i]n some jurisdictions, **once the substantial**
10 **relationship test is satisfied,** the presumption is rebuttable that the law firm’s
11 former attorney received confidential information during her prior representation.”
12 *Coles*, 973 F.Supp. at 974 (emphasis added).⁶

13
14
15 Even if it is assumed that Nevada law recognizes a rebuttable presumption
16 of shared confidences, both of these cases hold the substantial relationship must
17 first be established by satisfying the three prong *Waid* test. After it has been
18 established the matters are “substantially related,” the rebuttable presumption
19 arises. *Coles*, 973 F.Supp. at 974. However, Kid's Quest is arguing the
20 presumption can be used to satisfy the three-prong *Waid* test. This is the opposite
21 of what the *Coles* and *SHFL Entm't, Inc.* Court held.

22
23
24
25 ⁶ In both of these cases, the moving party presented evidence the attorney
26 subject to disqualification was provided confidential information. *Coles*, 973 F.
27 Supp. at 973 (affidavit declaring the confidential information was disclosed to
28 and shared with all members of the firm); *SHFL Entm't, Inc.*, 2013 U.S. Dist.
LEXIS 6635 at 32 (finding emails, memorandums, and declarations
demonstrated the subject attorney was provided confidential information).

1 Finally, even if Nevada law had a rebuttable presumption of shared
2 confidence, the presumption has been rebutted. The District Court found Mr.
3 Schnitzer had no confidential information. [RA at RA 7]. This Court must give
4 deference to the District Court's findings that clearly rebut any presumption that
5 Kid's Quest argues exists. *Aspen Fin. Servs.*, 313 P.3d at 878. As such, Kid's
6 Quest's argument is entirely unfounded and fails to demonstrate the District Court
7 abused its discretion in denying its Motion to disqualify.
8
9
10

11 **V. RELIEF SOUGHT**

12 Based upon the foregoing, the District Court did not abuse its discretion in
13 an arbitrary or capricious manner by denying Kid's Quest's Motion to Disqualify.
14 As such, this Court should deny the Petition.
15

16 Respectfully submitted this 13th day of May, 2016.

17
18
19 KRAVITZ, SCHNITZER & JOHNSON, CHTD.

20 

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1
2 **CERTIFICATE OF COMPLIANCE**

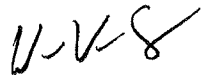
3 STATE OF NEVADA }
4 } ss.
5 COUNTY OF CLARK }

6 I, Wade J. VanSickle, Esq., declare the following under penalty of perjury:

- 7
- 8 1. I hereby certify that this Answering Brief complies with the formatting
9 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)
10 and the type style requirements of NRAP 32(a)(6) because this Answering
11 Brief has been prepared in a proportionally spaced typeface using Microsoft
12 Word 2010 in 14-point Times New Roman font.
13
- 14
- 15 2. I further certify this Answering Brief complies with the page-volume
16 limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP
17 32(a)(7)(C), it contains less than 14,000 words and 1,300 lines. Specifically, this
18 Answer contains 9,077 words commencing from The Statement of Issues
19 Presented.
20
- 21
- 22
- 23 3. Finally, I hereby certify that I have read this Answering Brief, and to the best
24 of my knowledge, information, and belief, it is not frivolous or interposed for
25 any improper purpose. I further certify this Answering Brief complies with all
26
27
28

1 applicable Nevada Rules of Appellate Procedure. I understand that I may be
2
3 subject to sanctions in the event that the accompanying Answering Brief is not
4
5 in conformity with the requirements of the Nevada Rules of Appellate
6 Procedure.

7 DATED this 13th day of May, 2016.
8
9

10 

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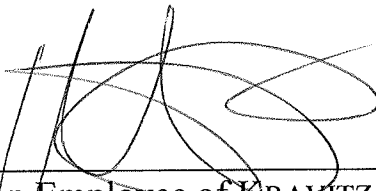
CERTIFICATE OF SERVICE

I CERTIFY that on the 13 day of May, 2016, I filed electronically with the Nevada Supreme Court and served by electronic service the foregoing **RESPONDENTS, ISABELLA GODOY, a Minor, by and through her mother, VERONICA JAIME'S ANSWERING BRIEF** upon all parties listed on the Master Service List, (or, if necessary, by Regular U.S. Mail) to:

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