

Case No. \_\_\_\_\_

---

IN THE SUPREME COURT OF THE STATE OF NEVADA

---

X'ZAVION HAWKINS, an Individual,

*Petitioner,*

vs.

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

*Respondent,*

-and-

GGP MEADOWS MALL, a Delaware Limited Liability Company; MYDATT  
SERVICES, INC. D/B/A VALOR SECURITY SERVICES, an Ohio Corporation; and  
MARK WARNER, an Individual.

*Real Parties in Interest.*

---

District Court Case No. A-15-717577-C

---

**PETITION FOR EXTRAORDINARY WRIT RELIEF**

---

DAVID J. CHURCHILL, Nev. Bar No. 7301

JOLENE J. MANKE, Nev. Bar No. 7436

**INJURY LAWYERS OF NEVADA**

6900 Westcliff Drive, Suite 707

Las Vegas, Nevada 89145

Telephone: 702-868-8888

Facsimile: 702-868-8889

david@injurylawyersnv.com

jolene@injurylawyersnv.com

*Attorneys for Petitioner*

Electronically Filed  
Nov 22 2016 08:31 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES</b> .....	iii
<b>NRAP 21(a)(1) ROUTING STATEMENT</b> .....	v
<b>PETITION</b> .....	1
<b>I. INTRODUCTION</b> .....	4
<b>II. STATEMENT OF FACTS</b> .....	8
<b>A. The Parties</b> .....	8
1. <i>Petitioner</i> .....	8
2. <i>Defendants</i> .....	8
<b>III. PROCEDURAL HISTORY</b> .....	8
<b>A. Petitioner Files a Lawsuit Against Defendants</b> .....	8
<b>B. LBBS' Representation of Mydatt and Warner</b> .....	9
<b>C. Plaintiff Moves to Disqualify LBBS; the District Court Grants the Motion</b> .....	9
<b>D. Defendants Move to Dismiss Petitioner's Complaint; the District Court Denies the Motion, but Grants Sanctions</b> .....	9
<b>E. Defendants Move for Attorneys' Fees and Costs Against Petitioner on Behalf of All Law Firms, Including Lewis Brisbois Bisgaard &amp; Smith; the District Court Grants the Motion as to all Defense Law Firms. Now, Defendants are Moving to Dismiss Petitioner's Complaint Based on the Order Granting Attorneys' Fees and Costs.</b> .....	10
<b>IV. ISSUE PRESENTED</b> .....	11
<b>V. RELIEF REQUESTED</b> .....	11
<b>VI. TIMING OF PETITION</b> .....	11
<b>VII. EXTRAORDINARY RELIEF IS APPROPRIATE</b> .....	12

<b>VIII. A WRIT SHOULD ISSUE .....</b>	<b>14</b>
<b>A. Standard of Review .....</b>	<b>14</b>
<b>B. The District Court Erred as a Matter of Law by Awarding Attorneys Fees to the Conflicted Law Firm of Lewis Brisbois Bisgaard &amp; Smith .....</b>	<b>14</b>
1. <i>The Rules Prohibiting Attorney – Client Conflicts are Well Established s.....</i>	14
2. <i>Public Policy Cannot Condone Conflicted Attorneys Benefitting a Directly Adverse Client to the Detriment of an Aggrieved Client .....</i>	16
3. <i>Public Policy Cannot Permit Conflicted Attorneys to Monetarily Benefit from the Conflict.....</i>	18
<b>C. The District Court Erred as a Matter of Law Granting and Denying Defendants’ Motion to Dismiss Because Petitioner Corrected His Deposition Testimony Without Being Compelled to Do So and He Did Not Disobey A Court Order .....</b>	<b>21</b>
1. <i>Petitioner Voluntarily Corrected His Deposition Testimony.....</i>	21
2. <i>Crafting a Jury Instruction Relating to Petitioner’s Failure to Identify the Shooters Pursuant to NRCP 16.1 Potentially Invades the Jury’s Province to Determine Credibility.....</i>	22
<b>IX. CONCLUSION .....</b>	<b>23</b>
<b>VERIFICATION .....</b>	<b>25</b>
<b>CERTIFICATION PURSUANT TO NRAP 28.2 AND NRAP 21(5) .....</b>	<b>26</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>27</b>

## **TABLE OF AUTHORITIES**

### **CASES**

*Borger v. Eighth Jud. Dist. Ct.,*

120 Nev. 1021, 102 P.3d 600 (2004) ..... 14

*Fair v. Bakhtiari,*

125 Cal.Rptr.3d 765 (Cal. Ct. App. 2011) ..... 21

*Goldstein v. Lees,*

120 Cal.Rptr. 253 (Cal. Ct. App. 1975) ..... 13

*Huskinson & Brown v. Wolf,*

32 Cal.4<sup>th</sup> 453, 9 Cal. Rptr.3d 693, 84 P.3d 379 (2004) ..... 20

*Jeffry v. Pounds,*

136 Cal.Rptr.373 (Cal. Ct. App. 1977) ..... 13

*Lioce v. Cohen,*

124 Nev. 1, 174 P.3d 970 (2008) ..... 14

*Marquis & Aurbach v. Eighth Jud. Dist. Ct.,*

122 Nev. 1147, 146 P.3d 1130 (2006) ..... 14

*Moseley v. Eighth Jud. Dist. Ct.,*

124 Nev. 654, 188 P.3d 1136 (2008) ..... 11

*Nevada Yellow Cab Corp. v. Dist. Ct.,*

123 Nev. 44, 152 P.3d 737 (2007) ..... 12

*Pan v. Dist. Ct.,*

120 Nev. 222, 88 P.3d 840 (2004) ..... 12

*Scarbo v. Dist. Ct.,*

125 Nev. 118, 206 P.3d 975 (2009) ..... 12

*Sheppard Mullin Richter & Hampton LLP v. J-M Mfg. Co., Inc.,*

198 Cal.Rptr.3d 253 (Cal. Ct. App. 2016) ..... 13

1	<i>State v. Eighth Jud. Dist. Ct.,</i>	
2	118 Nev. 140, 42 P.3d 233 (2002) .....	12
3	<i>United States v. Binder,</i>	
4	769 F.2d 595, 602 (9 <sup>th</sup> Cir. 1985) .....	22
5	<i>Walters v. Eighth Jud. Dist. Ct.,</i>	
6	127 Nev. ___, 263 P.3d 231 (2011) .....	13
7	<b>JURY INSTRUCTIONS, OPINIONS, RULES, STATUTES AND</b>	
8	<b>TREATISES</b>	
9	Cal. RPC 3-310.....	16
10	NRCP 37 .....	9
11	NRPC 1.9.....	14
12	NRPC 3.4(e) .....	14
13	NRPC 1.10 .....	15
14	NRS 34.160 .....	12
15	NRS 34.170.....	12
16	NRS 48.035 .....	23
17	Nev. Const. Art. 6 § 4 .....	12
18	Nev. J.I 1.08 .....	23
19	Nev. J.I 2.07 .....	22
20	State Bar of Nevada	
21	Formal Opinion from the Standing Committee on Ethics, No. 39 .....	16
22	1 Witkin, Cal. Proc. 5 <sup>th</sup> (2008) Attys, 104, p. 142 .....	16

1 **NRAP 21(a)(1) ROUTING STATEMENT**

2 Pursuant to Nevada Rule of Appellate Procedure 17, this Petition for  
3 Extraordinary Writ Relief should be retained by the Nevada Supreme Court. Initially,  
4 this matter invokes the original jurisdiction of the Nevada Supreme Court. *See* NRAP  
5 17(a)(1); *see also* NRS 34.160. Second, this matter raises, as a principal issue, a question  
6 of first impression involving Nevada Rules of Professional Conduct—specifically,  
7 whether the Nevada Rules of Professional Conduct prohibit a conflicted law firm from  
8 seeking attorneys’ fees and costs from an aggrieved client. *See* NRAP 17(a)(13). Third,  
9 this matter raises, as a principal issue, a question of statewide public importance. *See*  
10 NRAP 17(a)(14); *see also City of Oceanside v. Superior Court*, 96 Cal. Rptr. 2d  
11 621, 630 (2000) (holding application of independent acts exception to joint public safety  
12 operations would contravene “public policy consideration[s].”). Finally, this matter does  
13 not involve a discovery order or an order resolving a motion in limine. *See* NRAP  
14 17(b)(8).

15 Accordingly, Petitioner respectfully requests that the Nevada Supreme Court  
16 retain, hear, and decide this matter.

1 X'Zavion Hawkins ("Petitioner") petitions this Court to issue an extraordinary writ  
2 of mandamus vacating the Order granting Defendants in the underlying matter's motion  
3 for attorneys' fees and costs relating to their motion to dismiss Petitioner's complaint  
4 which was both denied and granted.

5 Alternatively, Petitioner petitions this Court to issue an extraordinary writ of  
6 mandamus vacating the Order both denying and granting Defendants' motion to dismiss  
7 Petitioner's complaint which was drafted by the conflicted law firm of Lewis Brisbois  
8 Bisgaard & Smith ("LBBS") against the aggrieved client, Petitioner.

9 This Court's intervention at this time is both necessary and appropriate because:

- 10 • The directly adverse work LBBS performed against Petitioner violates  
11 public policy holding the attorney-client privilege inviolate in all but a small  
12 number of instances.
- 13 • The public interest in the administration of justice will be significantly  
14 impacted as LBBS is seeking \$19,846.00 of the ordered \$41,635.00 in  
15 attorneys' fees for a discovery motion seeking to have Petitioner's case  
16 dismissed.
- 17 • As the ultimate injury to Petitioner, the substituted law firm of Backus  
18 Carranza & Burden ("BCB") filed a motion to strike and dismiss Petitioner's  
19 complaint on November 18, 2016, all arising from the work performed by  
20 LBBS before its disqualification.
- 21 • The intent of the statutes at issue (NRPC 1.9 and 1.10) are: 1) to prevent  
22 disclosure of confidential information that could be used to a former client's  
23 disadvantage; and 2) the scrupulous administration of justice.

24 ///

25 ///

26 ///

- LBBS' violations of NRPC 1.9 and 1.10 should bar any recovery of attorneys fees and costs against Petitioner. However, the District Court determined Petitioner would not be harmed by the conflicted law firm seeking such recovery. The District Court's determination was erroneous as a matter of law.
- Even though Petitioner produced an errata to his deposition testimony clarifying his memory problems surrounding people involved in the shooting without being compelled to do so, the District Court intends to craft a jury instruction commenting on Petitioner's failure to identify these witnesses pursuant to NRCP 16.1, which could potentially invade the jury's province to determine credibility.
- This Court has examined NRPC 1.9 and 1.10 in various contexts, but it has never addressed the precise questions presented here – whether the conflicted law firm may seek to recover attorneys fees and costs from the aggrieved client, and whether the work performed by the conflicted law firm should be allowed to stand, potentially to the ultimate harm of dismissal of the aggrieved client's action.
- Under California's counterpart to NRPC 1.9 and 1.10 (Cal. RPC 3-310), the specific issues presented here have been addressed by the California Supreme Court and the Courts of Appeal, all of whom have squarely held that not only is it improper for a conflicted law firm to seek to benefit from the conflict, but that such a conflict necessitates "disgorgement" of attorneys' fees.
- The District Court nevertheless determined that Petitioner should pay LBBS for the directly adverse work it performed against Petitioner, which may lead to complete dismissal of his cause of action against Defendants.



This decision is plainly wrong—as a matter of law and public policy—and this Court’s intervention is necessary.

DATED this 21<sup>st</sup> day of November, 2016.

## INJURY LAWYERS OF NEVADA

*/S/JOLENE J. MANKE*

By:

DAVID J. CHURCHILL

JOLENE J. MANKE

*Attorneys for Petitioner*

1 **I. INTRODUCTION**

2 The facts pertinent to this matter are not disputed. While attending the Nike Air  
3 Jordan Green Glow Shoe Launch taking place at Meadows Mall during the early morning  
4 hours of August 17, 2013, Petitioner was shot multiple times by another patron.<sup>1</sup> The  
5 shooter was with a group of other patrons.<sup>2</sup> As a result of the shooting, Petitioner is  
6 paralyzed from the waist down.<sup>3</sup>

7 Before litigation commenced, Petitioner was represented by Jason W. Barrus, Esq.  
8 and Lloyd W. Baker, Esq. of Baker Law Firm.s.<sup>4</sup> On December 18, 2014, Petitioner, his  
9 mother and Messrs. Barrus and Baker met with Paul A. Shpirt, Esq. and Tracy A. Eglet,  
10 Esq. of Eglet Law Group n/k/a Eglet Prince to discuss referring Petitioner's matter to  
11 Eglet Law Group for litigation.<sup>5</sup> Eglet Law Group decided to accept the referral.<sup>6</sup>  
12 Accordingly, during the meeting on December 18, 2014, Mr. Shpirt signed the retainer  
13 agreement with Petitioner.<sup>7</sup> He also signed the attorney fee sharing agreement between  
14 Eglet Law Group, Baker Law Firm and Petitioner.s.<sup>8</sup> Mr. Barrus provided a thumb drive  
15 containing materials relating to Petitioner's matter to Eglet Law Group.<sup>9</sup>

16 On March 16, 2015, Mr. Shpirt telephoned Mr. Barrus to advise him that Eglet  
17 Law Group would not be able to continue representing Petitioner.<sup>10</sup> That same day, Mr.  
18 Shpirt sent an e-mail to Messrs. Baker and Barrus memorializing his conversation with  
19

---

20 <sup>1</sup> See e.g., Petitioner's Appendix ("PA") Vol. 1, Ex. 1, at 3.  
21 Hereinafter, citations to Petitioner's Appendix will immediately be preceded by the  
22 volume number, followed by an Exhibit number, followed by a pincite to the Appendix  
23 pagination (e.g., "2PA, Ex. 14, at 198").

24 <sup>2</sup> *Id.* at 3.

25 <sup>3</sup> *Id.* at 7. (*See also*, 4PA, Ex. 25, at 824.)

26 <sup>4</sup> 4PA, Ex. 25, at 824.

27 <sup>5</sup> *Id.*

28 <sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

1 Mr. Barrus that Eglet Law Group would not be able to continue representing Petitioner  
2 because of “some of the problems we see with liability in this case” and because “the  
3 police report creates a lot of issues for us.”<sup>11</sup>

4 Baker Law Firm then referred Petitioner’s matter to Injury Lawyers of Nevada.<sup>12</sup>  
5 On April 27, 2015, Injury Lawyers of Nevada filed Petitioner’s complaint alleging claims  
6 for negligence, respondeat superior and gross negligence against Meadows Mall, Mydatt  
7 Services, Inc. d/b/a Valor Security Services (“Mydatt”) and Mark Warner (“Warner”).<sup>13</sup>

8 Sometime in July of 2015, Mr. Shpirt left Eglet Law Group and returned to LBBS  
9 where he had practiced previously.<sup>14</sup> In October of 2015, Josh Cole Aicklen, Esq., a  
10 partner with LBBS, was retained to monitor the defense of Mydatt and Warner being  
11 provided by Lee, Hernandez, Landrum & Garofalo.<sup>15</sup> Also in October of 2015, Messrs.  
12 Aicklen and Shpirt realized Mr. Shpirt had represented Petitioner while practicing with  
13 Eglet Law Group.<sup>16</sup> LBBS took efforts to screen off Mr. Shpirt from Petitioner’s  
14 matter.<sup>17</sup> However, LBBS did not send notice to Petitioner that Mr. Shpirt was practicing  
15 with LBBS.<sup>18</sup> On November 16, 2015, LBBS filed a notice of association of counsel for  
16 Mydatt and Warner.<sup>19</sup>

17 Thereafter, LBBS filed a motion to dismiss Petitioner’s complaint based on an  
18 allegation of unclean hands relating to information obtained from Det. William Majors,  
19 the Metro detective who oversaw the investigation of Petitioner being shot at Meadows  
20

---

21 10 *Id.*  
22 11 *Id.*  
23 12 *Id.*  
24 13 *Id.* (See also 1PA, Ex. 1, at 1.)  
25 14 4PA, Ex. 25 at 824. (See also 3PA, Ex. 19, at 550-551; 580-581.)  
26 15 *Id.*  
27 16 *Id.*  
28 17 *Id.*  
18 *Id.*  
19 *Id.*

1 Mall.<sup>20</sup> The discovery motion was based on Petitioner's deposition testimony that he did  
2 not recall information relating to the shooters.<sup>21</sup> Defendants cited NRCP 37 as the basis  
3 for their motion. Without any motion practice compelling him to do so, Petitioner  
4 produced an errata clarifying his deposition testimony on March 31, 2016.<sup>22</sup> At the  
5 hearing on the motion to dismiss on May 3, 2016, the Court determined an evidentiary  
6 hearing was required.<sup>23</sup>

7 During the evidentiary hearing on May 3, 2016, Mr. Aicklen argued against  
8 Petitioner as follows:

9 . . . We find this out and I take his deposition and based upon his written  
10 discovery responses, I think he's going to lie to me. And, based on 26 years  
11 of practicing law, I think he's going to lie in his depo, but I had no idea how  
much he was going to lie. Other than his name, I don't believe the man  
spoke the truth throughout the entire time of his reported deposition.<sup>24</sup>

12 . . . I don't talk about my work. My wife this morning said: What are you  
13 doing today? You've got your suit on. I said: I'm going down to get justice.  
14 I'm going down to get a case dismissed of a perjurer, a liar, a man who  
crafted his lies to try and get money under oath.<sup>25</sup>

15 Mr. Aicklen was very passionate against Petitioner and did not accurately reflect  
16 the entirety of the facts on at least one occasion during the hearing as follows:

17 And I apologize. That is a mistake. He did not identify anybody in the first  
18 one. In the second one, he did, and I apologize. I was wrong. First one, he  
did not. Second one, he did.<sup>26</sup>

19 On May 11, 2016, Petitioner brought a motion to disqualify LBBS on order  
20 shortening time based upon Mr. Shpirt's prior representation of Petitioner at Eglet Law  
21 Group, the imputed conflict to LBBS and LBBS' failure to provide notice to Petitioner  
22 that Mr. Shpirt was practicing at LBBS after LBBS began representing Mydatt and

---

23 <sup>20</sup> *Id.* at 825.

24 <sup>21</sup> *See generally*, 1PA, Ex. 11.

25 <sup>22</sup> 2PA, Ex. 14, at 335-338.

26 <sup>23</sup> 4PA, Ex. 25, at 825; 5PA, Ex. 37, at 1018-1029.

27 <sup>24</sup> 5PA, Ex. 37, at 994.

28 <sup>25</sup> *Id.*

Warner.<sup>27</sup> During an evidentiary hearing on June 8, 2016, the Court determined there was a conflict of interest pursuant to NRPC 1.9 because: 1) Mr. Shpirt as an attorney with Eglet Law Group was viewed to have represented Petitioner; 2) Petitioner's matter with Eglet Law Group was the same matter currently pending before the Court; Mr. Shpirt was currently practicing with LBBS which firm was then representing Mydatt and Warner whose interests are directly adverse to Petitioner in this matter.<sup>28</sup> Petitioner specifically did not expressly consent to waive any potential conflict.<sup>29</sup> The Court also determined that Mr. Shpirt's conflict was imputed to LBBS because "importantly, no evidence was presented demonstrating compliance with the requirement that written notice be promptly given to the former client."<sup>30</sup>

Even though LBBS was determined to be a conflicted law firm, the adverse work performed by LBBS was permitted to stand. At a subsequent evidentiary hearing the Court denied Defendants' motion to dismiss Petitioner's complaint.<sup>31</sup> However, the Court indicated an intent to craft a jury instruction regarding Petitioner's failure to identify the shooters pursuant to NRCP 16.1.<sup>32</sup> The Court also indicated a motion for attorneys' fees and costs by Defendants would be entertained.<sup>33</sup> Subsequently, the Court granted Defendants' motion for attorneys' fees and costs against Petitioner for the motion to dismiss, including an award of \$19,846.00 to the conflicted law firm of LBBS.<sup>34</sup>

Because the District Court's granting of Defendants' motion for attorneys fees and costs is erroneous as a matter of law, this Court should issue a writ of mandamus vacating

---

<sup>26</sup> *Id.* at 1017.

<sup>27</sup> 4PA, Ex. 25, at 825.

<sup>28</sup> *Id.* at 826.

<sup>29</sup> *Id.* at 827.

<sup>30</sup> 4PA, Ex. 25, at 826.

<sup>31</sup> *See generally*, 4PA, Ex. 24. (*See also generally*, 6PA, Ex. 39.)

<sup>32</sup> 4PA, Ex. 24, at 820-821.

<sup>33</sup> 4PA, Ex. 25, at 820.

<sup>34</sup> 4PA, Ex. 34, at 950.

1 the District Court's order and instructing the District Court to deny the motion with  
2 prejudice. Alternatively, the District Court's granting and denying of Defendants'  
3 motion to dismiss Petitioner's complaint is erroneous as a matter of law, and this Court  
4 should issue a writ of mandamus vacating the District Court's order and instructing the  
5 District Court to deny the motion with prejudice.

## 6 **II. STATEMENT OF FACTS**

### 7 **A. The Parties.**

#### 8 **1. Petitioner.**

9 Mr. X'Zavion Hawkins ("X'Zavion") is an individual who at all relevant times,  
10 including the date of the incident on August 17, 2013, did and does now reside in Clark  
11 County, Nevada. (1PA, Ex 1, at 2.)

#### 12 **2. Defendants.**

13 GGP Meadows Mall, LLC is a Delaware Limited Liability Company ("GGP") that  
14 operates the Meadows Mall located at 4300 Meadows Lane in Clark County, Nevada.  
15 On August 17, 2013, stores located within Meadows Mall were participating in the Nike  
16 Air Jordan Green Glow shoe launch. (*Id.* at 2; 4.)

17 Mydatt Security Services d/b/a Valor Security, Inc. ("Mydatt") is an Ohio  
18 corporation that was providing security services for Meadows Mall on August 17, 2013.  
19 (*Id.* at 2-3.)

20 On August 17, 2013, Mr. Mark Warner was employed by Mydatt as the head of  
21 security for Meadows Mall. (*Id.* at 3.)

## 22 **III. PROCEDURAL HISTORY**

### 23 **A. Petitioner Files His Complaint Against Defendants.**

24 On April 27, 2015, Petitioner brought claims against the Real Parties in Interest  
25 (GGP, Mydatt and Warner) for negligence, respondeat superior and gross negligence  
26 relating to their handling of the shoe launch. (*See generally* 1PA, Ex. 1, at 1-10.)

In October of 2015, Messrs. Aicklen and Shpirt knew Mr. Shpirt had a conflict with X'Zavion. At the same time, Mr. Aicklen, a partner with LBBS, was retained to monitor the defense of Mydatt and Warner being provided by Lee, Hernandez, Landrum & Garofalo. (3PA, Ex. 19, at 550-551; 580-583.) LBBS took efforts to screen off Mr. Shpirt from Petitioner's matter. (4PA, Ex. 25, at 826.) However, LBBS did not send notice to Petitioner that Mr. Shpirt was practicing with LBBS. (*Id.*) On November 16, 2015, LBBS filed a notice of association of counsel for Mydatt and Warner. (*See generally*, 1PA, Ex. 10.)

At an evidentiary hearing on June 8, 2016, the Court determined there was a conflict of interest pursuant to NRPC 1.9 because: 1) Mr. Shpirt as an attorney with Eglet Law Group was viewed to have represented X'Zavion; 2) Petitioner's matter with Eglet Law Group was the same matter currently pending before the Court; Mr. Shpirt was currently practicing with LBBS which firm was then representing Mydatt and Warner whose interests are directly adverse to X'Zavion in this matter. (4PA, Ex. 25, at 826.) X'Zavion specifically did not expressly consent to waive any potential conflict. (*Id.* at 827.) The Court also determined that Mr. Shpirt's conflict was imputed to LBBS because "importantly, no evidence was presented demonstrating compliance with the requirement that written notice be promptly given to the former client." (*Id.* at 826.)

Before its disqualification, LBBS filed a motion to dismiss X’Zavion’s complaint on behalf of Mydatt and Warner based on NRP 37 and the case of *Young v. Johnny Ribiero Bldg.*, 106 Nev. 88 (1990). (*See generally*, 1PA, Ex. 11.) Although LBBS was disqualified as a conflicted law firm at the hearing on June 8, 2016, the work LBBS

1 performed against X'Zavion went forward at an evidentiary hearing on Defendants'  
2 motion to dismiss X'Zavion's complaint on July 21, 2016. (See generally, 4PA, Ex. 25;  
3 5PA, Ex. 38; 5PA Ex. 39.)

4 Although the Court denied Defendants' motion to dismiss X'Zavion's complaint, it  
5 indicated an intent to craft a jury instruction regarding Petitioner's failure to identify the  
6 shooters pursuant to NRCP 16.1. (4PA, Ex. 24, at 820-821.)<sup>35</sup> The Court also indicated  
7 a motion for attorneys' fees and costs by Defendants would be entertained. (Id. at 820.)

8 **E. Defendants' Move for Attorneys' Fees and Costs Against Petitioner on Behalf**  
9 **of All Law Firms, Including Lewis Brisbois Bisgaard & Smith; the District**  
10 **Court Grants the Motion as to all Defense Law Firms. Now, Defendants are**  
11 **Moving to Dismiss Petitioner's Complaint Based on the Order Granting**  
12 **Attorneys' Fees and Costs.**

13 The Court granted Defendants' motion for attorneys' fees and costs against Petitioner  
14 for the motion to dismiss, including an award of \$19,846.00 to the conflicted law firm of  
15 LBBS. (4PA, Ex. 34 at 950.) Now, based upon the Court's granting of attorneys' fees  
16 and costs against X'Zavion, Defendants are moving to strike X'Zavion's complaint. (*See*  
17 *generally*, 4PA, Ex. 36.)  
18  
19  
20  
21  
22  
23  
24  
25

---

26 <sup>35</sup>



1 **IV. ISSUES PRESENTED**

2 Did the District Court improperly allow work performed by a conflicted law firm  
3 to stand against the aggrieved client when it undermines Petitioner's case to the point of  
4 possible dismissal, and dismissal is now being requested by the substituted law firm  
5 based upon work performed by the conflicted law firm?

6 Did the District Court improperly make an award of attorney fees and costs against  
7 Petitioner and in favor of a conflicted law firm working completely against Petitioner?

8 Did the District Court improperly decide to craft a jury instruction as a sanction for  
9 an alleged discovery abuse when Petitioner had already produced an errata sheet  
10 correcting his deposition testimony before any motion was filed?

11 **V. RELIEF REQUESTED**

12 Petitioners seek a writ of mandamus vacating the District Court's order and  
13 compelling the District Court to enter an order denying Defendants' motion for attorney  
14 fees and costs against Petitioner because of the work performed by the conflicted law  
15 firm of LBBS, especially when Defendants are now seeking the ultimate sanction of  
16 dismissal of Petitioner's complaint based upon work performed by the conflicted law  
17 firm. The District Court denied Respondent's underlying motion to dismiss Petitioner's  
18 complaint, public policy must prohibit a conflicted law firm from working completely  
19 against the aggrieved client to the benefit of another client and from monetarily profiting  
20 from the conflict, and a jury instruction potentially touching on Petitioner's credibility  
21 must not be allowed when such a determination is soundly within the province of the trier  
22 of fact.

23 **VI. TIMING OF PETITION**

24 Extraordinary writ relief must be timely sought. *Moseley v. Eighth Jud. Dist. Ct.*,  
25 124 Nev. 654, 659 n.6, 188 P.3d 1136, 1140 n.6 (2008) (concluding that the equitable  
26 doctrine of laches did not preclude writ relief where the petition was filed approximately  
27  
28

four months after entry of the underlying order); *State v. Eighth Jud. Dist. Ct.*, 118 Nev. 140, 148, 42 P.3d 233, 238 (2002) (finding writ petition filed four months after the district court denied a motion to dismiss did “not present inexcusable delay.”).

Here, the District Court’s Order denying the Motion for Summary Judgment was entered on January 5, 2016. (Order.) Notice of entry of the Order was filed on January 6, 2016. (Notice of Entry of Order.) MedicWest filed this Petition in a timely manner—approximately one month following the entry of the Order. *See Moseley*, 124 Nev. at 659 n.6, 188 P.3d at 1140 n.6; *State*, 118 Nev. at 148, 42 P.3d at 238.

## **VII. EXTRAORDINARY RELIEF IS APPROPRIATE**

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion. 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 “available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.” *Nevada Yellow Cab Corp. v. Dist. Ct.*, 123Nev. 44, 49, 152 P.3d 737, 740 (2007). Petitioner has the burden of demonstrating why extraordinary writ relief is warranted. *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). This Court has broad discretion to decide whether to consider a petition for a writ of mandamus. *See Leibowitz v. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003) (citing NRS 34.170). In exercising its discretion, “this [C]ourt may entertain mandamus petitions when judicial economy and sound judicial administration militate in favor of writ review.” *Scarbo v. Dist. Ct.*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009).

A writ of mandamus should issue here because the District Court committed an arbitrary and capricious exercise of discretion when it both granted and denied the motion

1 to dismiss the complaint based on work performed by the conflicted law firm and  
2 subsequently entered an order granting attorneys' fees and costs to the conflicted law  
3 firm. *See Int'l Game Tech., Inc. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096  
4 (2006) ("A writ of mandamus . . . is appropriate when the district court manifestly abuses  
5 its discretion."). The relief is warranted in the name of judicial economy and sound  
6 judicial administration, because Petitioner's case is in jeopardy of dismissal based on  
7 work performed by the conflicted law firm and Petitioner could alternatively be forced to  
8 litigate the remainder of this case before he could appeal the District Court's orders. *See,*  
9 *Walters*, 127 Nev. at \_\_\_, 263 P.3d at 234.

10 Additionally, a writ is also appropriate because this matter involves an important  
11 matter of public policy in which the Court could provide further guidance and  
12 clarification. *See Walters*, 127 Nev. at \_\_\_, 263 P.3d at 234. Specifically, entertaining the  
13 writ will provide the Court with an opportunity to clarify whether it is appropriate for a  
14 conflicted law firm to seek attorneys' fees and costs from the aggrieved client and  
15 whether the work performed by the conflicted law firm should stand. *See Goldstein v.*  
16 *Lees*, 120 Cal.Rptr. 253 (Cal. App. 1975)(holding conflicted attorney must be denied  
17 attorney's fees when the attorney possessed corporate secrets that were material); *Jeffry*  
18 *v. Pounds*, 136 Cal.Rptr. 373 (Cal. App. 1977)(holding that **attorney must be denied**  
19 **any fees for work performed after a conflict arose even though the representations**  
20 **involved unrelated matters**)[Emphasis Added.]; *Sheppard Mullin Richter & Hampton*  
21 *LLP v. J-M Mfg. Co., Inc.*, 198 Cal.Rptr.3d 253 (Cal. App. 4<sup>th</sup> 2016)(holding that  
22 applying Cal. RPC 3-310 prohibiting attorney-client conflicts without written consent  
23 **requires disgorgement of attorneys' fees** by conflicted law firm consistent with the  
24 purpose of the statute even when the conflict relates to completely different  
25 matters)[Emphasis Added].

26 ///

1 **VIII. A WRIT SHOULD ISSUE**

2 **A. Standard of Review.**

3 Questions of law, such as those at issue in this petition, are reviewed de novo.  
4 *Marquis & Aurbach v. Eighth Jud. Dist. Ct.*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136  
5 (2006); *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

6 **B. The District Court Erred as a Matter of Law By Awarding**  
7 **Attorneys Fees to the Conflicted Law Firm of Lewis Brisbois**  
8 **Bisgaard & Smith**

9 1. The Rules Prohibiting Attorney-Client Conflicts are Well Established.

10 At the evidentiary hearing on June 8, 2016, the District Court determined that  
11 LBBS violated NRPC 1.9 and 1.10 relating to its defense of Mydatt and Warner against  
12 Petitioner. (*See generally*, 4PA, Ex. 25 and 5PA, Ex. 38.) NRPC 1.9 provides as  
13 follows:

14 **Rule 1.9. Duties to Former Clients.**

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

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

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

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

24 (3) Unless the former client gives informed consent,  
25 confirmed in writing.  
26  
27  
28

1 (c) A lawyer who has formerly represented a client in a  
2 matter or whose present or former firm has formerly  
3 represented a client in a matter shall not thereafter:

4 (1) Use information relating to the representation to the  
5 disadvantage of the former client except as these Rules would  
6 permit or require with respect to a client, or when the  
7 information has become generally known; or

8 (2) Reveal information relating to the representation  
9 except as these Rules would permit or require with respect to a  
10 client.

11 Further, NRPC 1.10 provides as follows:

12 **Rule 1.10. Imputation of Conflicts of Interest.**

13 (a) While lawyers are associated in a firm, none of them shall  
14 knowingly represent a client when any one of them practicing alone would  
15 be prohibited from doing so by Rules 1.7, 1.9, or 2.2, unless the prohibition  
16 is based on a personal interest of the prohibited lawyer and does not present  
17 a significant risk of materially limiting the representation of the client by the  
18 remaining lawyers in the firm.

19 (b) When a lawyer has terminated an association with a firm, the firm is  
20 not prohibited from thereafter representing a person with interests materially  
21 adverse to those of a client represented by the formerly associated lawyer  
22 and not currently represented by the firm unless:

23 (1) The matter is the same or substantially related to that in which  
24 the formerly associated lawyer represented the client; and

25 (2) Any lawyer remaining in the firm has information protected by  
26 Rules 1.6 and 1.9(c) that is material to the matter.

27 (c) A disqualification prescribed by this Rule may be waived by the  
28 affected client under the conditions stated in Rule 1.7.

(d) Reserved.

(e) When a lawyer becomes associated with a firm, no lawyer associated  
in the firm shall knowingly represent a person in a matter in which that  
lawyer is disqualified under Rule 1.9 unless:

(1) The personally disqualified lawyer did not have a substantial  
role in or primary responsibility for the matter that causes the  
disqualification under Rule 1.9;

1 (2) The personally disqualified lawyer is timely screened from any  
2 participation in the matter and is apportioned no part of the fee therefrom;  
and

3 (3) Written notice is promptly given to any affected former client to  
4 enable it to ascertain compliance with the provisions of this Rule.

5 2. Public Policy Cannot Condone Conflicted Attorneys Benefitting a  
6 Directly Adverse Client to the Detriment of an Aggrieved Client

7 Messrs. Aicklen and Shpirt conceded that Mr. Shpirt had a conflict relating to  
8 X'Zavion. (3PA, Ex. 19, at 550-551, 580-583; 4PA, Ex. 25, at 826.) The Court  
9 determined that the conflict was imputed to LBBS because of the failure to provide  
10 X'Zavion notice of the conflict. (*Id.*) From the inception of LBBS' representation of  
11 Mydatt and Warner, it had a direct conflict of interest with X'Zavion pursuant to NRPC  
12 1.9 and 1.10. No exception under the State Bar of Nevada's Formal Opinion from the  
13 Standing Committee on Ethics, No. 39 applied to LBBS' employment of Mr. Shpirt  
14 because LBBS never provided notice to X'Zavion that Mr. Shpirt was employed with  
15 LBBS. X'Zavion never had the opportunity to consent or withhold his consent for LBBS  
16 to represent Defendants Mydatt and Warner in this matter.

17 Every jurisdiction has rules prohibiting attorney-client conflicts, and California  
18 RPC 3.310 comports with NRPC 1.9 and 1.10, providing as follows:

19 **Rule 3-310 Avoiding the Representation of Adverse Interests**

20 (A) For purposes of this rule:

21 (1) "Disclosure" means informing the client or former client of the relevant  
22 circumstances and of the actual and reasonably foreseeable adverse  
consequences to the client or former client;

23 (2) "Informed written consent" means the client's or former client's written  
24 agreement to the representation following written disclosure;

25 (3) "Written" means any writing as defined in Evidence Code section 250.

26 (B) A member shall not accept or continue representation of a client without  
providing written disclosure to the client where:

- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
- (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
- (b) the previous relationship would substantially affect the member's representation; or
- (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
- (C) A member shall not, without the informed written consent of each client:
- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represents a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

At the time LBBS filed the motion to dismiss against X'Zavion on behalf of Mydatt and Warner, the firm was actively violating its duty of loyalty to X'Zavion. Such action is against public policy. LBBS seeking to recover attorneys' fees from X'Zavion for the very work it performed while it was acting contrary to his interests is also against public policy. Again, based upon X'Zavion's belief that LBBS never should have had any adversarial involvement in this matter, Defendants should not be allowed to benefit from LBBS conflict with X'Zavion. Now, based upon the work performed by LBBS while it was conflicted against X'Zavion, his complaint is potentially in jeopardy of being dismissed. (*See generally*, 4PA, Ex. 36.)

///

///

1                   3.     Public Policy Cannot Permit Conflicted Attorneys to Monetarily  
2                             Benefit from the Conflict.

3             While this Court has not specifically addressed the issue of conflicted law firms  
4 monetarily benefitting from the conflict, California courts have done so. When  
5 California courts have addressed the issue of whether conflicted law firms may benefit  
6 from work performed relating to conflicted matters, they have long determined that  
7 forfeiture and disgorgement of attorneys' fees is appropriate. In *Sheppard Mullin Richter*  
8 *& Hampton LLP v. J-M Mfg. Co., Inc.*, 198 Cal.Rptr.3d 253 (Cal. App. 4<sup>th</sup> 2016), a  
9 California appellate court relied on California's long-standing precedent to require a  
10 conflicted law firm to disgorge and forfeit millions of dollars in legal fees based on the  
11 firm's failure to disclose an actual conflict of interest.

12             Specifically, the Sheppard court found as follows:

13             Sheppard Mullin's breach of the duty of loyalty set forth in Rule 3-310 was  
14 a violation of public policy. A finding that Sheppard Mullin was  
15 nonetheless entitled to its attorney fees as if no breach had occurred would  
16 undermine the same public policy. We therefore follow the reasoning of  
*Goldstein* and *Jeffry* and hold that Sheppard Mullin is not entitled to its fees  
for the work it did for J-M while there was an actual conflict with South  
Tahoe. *Id.* at 274.

17             In *Sheppard*, the law firm had billed over \$3.8 million defending its client J-M  
18 Manufacturing Co., Inc., the world's largest manufacturer of polyvinyl chloride (PVC)  
19 pipe in a large Qui Tam lawsuit involving numerous parties. *Id.* at 257. Prior to its  
20 engagement, the firm ran a standard conflicts check that indicated the firm had  
21 represented one of the adverse intervening parties in the Qui Tam action, South Tahoe  
22 Public Utility District, on certain unrelated employment matters. *Id.* Several weeks later  
23 the firm also undertook a new and minor unrelated matter for South Tahoe, but failed to  
24 disclose the existing conflict with J-M or obtain an informed waiver of the conflict from  
25 either of its clients. *Id.* at 258. Neither the court nor J-M disputed the limited scope of  
26



1 the work performed by the firm on behalf of South Tahoe. The most important fact was  
2 the firm's failure to give notice of its ongoing, adverse representation. *Id.* at 260.

3 South Tahoe brought a successful motion to disqualify the Sheppard Mullin firm in  
4 the Qui Tam action. *Id.* After Sheppard Mullin was disqualified, J-M refused to pay  
5 approximately \$1.3 million in outstanding legal fees. *Id.* Sheppard Mullin sued J-M to  
6 recover those outstanding fees and compel arbitration where the arbitration panel  
7 awarded the firm a majority of its attorneys' fees. *Id.* at 261. The arbitration panel found  
8 that "Sheppard Mullin's conduct was not so serious or egregious as to make  
9 disgorgement of fees appropriate" where the representation of the adverse client "was  
10 unrelated to the subject of the J-M representation, and therefore the conflict did not  
11 pervade the whole relationship with J-M ..." *Id.* A California trial court affirmed the  
12 arbitration award, but J-M appealed, arguing that the violation of CRPC 3-  
13 310 on conflicts of interest rendered the engagement contract illegal or void as a matter  
14 of public policy. *Id.* at 261.

15 First, the California appeals court determined that, under the applicable arbitration  
16 agreement and California law, the court should make a de novo determination as to  
17 whether the engagement contract was enforceable. *Id.* at 262-265. Second, the court  
18 determined that, despite standard waivers of both current and future conflicts contained in  
19 their client's engagement agreements, Sheppard Mullin had failed to obtain informed  
20 written consent as required by Rule 3-310(C)(3). *Id.* at 266-267. Third, the court found  
21 that the "attorney's duty of undivided loyalty that forms the basis of Rule 3-310  
22 constitutes the very foundation of an attorney-client relationship" and, thus, the  
23 engagement agreement was invalid and unenforceable because it "violated an expression  
24 of public policy." *Id.* at 272-273.

25 Turning to the merits, the court held that Sheppard Mullin "[was] not entitled to its  
26 fees for the work it did for J-M while there was an actual conflict with [its other client]."

1 *Id.* at 274. In reaching this conclusion, the court relied primarily on two California  
2 appeals court cases from the 1970's. *See, Id.* at 272 (analyzing *Goldstein v. Lees*, 120  
3 Cal.Rptr. 253 (Cal. App. 1975) and *Jeffry v. Pounds*, 136 Cal.Rptr.373 (Cal. App. 1977)).  
4 The *Goldstein* court found an engagement contract "void for reasons of public policy"  
5 where counsel represented a minority shareholder and director in a proxy fight to gain  
6 control of a company for which the attorney had served as in-house counsel several years  
7 prior to the proxy fight. 120 Cal.Rptr. at 254-255. Central to the decision was the fact that  
8 the attorney possessed "corporate secrets that [were] material to the proxy fight." *Id.* at  
9 255. In *Jeffry*, a small law firm's lead partner represented both a husband in a personal  
10 injury action and his wife in her divorce proceeding against the husband. 67 Cal.App 3d  
11 at 374-375. There, the court denied any fees for work performed after the conflict arose  
12 even though the representations involved "unrelated matters" and the law firm did not  
13 have a "dishonest purpose" or engage in "deliberately unethical conduct." *Id.* at 377.

14 Besides arguing for all its fees, Sheppard Mullin also argued that despite its  
15 violation of CRPC 3-310, quantum meruit should be allowed for its representation of J-M  
16 in the Qui Tam action. *Id.* at 274. However, the court pointed out that the California  
17 Supreme Court had found that quantum meruit recovery must be denied in cases of  
18 ethical violations. *Id.* (citing *Huskinson & Brown v. Wolf*, 32 Cal.4<sup>th</sup> 453, 9 Cal. Rptr.3d  
19 693, 84 P.3d 379 (2004).) The *Sheppard Mullin* court further found that "when a conflict  
20 of interest is asserted as a "[d]efense in the attorney's action to recover fees or the  
21 reasonable value of services[, a] violation of the fiduciary obligation will defeat  
22 recovery." *Id.* at 272. (citing 1 Witkin, Cal. Proc. 5<sup>th</sup> (2008) Attys, 104, p. 142.) The  
23 *Sheppard Mullin* court found that "Sheppard Mullin's violation of Rule 3-310  
24 preclude[d] if from receiving compensation [whatsoever] for services provided to J-M in  
25 the Qui Tam Action." *Id.* Likewise, LBBS' violation of its fiduciary duty to X'Zavion  
26 created by its failure to provide notice of its employment of Mr. Shpirt should have

1 precluded it from looking to X'Zavion for any compensation for services provided  
2 defending Mydatt and Warner against X'Zavion.

3 The *Sheppard Mullin* court was swayed by the *Fair* decision, in which the court  
4 found disgorgement of attorney fees appropriate regardless of any proof of damages  
5 when a conflict of interest is involved, *See, Fair*, 125 Cal.Rptr.3d at 779. Besides  
6 precluding a conflicted firm from seeking recovery from the aggrieved client, the  
7 *Sheppard Mullin* decision arguably sets precedent for the automatic disgorgement of all  
8 attorneys' fees incurred while a conflict of interest violation exists.

9 The facts relating to X'Zavion and LBBS are more egregious than those relating to  
10 *Sheppard Mullin*. While the work Sheppard Mullin performed for South Tahoe was  
11 completely unrelated and quite minor, the work performed by LBBS defending Mydatt  
12 and Warner was directly related to X'Zavion and so adverse that LBBS filed a motion to  
13 dismiss X'Zavion's complaint. Now, based on the Court's granting of Defendants'  
14 motion for attorneys' fees and costs against X'Zavion, his complaint is in jeopardy of  
15 being dismissed. (*See generally*, 4PA, Ex. 36.)

16 **C. The District Court Erred as a Matter of Law Granting and**  
17 **Denying Defendants' Motion to Dismiss Because Petitioner**  
18 **Corrected His Deposition Testimony Without Being Compelled to**  
19 **Do So and He Did Not Disobey A Court Order**

20 *1. Petitioner Voluntarily Corrected His Deposition Testimony.*

21 NRCP 37 relates to compelling disclosure or discovery, and provides a remedy  
22 when a party fails to do so. Defendants never brought a motion to compel against  
23 Petitioner. Defendants filed a motion to dismiss Petitioner's complaint. (*See generally*,  
24 1PA, Ex. 11.) Petitioner told Defendants at the outset of his deposition that he takes a  
25 number of pain medications (morphine, hydrocodone, bacopin and gabapentin.) (1PA,  
26 Ex. 11, at 119.) He also testified that he probably would not be able to give his best

1 testimony because “I forget sometimes.” (*Id.*) Petitioner testified repeatedly that he did  
2 not know the answer to specific questions relating to the shooters. (*Id.*, generally.)  
3 Petitioner voluntarily produced an errata sheet clarifying his deposition testimony. (2PA,  
4 Ex. 14, at 335-338.) Defendants never moved to compel Petitioner to participate in  
5 discovery, and Petitioner never refused to do so. (4PA, Ex. 24, at 819.) Accordingly, it  
6 was proper for the Court to deny Defendants’ motion to dismiss Petitioner’s complaint.  
7 (*Id.*) However, the granting of Defendants’ motion for attorneys’ fees and costs is now  
8 potentially acting as a dismissal of Petitioner’s complaint. (*See generally*, 4PA, Ex. 36.)

9           2.       *Crafting a Jury Instruction Relating to Petitioner’s Failure to Identify*  
10                   *the Shooters Pursuant to NRCP 16.1 Potentially Invades the Jury’s*  
11                   *Province to Determine Credibility.*

12           The District Court intends to craft a jury instruction relating to Petitioner’s failure  
13 identify the shooters pursuant to NRCP 16.1. (4PA, Ex. 34, at 820-821.) Such a jury  
14 instruction potentially invades the province of the jury to determine credibility.  
15 Specifically, “[c]redibility is a matter to be decided by the jury.” *United States v. Binder*,  
16 769 F.2d 595, 602 (9<sup>th</sup> Cir. 1985).

17           The responsibility of the jury relating to witness credibility is clearly stated in  
18 Nevada Jury Instruction No. 2.07 which specifically provides as follows:

19           The credibility or believability of a witness should be determined by his  
20 manner upon the stand, his relationship to the parties, his fears, motives,  
21 interests or feelings, his opportunity to have observed the matter to which he  
22 testified, the reasonableness of his statements and the strength or weakness  
23 of his recollections.

24           If you believe that a witness has lied about any material fact in the case, you  
25 may disregard the entire testimony of that witness or any portion of his  
26 testimony which is not proved by other evidence.

27           The District Court’s role is to determine the proper application of the law, not the  
28 weight of witness testimony. The District Court cannot invade the province of the jury to

1 determine credibility while remaining impartial. The District Court specifically advises  
2 the jury regarding its impartiality in Nevada Jury Instruction No. 1.08 as follows:  
3

4 If, during this trial, I have said or done anything which has suggested to you  
5 that I am inclined to favor the claims or position of any party, you will not  
be influenced by any such suggestion.

6 **I have not expressed, nor intended to express, nor have I intended to**  
7 **intimate, any opinion as to which witnesses are or are not worthy of**  
8 **belief, what facts are or are not established, or what inferences should be**  
drawn from the evidence. **If any expression of mine has seemed to**  
9 **indicate an opinion relating to any of these matters, I instruct you to**  
10 **disregard it.** [Emphasis added.]

11 The determination of whether Petitioner is or is not being honest, and the weight  
12 his testimony should be given is an issue that should be left for the jury. Any benefit  
13 from allowing the District Court to craft a jury instruction relating to Petitioner's  
14 credibility would be "substantially outweighed by the danger of unfair prejudice, of  
15 confusion of the issues or of misleading the jury." NRS 48.035. Neither the District  
16 Court nor counsel should be permitted to express an opinion concerning the credibility of  
17 parties per Nevada Rule of Professional Conduct 3.4(e). *See also Lioce v. Cohen*, 124  
18 Nev. 1, 174 P.3d 970 (2008). Allowing the District Court to craft a jury instruction  
19 relating to Petitioner's credibility would be contrary to Nev. J.I. 1.08 and would obviate  
20 Nev. J.I. 2.07. Stepping outside the bounds of determining the proper law to apply to the  
21 facts and assuming determining witness credibility would be appealable error.  
22  
23

## 24 **IX. CONCLUSION**

25 As explained above, public policy must prohibit a conflicted law firm from using  
26 confidential information to act contrary to the aggrieved client's interests to the point of  
27

1 dismissal of his complaint and adding to insult to injury by forcing the aggrieved client to  
2 pay for the conflicted law firm's Accordingly, Petitioner respectfully requests that the  
3 Court issue a writ of mandamus vacating the District Court's order and directing the  
4 District Court to enter an order denying Respondents' motion for attorney fees and costs  
5 and an adverse jury instruction.

6 DATED this 21<sup>st</sup> day of November, 2016.

7 **INJURY LAWYERS OF NEVADA**

8  
9 */s/ Jolene J. Manke*

10 By: \_\_\_\_\_

11 DAVID J. CHURCHILL

12 JOLENE J. MANKE

13 *Attorneys for Petitioner*  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2. The foregoing Petition is true of my own knowledge except as to those  
rs stated on information and belief, and that, as to such matters, I believe them to b

EXECUTED this 21 day of November, 2016.

XZavion J Hawkins  
XZavion Hawkins

**CERTIFICATION PURSUANT TO NRAP 28.2 AND NRAP 21(5)**

I, Jolene J. Manke, attorney for Petitioner in the above-matter, do hereby certify pursuant to NRAP 28.2 the following:

(1) I have read the Petition;

(2) To the best of my knowledge, information and belief, the Petition is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) I believe that the Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to a page and volume number, if any, of the appendix where the matter relied on is to be found; and

(4) I represent that the Petition complies with the formatting requirements of Rule 32 (a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

(5) Pursuant to NRAP 12(5), I verify that the facts set forth herein are true and correct to the best of my knowledge.

I declare the foregoing is true under penalty of perjury.

DATED this 21<sup>st</sup> day of November, 2016.

  
JOLENE J. MANKE



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

HON. JOANNA KISHNER DEPARTMENT XXXI Eighth Judicial District Court Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	<i>Respondent</i>
--	-------------------

*Respondent*

Email:  
[dlee@lee-lawfirm.com](mailto:dlee@lee-lawfirm.com)  
[crenwick@lee-lawfirm.com](mailto:crenwick@lee-lawfirm.com)

*Attorneys for Real Parties in Interest*  
GGP MEADOWS MALL, LLP,  
MYDATT SECURITY SERVICES,  
INC. d/b/a VALOR SECURITY  
SERVICES and MARK WARNER

Email:  
edgarcarranza@backuslaw.com

*Attorneys for Real Parties in Interest*  
MYDATT SECURITY SERVICES,  
INC. d/b/a VALOR SECURITY  
SERVICES and MARK WARNER

Employee of INJURY LAWYERS OF NEVADA