CASE NO.

IN THE

SUPREME COURT OF NEVADA

HALL PRANGLE & SCHOONVELD, LLC, MICHAEL PRANGLE, ESQ., KENNETH M. WEBSTER, ESQ. AND JOHN F. BEMIS, ESQ.

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, HONORABLE JUDGE RICHARD SCOTTI

Respondent,

-and-

MISTY PETERSON, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JANE DOE

Real Party in Interest

District Court Case No.: A-09-595780-C

PETITION FOR EXTRAORDINARY WRIT RELIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

HALL PRANGLE & SCHOONVELD, LLC, a Nevada Limited Liability Company; MICHAEL E. PRANGLE, ESQ., an individual; KENNETH M. WEBSTER, ESQ., an individual; JOHN F. BEMIS, ESQ., an individual; Petitioners, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, HONORABLE JUDGE RICHARD SCOTTI, Respondent, AND MISTY PETERSON, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JANE DOE, Real Party in Interest.	Supreme Court No. District Court No. A-09-595780 -C **PETITION FOR EXTRAORDINARY WRIT RELIEF**

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Petitioners Hall Prangle & Schoonveld, LLC, Michael E. Prangle, Esq., Kenneth M. Webster, Esq., and John F. Bemis, Esq. (collectively, "Hall Prangle") petition this Court to issue an extraordinary writ of mandamus vacating the District Court's (the Hon. Richard Scotti) findings (*i.e.*, sanctions)

that Hall Prangle twice violated Nevada Rule of Professional Conduct 3.3 (the "Attorney Sanctions"). The Attorney Sanctions are contained within the November 4, 2015 Order Striking Answer of Defendant Valley Health System LLC as Sanction for Discovery Misconduct (the "Sanction Order").[1]

The Attorney Sanctions should be vacated for two reasons. First, the District Court deprived Hall Prangle of due process by not providing sufficient notice that it was considering sanctions for alleged violations of Nevada Rule of Professional Conduct 3.3. Second, even assuming sufficient notice was provided, the District Court manifestly abused its discretion by finding that Hall Prangle ***twice*** violated Nevada Rule of Professional Conduct 3.3, with one of the supposed violations not even occurring before the District Court. This Court has repeatedly confirmed that extraordinary relief in the

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[1] The Sanction Order also contains discovery sanctions against Hall Prangle's clients (the "Party Sanctions"), Valley Health System d/b/a Centennial Hills Hospital Medical Center ("Centennial Hills") and Universal Health Services, Inc. ("UHS") (jointly, "Defendants"). The propriety of the Party Sanctions is the subject of a pending appeal before this Court (Supreme Court No. 70083) (the "Appeal"). Because they relate to the same Order, Hall Prangle and Defendants will seek to consolidate this Writ Petition with the Appeal at the appropriate time.

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form of a writ of mandamus is an appropriate remedy for the review of attorney sanctions. As shown below, that relief is appropriate here.

DATED this 16th day of August, 2016.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN
JOSHUA P. GILMORE

AND

HALL PRANGLE & SCHOONVELD, LLC
MICHAEL E. PRANGLE
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I. NRAP 17 STATEMENT

The Writ Petition does not fall within any of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

II. INTRODUCTION

On August 4, 2015, the District Court issued an Order Setting Evidentiary Hearing (the "Notice"). In the Notice, the District Court informed Hall Prangle and Defendants of the scope and purpose of the Evidentiary Hearing.

> The purpose of the [E]videntiary Hearing shall be to determine[;] (1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses; (2) whether or not that was inten[ded] to thwart the discovery process in this case, and hinder Plaintiff to discover the relevant facts[;] and (3) a failure to let the Court know what was going on in the case and whether the UHS Defendants misled the Court.

The Notice did not specify that the District Court would be considering, via the Evidentiary Hearing, whether Hall Prangle (as opposed to Defendants) committed some form of misconduct. More importantly, the Notice did not indicate that the District Court was considering sanctions for alleged violations of Nevada Rule of Professional Conduct 3.3, or any Rule of Professional

Conduct for that matter. The first time Hall Prangle learned that the District Court was considering such a finding was their receipt of the Sanction Order. As a result, Hall Prangle was deprived of due process with respect to the Attorney Sanctions.

Second, the District Court's findings that Hall Prangle ***twice*** violated Nevada Rule of Professional Conduct 3.3 were a manifest abuse of discretion. The alleged factual misrepresentation? Hall Prangle's argument—on the evidence—that "[t]here were absolutely no known prior acts by Farmer that could potentially put Centennial Hills on notice that Farmer would assault a patient."[2] Hall Prangle's statement, on behalf of Defendants, was an argument and opinion as to what the evidence showed, not a factual misrepresentation to the District Court. As attorneys regularly do, Hall Prangle was weighing the

[2] The second finding of a Rule 3.3 violation related to a Petition for Writ of Mandamus and/or Writ of Prohibition, filed with this Court on April 29, 2015 (Case No. 67886) (the "April 29, 2015 Writ Petition"). The offending statement in the April 29, 2005 Writ Petition? "Specifically, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe." Therefore, not only did the District Court publicly reprimand Hall Prangle for a statement made to this Court (as opposed to the District Court), it found that Hall Prangle violated Rule 3.3 for simply summarizing an argument set forth in the underlying Opposition to a Motion for Summary Judgment.

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evidence and arguing their clients' position that it was not reasonably foreseeable that Steven Farmer would sexually assault a patient. This does not—and cannot—violate Nev. R.P.C. 3.3.

For the foregoing reasons, this Court should issue a writ of mandamus vacating the Attorney Sanctions.

III. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. Summary of the Dispute.

On May 14, 2008, Steven Farmer ("Farmer") sexually assaulted Jane Doe ("Doe") while she was a patient at Centennial Hills. (Petitioners' Appendix ("PA"), Vol. VII, Tab 23, at 1316.) Because Doe did not report the assault, a criminal investigation resulted from Farmer's sexual assault of a different Centennial Hills patient named Roxanne Cagnina ("Cagnina")—a non-party to this action—on May 15-16, 2008. (*Id.*) This particular lawsuit concerns the sexual assault of Doe (Cagnina filed a separate lawsuit), and with respect to Defendants, whether or not they were liable for Farmer's intentional tort.

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B. Underlying Facts.

In 2008, Farmer was assigned to work at Centennial Hills through a staffing agency called American Nursing Services ("ANS"), which had a contract with Centennial Hills to provide hospital staff such as Certified Nursing Assistants. (*Id.*, Vol. VII, Tab 23, at 1315.) Following Cagnina's report of Farmer's assault, the Las Vegas Metropolitan Police Department ("Metro") interviewed and transcribed statements from Centennial Hills nurses Margaret Wolfe ("Wolfe") and Christine Murray ("Murray"). (*Id.* at 1317.)

Centennial Hills conducted an internal investigation regarding the Cagnina incident. (*Id.*) Centennial Hills retained Hall Prangle, members of which met with, among others, Wolfe, Murray, and Centennial Hills nurse Renato Sumera ("Sumera") because each one was involved in Cagnina's treatment. (*Id.* at 1316-17; Vol. VI, Tab 22, at 996.) At that time, Centennial Hills and Hall Prangle were unaware of the incident regarding Doe. (*Id.*, Vol. VII, Tab 23, at 1316-17.) During the investigation, Hall Prangle attempted to obtain Wolfe's and Murray's statements from Metro and the Clark County Public Defender, but, due to a pending criminal proceeding against Farmer, both refused to turn the statements over unless a court order was entered. (*Id.*,

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Vol. VI, Tab 22, at 993, 1170.)

C. Discovery.

Although members of Hall Prangle had interviewed Wolfe, Murray, and Sumera in mid-2008 after the Cagnina incident and listed them in Defendants' initial disclosures in the Cagnina lawsuit, (*id.*, Vol. VIII, Tab 25, at 1507-08), they did not re-interview these nurses after Doe filed her Complaint because those particular nurses were not involved in Doe's treatment. (*Id.*, Vol. VI, Tab 22, at 997.) Further, Wolfe and Murray were not Centennial Hills employees during the pendency of the Doe lawsuit—Murray left Centennial Hills on March 11, 2009, and Wolfe's employment ended on May 7, 2009. (*Id.*, Vol. VIII, Tab 25, at 1504.)

In February of 2013, Hall Prangle (Mr. Bemis in particular) received materials from the Clark County Public Defender's Office ("CCPD"), which included an audio recording of Murray's Metro statement. (*Id.*, Vol. VI, Tab 22, at 1041-42.) Mr. Bemis did not listen to the recording because he did not have speakers on his work computer. (*Id.* at 1093.) The CCPD production did not include the Wolfe Metro statement in audio or written form. (*Id.* at 1092-93.)

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In May of 2013, Hall Prangle received the Metro file regarding the Farmer investigation in the Cagnina lawsuit. (*Id.* at 1024.) The Discovery Commissioner (the Honorable Bonnie A. Bulla) designated the Metro file as confidential, which prohibited its disclosure to anyone outside of the Cagnina lawsuit (which would include Doe and her counsel). (*Id.*, Vol. XIV, Tab 64, at 2798; Vol. VIII, Tab 25, at 1540-1557.) Due to this Protective Order, neither Hall Prangle nor Farmer's counsel supplemented their disclosures (at that time) in this litigation with the contents of the Metro file. (*Id.*, Vol. VI, Tab 22, at 84.)

Hall Prangle produced the Metro file in this litigation in October of 2014 pursuant to an Order by the Discovery Commissioner. (*Id.* at 1062-63.) The Metro file comprised 190 pages, and included an affidavit of the Custodian of Records stating that the file was comprised of a total of 188 pages.[3] (*Id.*, Vol. XVI, Tab 77, at 2994-3185.) Each page was Bates-numbered with an "LVMPD" Bates number. (*Id.*) Although the Metro statement from Murray was included in the file, the Metro statement from

[3] The discrepancy in page count versus the actual number of pages produced is due to two, single-page custodian of records affidavits. The actual number of pages that constitute the underlying file (without these affidavits) is 188.

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Wolfe was not included. (*Id.*) Wolfe's Metro statement was disclosed in this litigation by Doe's counsel in March of 2015. (*Id.*, Vol. VIII, Tab 25, at 1565.)

D. <u>Doe's Motion for Summary Judgment.</u>

On September 29, 2014, Doe filed a Motion for Summary Judgment Regarding Liability (the "Summary Judgment Motion"). (*See generally id.*, Vol. 1, Tab 4, at 22-93.) Doe argued that Defendants were strictly liable for Farmer's assault. (*Id.*) On October 14, 2014, Defendants (through Hall Prangle) opposed the Summary Judgment Motion (the "Summary Judgment Opposition"). (*Id.*, Tab 6, at 99-112.) Relying on NRS 41.475, Defendants argued that strict liability did not apply because "Farmer's actions weren't reasonably foreseeable under the facts and circumstances of the case." (*Id.* at 102-03.)

In conjunction with their foreseeability argument, Defendants (through Hall Prangle) cited and summarized *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005) (a factually similar case), stating that "the Nevada Supreme Court concluded that [] because the assailant had no prior criminal record in the United States or Mexico, and because there w[ere] no prior complaints

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against the assailant for sexual harassment, that it was not reasonably foreseeable that the assailant would sexually assault a Safeway employee." (*Id.* at 107.) Based on *Wood*, Defendants argued that "[i]n the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial Hills on notice that Mr. Farmer would assault a patient." (*Id.*) Defendants further explained their argument, indicating that, *inter alia*, Farmer successfully went through a criminal background check, drug test, and employment background check prior to working at Centennial Hills. (*Id.* at 107-08.)

On February 27, 2015, the District Court denied the Summary Judgment Motion as to Defendants, finding, "[T]here is a genuine issue of material fact with regard to liability, the principal one being whether the misconduct of Farmer was reasonably foreseeable." (*Id.*, Vol. III, Tab 9, at 350.)

E. <u>The April 29, 2015 Writ Petition.</u>

On April 29, 2015, Defendants (through Hall Prangle) filed a Petition for Writ of Mandamus and/or Prohibition with this Court regarding the February 27, 2015 Order. (*See generally id.*, Tab 11, at 363-406.) In order to provide background information for this Court, Defendants summarized the

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arguments presented in the Summary Judgment Motion and the Summary Judgment Opposition. In doing so, the following statement was made: "Specifically, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe." (*Id.* at 386-87.) This Court denied the April 29, 2015 Writ Petition, finding that Defendants' right to an appeal following trial precluded extraordinary intervention. (*Id.*, Tab 14, at 488-89.)

F. <u>The Motion for Sanctions.</u>

On April 29, 2015, Doe filed a Motion for Rule 37 Sanctions related to the nondisclosure of Wolfe, Murray, and Sumera as witnesses as well as the Metro statements, seeking to establish that Farmer's misconduct was reasonably foreseeable to Defendants as a matter of law. (*See generally id.*, Tab 12, at 407-68.) After briefing and oral argument, Commissioner Bulla ruled as follows:

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- That the Metro statements by Murray and Wolfe be admitted at trial without the necessity of establishing foundation, and without any hearsay objections;
- That Centennial Hills and UHS pay $18,000 in monetary sanctions ($9,000.00 to Doe and $9,000.00 to a non-party); and
- That the District Court conduct an evidentiary hearing to address[:] "(1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses[;] (2) whether or not there was intention to thwart discovery in this case, and hinder Plaintiff to discover the relevant facts[;] and (3) a failure to let the Court know what was going on in the case and whether the UHS Defendants misled the Court."

(*Id.*, Vol. IV, Tab 19, at 607-08.) Commissioner Bulla also determined that these sanctions could be reduced if Defendants were able to prove "with a degree of probability" that they had "no knowledge of Sumera or Wolfe until recently." (*Id.* at 609.) The Report and Recommendations (which was drafted by Doe's counsel) did not include any accusations or insinuations that Hall Prangle had violated the Nevada Rules of Professional Conduct. (*Id.* at 605-11.)

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G. The Evidentiary Hearing Notice.

On August 4, 2015, the District Court issued the Notice. (*Id.* at 602-04.) In the Notice, the District Court informed Hall Prangle and Defendants of the scope and purpose of the Evidentiary Hearing.

> The purpose of the [E]videntiary Hearing shall be to determine[;] (1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses; (2) whether or not that was intention to thwart the discovery process in this case, and hinder Plaintiff to discover the relevant facts[;] and (3) a failure to let the Court know what was going on in the case and whether the UHS Defendants misled the Court.

(*Id.* at 603.) Similar to the Report and Recommendations, the Notice did not include any accusations or insinuations that Hall Prangle had violated the Nevada Rules of Professional Conduct. (*Id.* at 602-04.)

H. The Evidentiary Hearing.

On August 28, 2015, the District Court held an evidentiary hearing regarding the potential imposition of additional sanctions against Defendants. (*See generally id.*, Vol. VI-VII, Tab 22, at 949-1308.) During the hearing, members of Hall Prangle (Mr. Prangle and Mr. Bemis, in particular) mistakenly stated that the Metro file that they received in May of 2013

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contained Wolfe's Metro statement. (*Id.*, Tab 22, at 1059-60.) After Doe's counsel pointed out that Defendants' October 2014 disclosure of the Metro file did not include the Wolfe Metro statement, members of Hall Prangle reviewed the original file received from Metro, and clarified that Wolfe's Metro statement was not received in May of 2013. (*Id.* at 1086). Apart from this mistake—which was corrected—there was no evidence presented during the evidentiary hearing indicating that anyone from Hall Prangle received Wolfe's Metro statement in 2013.

During the evidentiary hearing, the District Court indicated that it was troubled by the statement in the Summary Judgment Opposition that "there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient." (*Id.* at 963-64.) Mr. Bemis, when questioned by Doe's counsel about that particular statement, stated that he had made that argument "as an advocate for [his] client" and disagreed with Doe's counsel's accusation that it was a false statement. (*Id.* at 1074-77.)

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I. The Sanction Order.

On November 4, 2015, the District Court issued its Sanction Order. (*See generally id.*, Vol. VII, Tab 23, at 1309-47.) Within the Sanction Order, the District Court made the following findings relevant to this Writ Petition:

> Centennial and its counsel told this Court in October of 2014, a minimum of eighteen (18) months after admitting they had the criminal file with the name and statements that "In the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient." Rule 3.3 of the Nevada Rules of Professional Conduct states "(a) a lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal by the lawyer." ***Centennial's lawyers violated this Rule***.
>
> Centennial incorrectly represented to the Nevada Supreme Court that it had not withheld any relevant evidence. Centennial stated: "there were no known prior acts or any other circumstances that could have put Centennial on notice that Farmer would sexually assault Ms. Doe." ***Again, Centennial's lawyers violated Rule 3.3.***

(*Id.* at 1333-34.) (internal citations omitted) (emphasis added).

J. The Motion for Reconsideration.

On November 19, 2015, Hall Prangle and Defendants filed a Motion for Reconsideration of the Sanction Order. (*See generally id.*, Vol. VIII, Tab 25,

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at 1390-1589). With respect to the Attorney Sanctions (separate arguments were made with respect to the Party Sanctions), Hall Prangle and Defendants argued, *inter alia*, that Hall Prangle had not been provided with sufficient notice that the District Court was considering sanctions under Nevada Rule of Professional Conduct 3.3. (*See generally id.*) Further, Hall Prangle and Defendants argued, *inter alia*, that regardless of the sufficiency of the Notice, Petitioners had not violated Nevada Rule of Professional Conduct 3.3. (*See generally id.*) Following additional briefing and oral argument, the District Court issued an Order on December 10, 2015 denying the Motion for Reconsideration. (*Id.*, Vol. X, Tab 29, at 1839-40.) With respect to the Attorney Sanctions, the District Court downplayed the gravity of its findings of ethical misconduct, stating that "[t]hough the Court addressed instances of professional misconduct in its findings, the sanctions upon Defendant Centennial are for Centennial's own actions." (*Id.* at 1840.)

IV. ISSUES PRESENTED

Did the District Court: (1) err when it issued the Attorney Sanctions without providing prior notice to Hall Prangle that it was considering sanctions for alleged violations of Nevada Rule of Professional Conduct 3.3; and/or (2)

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manifestly abuse its discretion when it found that Hall Prangle's foreseeability argument on behalf of Defendants amounted to knowing false statements of fact to a tribunal (the District Court and this Court), thereby constituting two violations of Nevada Rule of Professional Conduct 3.3.

V. RELIEF REQUESTED

Hall Prangle seeks an extraordinary writ of mandamus vacating the Attorney Sanctions.

VI. TIMING OF THIS PETITION

Extraordinary writ relief must be timely sought by a petitioner. *Widdis v. Dist. Ct.*, 114 Nev. 1224, 1227–28, 968 P.2d 1165, 1167 (1998) (laches did not preclude writ relief where the petition was filed approximately seven months after entry of the underlying order). The Sanction Order, which included the Attorney Sanctions, was filed on November 4, 2015. (PA, Vol. VII, Tab 23, at 1309.) The Order Denying the Motion for Reconsideration was filed on December 11, 2015. (*Id.*, Vol. X, Tab 29, at 1839.) Hall Prangle did not want to prejudice its clients by proceeding with the Writ Petition while the underlying case was still ongoing, so it awaited its resolution. Following a global settlement, the District Court entered an Order for Dismissal With

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Prejudice on February 29, 2016. (*Id.* at 1848.)[4] Because Hall Prangle intends to move to consolidate this Writ Petition with Defendants' pending Appeal, (*supra*, n. 1), it awaited the filing of Defendants' Opening Brief before filing the Writ Petition. Accordingly, Hall Prangle has prepared and filed this Writ Petition in a timely manner.

VII. SUMMARY OF REASONS WHY EXTRAORDINARY RELIEF IS APPROPRIATE

This Court has original jurisdiction to issue writs of mandamus. Nev. Const. Art. 6 § 4; *see also* NRS 34.160 ("The writ [of mandamus] may be issued by the Supreme Court . . . ."). "A writ of mandamus is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law." *Leibowitz v. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003) (citing NRS 34.170). This Court has broad discretion to decide whether to consider a petition for a writ of mandamus. *Id.*, 78 P.3d at 519.

Because an attorney is usually not a party to the underlying lawsuit, counsel of record subjected to sanctions may pursue review of that sanction

[4] In the Order for Dismissal With Prejudice, Hall Prangle (along with Defendants) preserved their appellate rights with respect to the Sanction Order. (*Id.* at 1849.)

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through an extraordinary writ. *Watson Rounds v. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d 228, 231 (2015) ("Sanctioned attorneys do not have standing to appeal because they are not parties in the underlying action; therefore, extraordinary writs are a proper avenue for attorneys to seek review of sanctions."); *Office of Washoe County Dist. Atty. v. Dist. Ct.*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000) ("Because petitioner cannot appeal the NRCP 11 order of sanctions, petitioner has 'no plain, speedy and adequate remedy at law other than to petition this court,' and therefore writ relief is an available remedy.") (citation omitted); *Albany v. Arcata Associates, Inc.*, 106 Nev. 688, 690 n. 1, 799 P.3d 566, 567 n. 1 (1990).

Although Hall Prangle was not monetarily sanctioned by the District Court, the findings in the Sanction Order that Hall Prangle (including Mr. Prangle, Mr. Webster, and Mr. Bemis) twice violated Nevada Rule of Professional Conduct 3.3 constitute a sanction in and of themselves. *U.S. v. Taleo*, 222 F.3d 1133, 1138 (9th Cir. 2000) ("[T]he district court made a finding and reached a legal conclusion that Harris knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction."). The damage that any such order inflicts on an attorney's

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professional reputation is akin to a public reprimand, thereby providing a pressing need for some type of appellate review. *Taleo*, 222 F.3d at 1138 ("[T]he district court's conclusion that Harris violated Rule 2–100 carries consequences similar to the consequences of a reprimand. If the court's formal finding is permitted to stand, it is likely to stigmatize Harris among her colleagues and potentially could have a serious detrimental effect on her career."); *accord Butler v. Biocore Med. Tech., Inc.*, 348 F.3d 1163, 1168-69 (10th Cir. 2003); *Adams v. Ford Motor Co.*, 653 F.3d 299, 306 (3d Cir. 1999); *Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997). In this instance, the Writ Petition is Hall Prangle's only available remedy for review of the District Court's findings of ethical misconduct (*i.e.*, the Attorney Sanctions).

Additionally, the Court may entertain a writ petition when "'an important issue of law requires clarification.'" *State v. Dist. Ct.*, 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004) (citation omitted); *see also We People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008) (explaining that this Court may exercise its discretion when a writ petition raises an issue "that presents an 'urgency and necessity of sufficient

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magnitude' to warrant [its] consideration") (quoting *Jeep Corp. v. Second Jud. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982)). The District Court found that Hall Prangle committed violations of Rule 3.3 for zealously arguing, on behalf of its clients, against a summary judgment finding of reasonable foreseeability. It is important for the legal community to obtain clarification from this Court regarding the proper application of Rule 3.3 so that attorneys are comfortable acting as zealous advocates for their clients without the fear of attorney sanctions simply because a judge disagrees with an argument.

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VIII. REASONS WHY A WRIT SHOULD ISSUE

A. Hall Prangle Was Deprived of Due Process.

Due process principles require that an attorney accused of professional misconduct receive adequate notice of the charges against him. *In re Discipline of Schaefer*, 117 Nev. 496, 515 n. 34, 25 P.3d 191, 204 n. 34 (2001); *accord In re Disciplinary Proceeding Against Sanai*, 225 P.3d 203, 206-07 (Wash. 2009) (explaining that notice and an opportunity to be heard must be given to an attorney charged with wrongdoing). The same due process principles apply to the extent the District Court (as opposed to the State Bar) accuses an attorney of professional misconduct. *Lioce v. Cohen*, 124 Nev. 1,

26, 174 P.3d 970, 986 (2008) ("Therefore, the district court may, on a party's motion or sua sponte, impose sanctions for professional misconduct at trial, ***after providing the offending party with notice and an opportunity to respond***.") (emphasis added).

"An attorney whom the court proposes to sanction must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter, and must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges." *In re Reilly*, 244 B.R. 46, 49 (D. Conn. 2000); *accord Adams*, 653 F.3d at 308 ("We have previously held that 'particularized notice is required to comport with due process' prior to sanctioning an attorney. 'Generally speaking, particularized notice will usually require notice of the precise sanctioning tool that the court intends to employ.'") (citation omitted).

As stated above, on August 4, 2015, the District Court issued the Notice. (PA, Vol. IV, Tab 19, at 602-04.) In the Notice, the District Court informed Hall Prangle and Defendants of the scope and purpose of the Evidentiary Hearing.

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> The purpose of the [E]videntiary Hearing shall be to determine[;] (1) if case terminating sanctions are appropriate based on the conduct of failing to disclose witnesses; (2) whether or not that was intention to thwart the discovery process in this case, and hinder Plaintiff to discover the relevant facts[;] and (3) a failure to let the Court know what was going on in the case and whether the UHS Defendants misled the Court.

(*Id.* at 603.) ***Notably absent from the Notice is any indication that the District Court will also consider whether Hall Prangle violated any of the Rules of Professional Conduct***. (*Id.*)

Hall Prangle prepared for the evidentiary hearing based on the issues set forth in the Notice. Hall Prangle was prepared to defend the actions of its clients; Hall Prangle was not told to prepare to show cause why it did not violate Nevada Rule of Professional Conduct 3.3. That is readily apparent based on the fact that Hall Prangle came to the evidentiary hearing without its own counsel. *Adams*, 653 F.3d at 309 ("[T]he fact that Colianni came to the hearing representing himself, as opposed to obtaining an attorney, is consistent with his claim that he did not realize the gravity of the circumstances and had no reason to believe that he might be subject to disciplinary proceedings."). As explained above, it was not until the beginning of the evidentiary hearing that

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the District Court informed Hall Prangle that it was "troubled" by a statement contained in the Summary Judgment Opposition. (PA, Vol. VI, Tab 22, at 963-64.) Even then, the District Court never made it known during the evidentiary hearing that it was considering attorney sanctions pursuant to Nevada Rule of Professional Conduct 3.3.[5]

Approximately two months later, Hall Prangle received the Sanction Order, which unexpectedly included the Attorney Sanctions (*i.e.*, findings that Hall Prangle twice violated Nevada Rule of Professional Conduct 3.3).[6] The sanctions were improper because the District Court gave no prior, particularized notice to Hall Prangle that it would consider whether Hall

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[5] The first time Hall Prangle was accused of a potential Nevada Rule of Professional Conduct 3.3 violation was upon receipt of Doe's Evidentiary Hearing Brief, which was received less than two days before the start of the evidentiary hearing. (*Id.*, Vol. V, Tab 21, at 744.) However, due process principles require that the notice originate from the sanctioning body. There is a big difference between the District Court (*i.e.*, the sanctioning body in this instance) providing particularized notice that it is considering a potential finding of ethical misconduct and opposing counsel gratuitously accusing its counterpart of the same less than two days before an evidentiary hearing. *See Gleason v. Isbell*, 145 S.W.3d 354, 360 (Tex. 2004) (noting that ad hominem attacks on opposing counsel "are ineffective and inappropriate"); *Irick v. U.S.*, 565 A.2d 26, 34 (D.C. Ct. App. 1989) (stating that "[a]d hominem attacks against opposing counsel are uncalled for and unprofessional")

[6] As set forth above, any such finding is akin to public reprimand, thus constituting an attorney sanction even without any monetary penalty. *Taleo*, 222 F.3d at 1138.

Prangle had violated the standard of care found in the Nevada Rules of Professional Conduct. ***Without prior notice of alleged rule violations, Hall Prangle was denied due process.*** *See Adams*, 653 F.3d at 308-09 (finding that the district court deprived an attorney of his due process rights by finding that he violated ABA Model Rule of Professional Conduct 3.5 without giving sufficient notice and an opportunity to address that specific charge); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 191 (3d Cir. 2002) (stating that particularized notice of alleged attorney misconduct is vital for due process purposes because an adverse finding may act "as a symbolic statement about the quality and integrity of the attorney's work—a statement which may have a tangible effect upon the attorney's career.") (quotations and citation omitted). Accordingly, the Attorney Sanctions entered against Hall Prangle cannot stand and must be vacated.

B. <u>Hall Prangle Did Not Violate Rule 3.3.</u>

1. *<u>The supposedly offending statements were not purely factual statements.</u>*

A lawyer must refrain from knowingly making a false statement of fact to a tribunal. Nevada RPC 3.3(a). Based on its plain language, Rule 3.3(a)

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prohibits a ***factual*** misrepresentation to a tribunal.[7] Naturally, a statement of opinion does not qualify as a false statement of fact. *See, e.g., Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992); *see also HK Systems, Inc. v. Eaton Corp.*, No. 02-C-1103, 2009 WL 742676, *4 (E.D. Wisc. March 18, 2009) (recognizing that counsel's characterization of "mixed questions of fact and law", as opposed to "pure fact", could not be said to breach counsel's duty of candor.).[8]

The District Court took issue with the following statement in the Summary Judgment Opposition: "There were absolutely no known prior acts by Farmer that could potentially put Centennial Hills on notice that Farmer would assault a patient." (*Id.*, Vol. VII, Tab 23, at 1333-34.) At its core, the preceding statement is ***not purely factual***. It is Hall Prangle's ***argument*** intertwined with ***opinion*** regarding the evidence relating to reasonable foreseeability (*i.e.*, mixed questions of law and fact). To be sure, the

[7] Nevada Rule of Professional Conduct 3.3(a) also prohibits a false statement of law to a tribunal. Based on the language of the Sanction Order, it does not appear that the District Court found that Hall Prangle made a false statement of law.

[8] *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n. 2, 245 P.3d 542, 546 n. 2 (2010) (recognizing that this Court may rely on unpublished federal district court opinions as persuasive, though nonbinding authority).

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supposedly offending statement was made in the "Argument" section of the Summary Judgment Opposition. (*Id.*, Vol. I, Tab 6, at 107.) It followed Hall Prangle's summary of a factually similar case, *Wood v. Safeway*, in which the Nevada Supreme Court affirmed the District Court's finding that it was not reasonably foreseeable that the employee would commit a sexual assault. (*Id.*) ***Based on that binding precedent***, Hall Prangle pointed out that, *inter alia*, Farmer successfully went through a criminal background check, drug test, and employment background check prior to working at Centennial Hills. (*Id.*)[9] As a result, Hall Prangle took the position that "[i]n the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial Hills on notice that Mr. Farmer would assault a patient." (*Id.*)

The information in the Murray and Wolfe Metro statements does not convert the statement at issue into a factual misrepresentation.[10] All that was

[9] The District Court's denial of the Summary Judgment Motion is further support for the premise that Hall Prangle's statement was not sanctionable. *Cf. Watson Rounds*, 131 Nev. Adv. Op. 79, 358 P.3d at 233-34 ("Further, despite several claims being eliminated by NRCP 50(a) and voluntary dismissal, all those claims survived summary judgment, demonstrating the district court believed there might have been sufficient evidence to support them.").

[10] As explained below, Hall Prangle was unaware of the content of the Wolfe Metro statement at the time the Summary Judgment Opposition was filed.

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shown through the Metro statements was that Farmer may have been overly attentive to female patients, sought out opportunities to adjust EKG leads on female patients, and was yelled at by an unidentified female patient. Hearing rumors about questionable behavior by a CNA is substantively different than having first-hand knowledge of wrongful acts committed by that CNA, particularly acts that would then make it foreseeable that the CNA might commit a heinous sexual assault.

Under Nevada Rule of Professional Conduct 1.3, Hall Prangle was obligated to diligently represent Defendants "with zeal in advocacy." MODEL RULES PROF'L CONDUCT R. 3.3 cmt. [1]. Hall Prangle was entitled to (in fact, obligated to) advocate the most favorable view of the relevant law and pertinent facts for their clients. *See In re S.C.*, 88 A.3d 1220, 1224 (Vt. 2014) ("A good faith argument, however, may be predicated on whatever pertinent facts and controlling law are most favorable to the client without violating" the duty of candor.)*; HK Systems*, No. 02-C-1103, 2009 WL 742676, at *4 (the court rejected opposing counsel's accusations of a breach of the duty of candor because "counsel was entitled to legally characterize the facts in a manner consistent with his overall legal theory."). Hall Prangle, based on its analysis

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of the relevant law and the pertinent facts, asserted the argument and opinion that there were not sufficient prior acts to potentially put Defendants on notice that Farmer would commit a sexual assault. The mere fact that the District Court may have disagreed with the argument does not transform the statement into a "false statement of fact" and a Rule 3.3 violation. *See Murphy v. Zoning Bd. of Appeals of City of Stamford*, 860 A.2d 764, 775 (Conn. App. Ct. 2004) (recognizing that "reasonable disagreements … are not prohibited in our adversary process.").

The District Court's Rule 3.3 findings are even more precarious when analyzing the second supposed violation. As explained above, the District Court also took issue with the following statement from the "Procedural History" section of the April 29, 2015 Writ Petition before this Court: "Specifically, Centennial Hills and UHS relied upon this Court's decision in *Wood v. Safeway, Inc.*, 121 Nev. 724, 737, 121 P.3d 1026, 1035 (2005), and urged that there were no known prior acts or any other circumstances that could have put Centennial Hills on notice that Farmer would sexually assault Ms. Doe." (PA, Vol. VII, Tab 23, at 1334.) As a preliminary matter, it is doubtful that the District Court had the authority to sanction an attorney for a

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statement made to a different tribunal. Even assuming it did, there is nothing false about the statement above. It is simply a summary (and an accurate one) of the arguments Hall Prangle asserted in the Summary Judgment Opposition. In the Sanction Order, the District Court selectively quoted only a portion of the statement in order to try to support its findings of a false statement of fact. (*Id.*)

For the foregoing reasons, Hall Prangle did not commit any Rule 3.3 violations because the supposedly offending statement was not a factual misrepresentation—it was attorney argument and opinion (as well as a later summary of that same argument and opinion).

2. *Hall Prangle did not knowingly make a false statement fact.*

Rule 3.3 presupposes a willful or intentional (rather than negligent) act by the lawyer. *See* Nevada RPC 1.0(f) (defining "knowingly" as having "actual knowledge of the fact in question"); *In re Fine*, 116 Nev. 1001, 1021, 13 P.3d 400, 414 (2000) (finding that "willful misconduct occurs when the actor knows he or she is violating a . . . rule of professional conduct and acts contrary to that . . . rule in spite of such knowledge").

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In analyzing a lawyer's conduct, a court may only consider what the lawyer knew at the time of the conduct. Nevada RPC 1.0A(c) (noting that the Nevada Rules of Professional Conduct presuppose that a lawyer's conduct will be analyzed "on the basis of the facts and circumstances as they existed at the time of the conduct in question"); *see also Mainor v. Nault*, 120 Nev. 770, 775, 101 P.3d 308, 325 (2004) (precluding courts from using the benefit of 20/20 hindsight to judge a lawyer's conduct). In addition, a court "should start with the presumption that, unless proven otherwise, lawyers . . . behave in an ethical manner." *Frazier v. Sup. Ct.*, 118 Cal. Rptr. 2d 129, 139 (Cal Ct. App. 2002) (quotation marks and citation omitted); *see also Assocs. Fin. Svcs. Co. of Hawai'i v. Mijo*, 950 P.2d 1219, 1231 (Haw. 1998) ("Courts presume that attorneys abide by their professional responsibilities[.]").

As set forth above, Hall Prangle made it clear at the evidentiary hearing that they had mistakenly argued and testified as to when they received the Wolfe statement. (PA, Vol. VI, Tab 22, at 1086.) Further, the documentary evidence supports Hall Prangle's clarification that the Wolfe statement was not included in the Metro file that Hall Prangle received in May of 2013 in the Cagnina Matter. (*Id.*, Vol. XVI, Tab 77, at 2994-3185; Vols. X-XI, Tab 35, at

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1867-2243.) Thus, to the extent that the contents of the Wolfe statement would turn the supposedly offending statement into a false statement of fact (it does not), it was not done knowingly because Hall Prangle did not receive the Wolfe statement until Doe disclosed it in March of 2015. (*Id.*, Vol. VIII, Tab 25, at 1565.) The District Court manifestly abused its discretion by concluding that Hall Prangle knowingly provided false factual information when the testimony and documentary evidence shows that Hall Prangle had not received the Wolfe statement prior to the Summary Judgment Opposition. Accordingly, the Attorney Sanctions entered against Hall Prangle cannot stand and must be vacated.

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IX. CONCLUSION

The District Court deprived Hall Prangle of due process by not providing sufficient notice that it was considering sanctions for alleged violations of Nevada Rule of Professional Conduct 3.3. Even assuming sufficient notice was provided, the District Court manifestly abused its discretion by finding that Hall Prangle ***twice*** violated Nevada Rule of Professional Conduct 3.3. The supposedly offending statements were not false statements of fact, and Hall Prangle did not knowingly mislead the District

Court. Accordingly, the Attorney Sanctions entered against Hall Prangle cannot stand and must be vacated.

DATED this 16th day of August, 2016.

BAILEY❖KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN
JOSHUA P. GILMORE

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VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Michael E. Prangle, individually and as a representative of Hall Prangle & Schoonveld, LLC, hereby declare under penalty of perjury of the laws of Nevada, that I am a Petitioner named in the foregoing Petition for Extraordinary Writ Relief and know the contents thereof; the Writ Petition is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 15 of August, 2016.

Michael E. Prangle

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VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Kenneth M. Webster, individually and as a representative of Hall Prangle & Schoonveld, LLC, hereby declare under penalty of perjury of the laws of Nevada, that I am a Petitioner named in the foregoing Petition for Extraordinary Writ Relief and know the contents thereof; the Writ Petition is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 12th of August, 2016.

Kenneth M. Webster

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VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, John F. Bemis, individually and as a representative of Hall Prangle & Schoonveld, LLC, hereby declare under penalty of perjury of the laws of Nevada, that I am a Petitioner named in the foregoing Petition for Extraordinary Writ Relief and know the contents thereof; the Writ Petition is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 12 of August, 2016.

John F. Bemis

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because:

[x] This petition has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font 14.

2. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of August, 2016, service of the foregoing **PETITION FOR EXTRAORDINARY WRIT RELIEF and PETITIONERS' APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF, VOLUMES I through XVII,** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
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Honorable Richard Scotti
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