IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE and HEIDI CANARELLI, and FRANK MARTIN, Special Administrator of the Estate of Edward C. Lubbers, Former Trustees,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE GLORIA STURMAN, District Judge,

Respondent,

and

SCOTT CANARELLI, Beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998,

Real Party in Interest.

Case No.

District Court No. A-18-781201

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for the Petitioners named in this writ petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 3rd day of June, 2019.

/s/ *J. Colby Williams*
J. COLBY WILLIAMS

RULE 26.1 DISCLOSURE

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

Petitioners are all individuals and the former trustees (or the representative of a former trustee) of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998. Lawrence and Heidi Canarelli (the parents of Scott Canarelli) resigned as Family Trustees of the Trust on May 24, 2013, and appointed Edward C. Lubbers as their successor. Mr. Lubbers resigned as Family Trustee of the Trust on October 6, 2017. Mr. Lubbers died on April 2, 2018. On June 27, 2018, Frank Martin, as the duly-appointed Special Administrator of Mr. Lubbers' estate, was substituted as a party in this action in the stead of Mr. Lubbers. Petitioners are referred to herein collectively as the "Former Trustees."

The following attorneys and law firms have appeared for the Former Trustees in the action below:

Donald J. Campbell, J. Colby Williams and Philip R. Erwin of Campbell & Williams;

Liane K. Wakayama of Marquis Aurbach Coffing; and

Joel Schwarz, Elizabeth Brickfield (formerly), and Var Lordahl (formerly) of Dickinson Wright, PLLC.

DATED this 3rd day of June, 2019.

CAMPBELL & WILLIAMS

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ROUTING STATEMENT

One of the principal issues in this writ petition is whether Nevada law permits a judicially created "fiduciary exception" to the attorney-client privilege even though such an exception is not codified in Nevada's statutory attorney-client privilege (NRS 49.095) or the statutory exceptions thereto (NRS 49.115). Accordingly, this Case should remain with the Nevada Supreme Court pursuant to NRAP 17(a)(11) and (12) as it raises a question of first impression, and that question is of statewide public importance. Additionally, this case involves a trust with a corpus exceeding $5,430,000, thereby excluding it from those matters presumptively assigned to the Nevada Court of Appeals. *See* NRAP(b)(14).

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I. INTRODUCTION

Petitioners are the Former Trustees and the representative of a deceased former trustee of The Scott Canarelli Irrevocable Trust (the "Trust"). The Trust previously owned minority interests in various corporations and limited liability companies that comprised part of the homebuilding operations of the American West Home Building Group founded by former trustee, Lawrence Canarelli ("Larry"). The Trust's assets were sold in May 2013 for more than $25 million pursuant to a written purchase agreement. The Real Party in Interest is Scott Canarelli ("Scott"), the sole beneficiary of the Trust and Larry's son. Scott is contesting aspects of the purchase agreement and other Trust matters in the litigation below.

This petition presents significant issues involving the attorney-client privilege and work product doctrine arising from a set of handwritten and typed notes that Petitioners inadvertently produced from the files of former trustee, Edward Lubbers ("Lubbers"). The Discovery Commissioner found the subject notes to be protected by the attorney-client privilege and work product doctrine, at least in part. The Commissioner, however, ruled *sua sponte* that a so-called "fiduciary exception" to Nevada's attorney-client privilege compelled partial production of the notes. As for work product, the Discovery Commissioner appropriately determined that Lubbers anticipated litigation with Scott at the time he prepared his notes. She nonetheless found that the bulk of the notes comprise "ordinary" (*i.e.*, fact) work product, and

ordered production on grounds that Scott had shown a substantial need to obtain the notes due to Lubbers' death during the pendency of the litigation.

Both sides filed objections to the Discovery Commissioner's Report and Recommendation ("DCRR"). Though the district court took a circuitous route to reach its ultimate destination, making inconsistent findings along the way, it affirmed the DCRR with one exception. Respectfully, the lower court's ruling is wrong for several reasons.

Attorney-client privilege. The district court affirmed the finding that some parts of Lubbers' noted are protected by the attorney-client privilege, and other parts are not. The Former Trustees contend that the entirety of Lubbers' notes, particularly his typed notes, are privileged and not subject to any exception. Notwithstanding the district court's affirmation that at least a portion of Lubbers' typed notes is attorney-client privileged, it incongruously found that there was no evidence to support the position that the notes reflected a communication with counsel because Lubbers was no longer alive to testify on the matter. This finding, though, unduly emphasizes an alleged lack of direct evidence while simultaneously ignoring the abundant other evidence supporting the privileged nature of the notes—including declarations from Lubbers' attorneys at the time, the contemporaneous billing records of Lubbers' counsel, and the notes themselves. Additionally, the district court's finding that other portions of the notes are subject to production because they

purportedly reflect "facts" likewise ignores the well settled principle that a privileged communication containing facts will remain protected, even if the facts contained therein are otherwise discoverable.

Next, the district court erred in affirming the Discovery Commissioner's finding that a "fiduciary exception" to the attorney-client privilege compelled the production of Lubbers' notes. The attorney-client privilege in Nevada and the exceptions thereto are governed by statute. *See* NRS 49.095; 49.115. There is no fiduciary exception in Nevada's statutory scheme. Nor has this Court ever embraced a fiduciary exception to the attorney-client privilege. Multiple jurisdictions with statutory frameworks nearly identical to Nevada's have expressly rejected the existence of a fiduciary exception to the attorney-client privilege. Because the fiduciary exception is not codified in NRS 49.095 or 49.115, the principles of statutory construction and this Court's precedent applying those principles in the context of other statutory privileges lead to the inexorable conclusion that the exception does not exist in Nevada. Simply put, any decision to adopt the fiduciary exception rests with Nevada's Legislature, not its courts.

Finally, assuming *arguendo* the fiduciary exception exists in Nevada, the exception certainly does not apply here as Lubbers prepared the subject notes for his own protection after Scott filed his original pleading in this action alleging that Lubbers had breached his fiduciary obligations as trustee of the Trust. Even those

jurisdictions that recognize the fiduciary exception uniformly agree that it does not apply to communications between a trustee and counsel when the purpose of the consultation is to protect and defend the trustee's own interests.

Work product. Though the district court correctly acknowledged that a party can create work product even if not at the direction of counsel and that Lubbers prepared his notes in anticipation of litigation with Scott, the district court erred when it found the notes discoverable based on substantial need. First, a showing of substantial need is irrelevant where, as here, the notes containing purported factual material are protected by the attorney-client privilege. Second, because Lubbers' notes do not encompass most of the categories upon which Scott identified a need for discovery, they do not meet the definition of substantial need in NRCP 26(b)(3). Third, to the extent the notes do contain any discoverable facts, Scott can obtain that information through other means.

II. RELIEF SOUGHT

Petitioners request this Court to issue a writ of prohibition (in the alternative, mandamus) directing the district court to: (1) vacate the portion of its May 31, 2019 order compelling the partial production of Lubbers' notes; and (2) issue an order determining that all of Lubbers' notes are protected by the attorney-client privilege and/or work product doctrine, and that Scott must therefore return the documents to

the Former Trustees or destroy them consistent with the terms of the parties' written ESI Protocol agreement.

III. ISSUES PRESENTED

1. Whether the district court erred in determining that only part of Lubbers' typed and handwritten notes are protected by the attorney-client privilege when the evidence shows the notes are dated the same date Lubbers participated in a phone call with his attorneys, Lubbers' attorneys confirmed they spoke to him on that particular date (and others) about the exact types of information contained in the notes, and the notes themselves reflect the type of information a trustee would share with his legal counsel.

2. Whether Nevada law permits a judicially-created "fiduciary exception" to the attorney-client privilege even though no such exception is codified in NRS 49.095 or NRS 49.115.

3. Whether the district court erred in determining that Scott had shown substantial need to obtain Lubbers' work product-protected notes where the notes are separately protected by the attorney-client privilege, the notes are not the substantial equivalent of the information Scott claims to need during discovery, and any discoverable facts contained within the notes may be obtained through other means.

IV. SUMMARY OF FACTS AND PROCEDURAL HISTORY

The Former Trustees provided a detailed factual history in their underlying papers, *see* 2 Petitioners' Appendix ("PA") at 211-220, which they incorporate but will not repeat here.[1] The essential facts are set forth below.

A. The Parties

Petitioners Larry and Heidi ("Heidi") Canarelli are Scott's parents. (2 PA 257:9-14). Larry is the head of the American West Homebuilding Group ("AWG"). The Canarellis gifted Scott and his three siblings equal minority interests in various corporations and limited liability companies that comprise part of AWG's homebuilding operations, which assets Scott then contributed to the Trust. (2 PA 257:9-14; 258:9-14; 261:4-15). His siblings likewise contributed their respective interests in the subject assets to identical irrevocable trusts (collectively the "Siblings Trusts"). (2 PA 261:4-15).

The Canarellis served as Family Trustees of the Trust from its formation in February 1998 until May 24, 2013. (2 PA 257:17-23; 260:19-25). Lubbers, a licensed attorney in Nevada, had served as Independent Trustee of the Trust since or about 2005. (2 PA 257:17-23). He became successor Family Trustee after the Canarellis resigned in May 2013. (2 PA 260:19-25). Lubbers resigned as Family

[1] Citations to "PA" are to the Joint Appendix. Each citation is preceded by the volume number where the page (and, sometimes, line) citation(s) can be found.

Trustee of the Trust on October 6, 2017, and died approximately six months later on April 2, 2018. On June 27, 2018, Frank Martin, as the duly-appointed Special Administrator of Lubbers' estate, was substituted as a party in Lubbers' stead.

B. The Purchase Agreement

On May 31, 2013, Lubbers, as Family Trustee of Scott's Trust, entered into a purchase agreement (the "Purchase Agreement") with the Siblings Trusts and an entity named SJA Acquisitions, LLC ("SJA"). (2 PA 261:4-15). The Siblings Trusts purchased the corporate interests held by the Trust, and SJA purchased the LLC interests held by the Trust. (2 PA 261:23-262:7). The purchase price exceeded $25 million, was subject to being increased based on a future valuation by an independent consultant, and was personally guaranteed by Larry and Heidi. (2 PA 261:23-263:9). While Scott is contesting aspects of the Purchase Agreement in the litigation below (*e.g.*, the valuations of the sold entities), it is undisputed that all amounts due under the Purchase Agreement are current. (1 PA 1-87; 3 PA 469-72).

C. Scott's Initial Petition and Related Events

Scott filed his initial petition ("Initial Petition") in the underlying action on September 30, 2013. (2 PA 256-271). Prior to that date, Scott's counsel, Solomon Dwiggins & Freer ("SDF"), had threatened to file a petition seeking, *inter alia*, to remove Larry and Heidi as Family Trustees of the Trust due to hostility between the parties and disputes over distributions. (2 PA 273-74). SDF also characterized

Lubbers' requirement that Scott provide receipts for his expenditures prior to receiving future distributions as "*per se* bad faith." (*Id.*). Lubbers specifically noted this development the next day in an agenda item ("***Scott – lawsuit threatened***"), which was then emailed to Larry and Bob Evans (another executive at AWG who assisted on Trust matters) on November 15, 2012. (2 PA 281-82) (emphasis added).[2]

The Initial Petition contained a number of adversarial allegations against the Canarellis and Lubbers, who was Family Trustee by that time, including that Lubbers "***admitted [ ] he had little personal knowledge*** of the Irrevocable Trust's management or its assets[,]" that "the Family Trustee [*i.e.*, Lubbers] ***violated the fiduciary obligations due and owing to Petitioner***[,]" and that Scott lacked "any way of verifying whether the sale was prudent . . . or ***designed to punish him or harm his financial interests***." (2 PA 260; 266; 268) (emphases added).

D. Lubbers Retains His Own Counsel and Creates Notes

Less than two weeks after Scott's service of the Initial Petition, Lubbers retained the law firm Lee, Hernandez, Landrum, Garofalo & Blake ("LHLGB") to represent him in connection with responding to the Initial Petition (and two other petitions filed by Scott related to different trusts). (2 PA 283-88). The contemporaneous billing records from LHLGB reflect that attorneys David Lee and

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[2] *See also*, (2 PA 277) (Former Trustees agreeing to search Bob Evans' electronically stored information ("ESI") on grounds he acted as their agent in connection with the Trust).

Charlene Renwick conducted a conference call with Lubbers on October 14, 2013 that lasted approximately a half hour. (2 PA 290). The general subject matter of the call was "responses to petition." (*Id.*). The billing records reflect additional calls between Lubbers and attorney Renwick on October 15 and 16, 2013. (*Id.*).

1. *The October 2013 Notes (the "Group 1 Notes")*

The Typed Notes. In connection with the October 14, 2013 telephone call with attorneys Lee and Renwick, Lubbers prepared (or had prepared) typed notes. (1 PA 161) (Bates No. RESP0013285).[3] As an initial matter, the typed notes contain the handwritten date "10-14-13" at the top, the same date as Lubbers' call with counsel. (*Id*.) Generally described, the notes begin by setting forth a series of questions asking potential ways to respond to the Initial Petition and the consequences thereof. (*Id.*) The notes next state Lubbers' "beliefs" regarding the district court's potential view of the case as well as his assessment of the strengths and weaknesses of certain legal issues related to the Purchase Agreement, his desired litigation strategy, and where there may be "risk." (*Id.*) Scott's counsel has

[3] Scott provided copies of Lubbers' Group 1 Notes to the Discovery Commissioner and the district court *in camera*, respectively, as sealed Exhibit 1 to his underlying Motion for Determination of Privilege and as sealed Exhibit 2 to his Objections to the DCRR. This, however, was after Scott had already publicly quoted the typed notes in several pleadings and papers filed below. *See* Point IV.E, *infra*. The Former Trustees will only describe the notes in general terms in this petition to avoid claims of waiver and further harm from Scott's improper use and unauthorized disclosure. The notes are, however, being provided to this Court under seal. (1 PA 160-64; 4 PA 676-80).

repeatedly characterized the typed notes as "admissions" by Lubbers. (1 PA 105-06; 3 PA 456:20-23; 5 PA 979:16-980:1).

Attorneys Lee and Renwick have confirmed that, during the October 14, 2013 call, Lubbers asked them several questions about his potential responses to the petitions, and further stated his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein. (2 PA 285; 288). In other words, Lubbers' attorneys have testified that they had a discussion with Lubbers about topics that are entirely consistent with the contents of the typed notes on the very date reflected on the face of said notes. Both attorneys further testified that they had similar discussions with Lubbers on different occasions throughout the representation. (*Id*.)

The Handwritten Notes. Lubbers also created handwritten notes in October 2013 related to the three petitions Scott filed on September 30, 2013. (1 PA 160; 162-64) (Bates No. RESP0013284; RESP0013286-88). Once again, the first page of the handwritten notes bears the date "10-14-13," the date of Lubbers' first call with attorneys Lee and Renwick. (1 PA 160) (Bates No. RESP0013284). Scott's counsel has acknowledged before the Discovery Commissioner and before the district court that the handwritten notes reflect communications between Lubbers and his counsel during the October 14, 2013 phone call. (3 PA 427:24-428:2) ("there's probably no dispute that these four handwritten pages were taken at the

same time during the call."); (5 PA 986:7-8) ("I don't think there's any dispute that that's what was discussed during the call, those handwritten notes.").

2. *The December 2013 Notes (the "Group 2 Notes")*

On or about December 2, 2013, the parties entered a revised stipulation in the action below appointing Stephen Nicolatus to conduct a valuation of the Trust assets sold pursuant to the Purchase Agreement. (2 PA 296-99). While the Parties had agreed to the appointment of Mr. Nicolatus, Scott expressly reserved his rights to seek redress for the conduct of the Trustees as it related to the Purchase Agreement. (2 PA 298:26-299:6). On or about December 19, 2013, the parties along with their respective counsel and representatives met with Mr. Nicolatus to discuss the materials he would need to conduct the valuation. Lubbers took handwritten notes during the meeting. (1 PA 166-67).

E. The Former Trustees Inadvertently Produce Lubbers' Notes, and Seek to Claw Them Back Pursuant to the Parties' ESI Protocol

Scott filed a Petition to Surcharge on June 27, 2017. Counsel for the Former Trustees inadvertently produced Lubbers' Group 1 Notes as part of the Former Trustees' Initial Disclosures on December 15, 2017. (2 PA 251) (Williams Decl. ¶ 21). In a supplemental production on April 6, 2018, counsel for the Former Trustees inadvertently produced Lubbers' Group 2 Notes. (2 PA 251-52) (*Id.* ¶ 22). The parties had previously agreed to a detailed, written ESI Protocol that expressly governed the procedure for dealing with such inadvertent productions. (1 PA 177).

The Group 1 Notes. With no forewarning, Scott unilaterally included Lubbers' typed notes as an exhibit to a Supplemental Petition he filed on May 18, 2018. (1 PA 88-136). The coversheet to Scott's Exhibit 4 described the typed notes as follows: "Memorandum ***prepared by Lubbers*** relating to the sale of the Purchased Entities, ***dated October 14, 2013***." *Id.* (emphases added). (1 PA 135-36). Though the exhibit was submitted *in camera*, Scott's counsel nevertheless publicly quoted the typed notes in the body of the Supplemental Petition, which seeks to add fraud and expanded breach of fiduciary duty claims against the Former Trustees. (1 PA 105:18-106:8).

The Former Trustees sent a letter on June 5, 2018 clawing back the Group 1 Notes pursuant to the parties' ESI Protocol, which prompted a series of communications between counsel for the parties and ultimately led to the filing of the underlying Motion for Privilege Determination and the responsive Opposition/Countermotion. (1 PA 183-91). Despite being on notice of the Former Trustees' position that the typed notes were privileged, and despite ostensibly agreeing to "sequester" the Group 1 Notes while the parties litigated their dispute, Scott's counsel again publicly-quoted the typed notes in subsequent court filings—including the Motion for Privilege Determination. (1 PA 143:1-9).

The Group 2 Notes. In contrast to the manner in which Scott's counsel improperly attempted to use the Group 1 Notes, Scott did not seek to make unilateral

use of the Group 2 Notes. (1 PA 193-204). His counsel instead properly notified the Former Trustees' counsel of the potential inadvertent production of those notes, after which the parties engaged in the clawback procedure set forth in the ESI Protocol and narrowed their dispute to just two pages of documents. (*Id.*)

F. Relevant Procedural Background

1. *Proceedings before the Discovery Commissioner*

Scott filed his Motion for Determination of Privilege Designation on July 13, 2018; the Former Trustees filed their Opposition and Countermotion for Remediation of Improperly Disclosed Attorney-Client Privileged and Work Product Protected Materials on August 10, 2018; Scott filed his Reply and Opposition on August 24, 2018, and the Discovery Commissioner conducted a thorough hearing on August 29, 2018. (1 PA 137-206; 2 PA 207-380; 3 PA 381-468).

As a threshold matter, the Discovery Commissioner found that Lubbers anticipated litigation at the time he prepared the Group 1 Notes in October 2013 shortly after Scott filed his Initial Petition. (3 PA 440:18-441:4; 442:12-17; 443:19-25). The Commissioner further found that the typed notes "reflect things that you would talk with your lawyer about. And if we want to say an attorney/client communication, I think this is probably more than anything else I've reviewed in camera appears to be that." (3 PA 446:9-14). In the end, the Commissioner found that the notes reflected attorney-client communications, *see* (3 PA 462:1-7) ("I think

it is attorney/client"), but found that the fiduciary exception permitted disclosure of portions of the notes to Scott. (*Id.*). To her credit, the Commissioner acknowledged that "the fiduciary privilege has not been determined in Nevada yet" (*see* 3 PA 383:4-5) and that this "critical issue" would likely need to go "all the way up" to the Nevada Supreme Court. (3 PA 403:7-10; 430:12-13; 456:13-15).

The Commissioner further found that the notes reflected work product, but that Scott had shown a substantial need to obtain portions of the notes on account of Lubbers' death. (3 PA 462:19-463:16). The Commissioner thereafter recommended that the notes be disclosed to Petitioner in redacted form, but stayed enforcement of her recommendations under EDCR 2.34(e) to permit the Former Trustees to file objections with the district court. (3 PA 463:19-23). After the Discovery Commissioner's rulings, Scott's counsel agreed to enter into a stipulation by which he would remove the public references to the typed notes contained in his various filings and replace them with redacted versions thereof. (3 PA 463:24-465:3; 3 PA 473-76).[4]

[4] The Discovery Commissioner also found that the Former Trustees had not waived the attorney-client privilege or work product protection for Group I Notes based on the (unsupported) allegation that counsel for the Former Trustees had stored the notes in an unsecure manner at the offices of AWG, thereby exposing their contents to unknown company employees. (3 PA 459:11-461:22). The district court affirmed this finding (*see* 5 PA 1036:20-22) and the Former Trustees do not challenge that part of the court's order. After the hearing before the Discovery Commissioner but before the issuance of the DCRR, Scott's counsel discovered that the Former Trustees had inadvertently produced the Group 1 Notes a second time back in June

2. *Proceedings before the district court*

The Discovery Commissioner entered the DCRR on December 6, 2018. (3 PA 477-89). Scott and the Former Trustees both filed objections to the DCRR on December 17, 2018; the parties filed their respective oppositions on January 14, 2019, and their respective replies on March 21, 2019. (3 PA 490-614; 4 PA 615-839; 5 PA 840-950). The Court conducted a lengthy hearing on the parties' respective objections on April 11, 2019, at the end of which it largely affirmed the DCRR. (5 PA 1032-37).

The district court overruled the Discovery Commissioner in a single respect related to one of Lubbers' handwritten notes (Bates No. RESP0013284). (5 PA 1036:13-18). Whereas the Discovery Commissioner had recommended that the entirety of RESP0013284 be produced based on the fiduciary exception to the attorney-client privilege, the district court instead found that the subject note does not involve matters of trust administration and appears to be related to the attorney-client relationship between Lubbers and his attorneys. (*Id.*) The district court, thus, ordered that the Former Trustees could claw back RESP0013284 with the exception of the last sentence on the document, which the court found was related to trust

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2018, a fact neither side knew at the time. (4 PA 838-39). In compliance with the parties' ESI Protocol, Scott's counsel provided notice of the inadvertent disclosure in November 2018, after which counsel for the Former Trustees' promptly issued a clawback request. (*Id.*).

administration and, therefore, subject to production based on the fiduciary exception. *Id.*

The district court affirmed the remainder of the DCRR even though it repeatedly stated the Discovery Commissioner had made a number of unsupported "assumptions" when finding that the typed notes were partially privileged. (5 PA 1006:7-15; 1009:9-10) ("there's just a lot of assumptions being made here that I don't think there's any evidence for."). The district court seemed to believe there was a lack of evidence as to the privileged nature of the notes because "Mr. Lubbers isn't here" to testify on the subject. (5 PA 1006:22-1007:3; 1012:9-13) ("we do not know if the attorneys were ever given [the typed notes].").

After making these comments, though, the district court then did an about-face and came "to the same conclusion" as the Discovery Commissioner. (5 PA 1019:1-8) ("I think I come to the same conclusion she does. And that is that I believe that at least a portion of that can be interpreted as, I'm a trustee. I've been served with a petition. You're my attorney. How do I respond to it? And you get an answer. So that would be privileged. The rest of it would not be[.]"). The district court likewise agreed that the fiduciary exception required partial disclosure of the typed notes. (5 PA 971:19-21; 1020:25-1021:5).[5]

[5] The Former Trustees moved to stay the district court proceedings while they pursue the instant writ relief. After a hearing on May 9, 2019, the district court granted a partial stay, but it would nonetheless permit Scott and his counsel to

V. WHY THE WRIT SHOULD ISSUE

The Former Trustees seek to preclude the improper disclosure/retention of attorney-client privileged and work product-protected notes. This Court has recognized that "[w]rit relief is an available remedy, where, as here, petitioners have no plain, speedy and adequate remedy at law other than to petition this court. If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995); *see also Las Vegas Dev. Assocs. v. Eighth Judicial Dist. Ct.*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014) (noting "that a writ of prohibition is an appropriate remedy to correct an order that compels the disclosure of privileged information."). If the district court's order to produce portions of Lubbers' notes (or allowing Scott to retain said portions) is allowed to go into effect, the notes would "irretrievably lose [their] confidential and privileged quality," and the Former Trustees will "have no effective remedy."

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continue to conduct discovery on matters ostensibly unrelated to Lubbers' notes. The Former Trustees contend that Scott's counsel has undisputedly obtained and used privileged information in the litigation below and, thus, a complete stay is necessary until a final determination is made as to the status of Lubbers' notes. This matter is addressed in more detail in the Former Trustees' Motion to Stay filed concurrently herewith.

Wardleigh, 111 Nev. at 350-51, 891 P.2d at 1183-84. Writ relief is required to prevent this harm.

Writ review is additionally appropriate where an important issue of law needs clarification, and public policy is served by this Court's invocation of its original jurisdiction. *See, e.g., Diaz v. Eighth Judicial Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 53-54 (2000). The opportunity to define the precise parameters of a statutory privilege, including the exceptions thereto, presents the type of important legal issue for which writ review is warranted. *See id.* (citing *Ashokan v. State Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993)). That is the exact type of important legal issue at stake here.

VI. ARGUMENT

A. Standard of Review

While this Court reviews discovery orders under the deferential abuse of discretion standard, *see Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012), "deference is not owed to legal error." *AA Primo Builders v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

Whether documents "are protected by the attorney-client privilege is a mixed question of law and fact subject to *de novo* review." *In re Fontainbleau Las Vegas Holdings, LLC*, No. 2:11-cv-00402-RLH, 2011 WL 1074125, at *3 (D. Nev. Mar. 18, 2011) (citing *In re Grand Jury Investigation,* 974 F.2d 1068, 1070 (9th

Cir.1988)); *cf. Bower v. Harrah's Laughlin, Inc.,* 125 Nev. 470, 480, 215 P.3d 709, 717 (2009) (explaining that the appellate court reviews mixed questions of law and fact *de novo* when legal issues predominate).

Finally, the question of whether a "fiduciary exception" to the attorney-client privilege exists in Nevada when no such exception is codified in NRS 49.095 or NRS 49.115 requires statutory construction. This Court reviews the application and interpretation of a statute *de novo*. *See In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 673 (2012) ("questions of statutory construction, including the meaning and scope of a statute, are questions of law, which [we] review [ ] de novo.").[6]

B. Lubbers' Typed Notes Are Attorney-Client Privileged in Their Entirety.

The attorney-client privilege is the oldest privilege recognized in law. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege "is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Wynn Resorts, Limited v. Eighth Judicial Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 341 (2017).

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[6] In addition to the common law fiduciary exception, the Discovery Commissioner found that the statutory exception contained in NRS 49.115(5) provided another basis requiring partial production of the typed notes. (3 PA 481:20-24). The district court affirmed this finding. (5 PA 1036:20-22). Because this issue also turns on the interpretation of the attorney-client privilege statutes, it is likewise subject to *de novo* review.

Nevada has codified the attorney-client privilege at NRS 49.095. *See id.* Specifically, "a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications: (1) between the client or the client's representative and the client's lawyer or the representative of the client's lawyer; (2) between the client's lawyer and the lawyer's representative; (3) made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest." NRS 49.095. The person asserting the privilege has the burden of establishing that it exists. *See Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).[7]

1. *The Former Trustees presented substantial evidence supporting the privileged nature of the typed notes.*

By virtue of Lubbers' death on April 2, 2018, the parties and the district court were admittedly deprived of a potentially valuable source of information regarding

[7] The Former Trustees focus their analysis of the attorney-client privilege in large part on Lubbers' typed notes (RESP0013285) as all parties recognize they are the "heart" of the parties' dispute. (5 PA 990:21-991:4). With respect to the remainder of the Group 1 Notes (RESP0013284; 0013286-88), it is the position of the Former Trustees that all of these handwritten notes are protected by the attorney client privilege as there is no dispute they were prepared by Lubbers during his October 14, 2013 phone call with counsel. *See* Point IV.D.1, *supra; cf. Brennan v. Western Nat. Mut. Ins. Co.*, 199 F.R.D. 660, 662 (D. S.D. 2001) (handwritten note by employee of insurance company memorializing communications with insurer's counsel over the telephone was covered by the attorney-client privilege). Lubbers' handwritten notes should, therefore, remain protected even if they contain "facts." *See* Point VI.B.2, *infra*.

the privileged nature of the typed notes. Notwithstanding this unfortunate circumstance, abundant other evidence exists to establish the application of the privilege including the notes themselves, the declarations of Lubbers' attorneys at the time, and the attorneys' contemporaneous billing records.

The typed notes contain the handwritten date "10-14-13" at the top—which is just two weeks after Lubbers was served with Scott's Initial Petition and the same date as Lubbers' call with counsel. (1 PA 161). That Lubbers spoke with his lawyers on that date is not only corroborated by attorneys Lee and Renwick, but also by their contemporaneous billing records. (2 PA 285; 287; 290). Generally described, the notes begin by setting forth a series of questions asking potential ways to respond to the Initial Petition and the consequences thereof. (1 PA 161). Both the Discovery Commissioner and the district court found that this portion of the typed notes was protected by the attorney-client privilege and that no exception applied thereto. (3 PA 481:7-10; 5 PA 1035:20-23).

The notes next state Lubbers' "beliefs" regarding the district court's potential view of the case as well as his assessment of the strengths and weaknesses of certain legal issues related to the Purchase Agreement, his desired litigation strategy, and where there may be "risk." (1 PA 161). The Discovery Commissioner and the district court found that these portions of the typed notes were subject to production because they reflected "facts" and addressed matters of trust administration, which

rendered them subject to production under the fiduciary exception. (3 PA 481:11-482:4; 5 PA 1035:24-27).

Attorneys Lee and Renwick have confirmed that, during the October 14, 2013 call, Lubbers asked them several questions about his potential responses to the petitions, and further stated his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein. (2 PA 285; 287). Lubbers' attorneys have thus testified that they had a discussion with Lubbers about topics that are entirely consistent with the contents of the typed notes on the very date reflected on the face of said notes. Both attorneys further testified that they had similar discussions with Lubbers on different occasions throughout the representation. *Id.*

Taken together, the foregoing evidence establishes that Lubbers' typed notes reflect communications "between an attorney and client, for the purpose of facilitating the rendition of legal services, and [were] confidential." *See Wynn Resorts*, 399 P.3d at 341.

2. *The district court erred in ordering the partial production of Lubbers' typed notes.*

The district court's ruling that the typed notes are subject to partial production based on the fiduciary exception is addressed separately below. *See* Point VI.C, *infra*. The district court's other basis for ordering production—that the notes reflect "facts"—is also erroneous for the reasons set forth herein.

As a threshold matter, the Former Trustees dispute the district court's finding that the lower two thirds of the typed notes reflect "facts." The typed notes instead reflect Lubbers' "beliefs." Beliefs are not facts; they are synonymous with "opinions." *See* www.merriam-webster.com/dictionary/belief. Lubbers was clearly expressing his opinions as to the way the district court may view the case, proposed courses of conduct in the litigation, and where there may be "risk." Such strategy-driven comments between client and counsel are exactly the kind of communications the attorney-client privilege is intended to protect.

Regardless, even if portions of the typed notes are deemed to contain "facts," they are still contained within a privileged communication with counsel. "Mere facts are not privileged, but communications about facts to obtain legal advice are." *Wynn Resorts*, 399 P.3d at 341; *Wardleigh*, 111 Nev. at 352, 891 P.2d at 1184 (same); *Upjohn Co*, 449 U.S. at 395-96 ("The protection of the privilege extends only to communications and not to facts. ***A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?***') (emphasis added) (quotations omitted). Because both the Discovery Commissioner and the district court found that the top portion of the typed notes reflect Lubbers' confidential communications with counsel to obtain legal advice, *see* Point VI.B.1,

supra, logic dictates that the foregoing precedent should protect the remainder of the notes even if they arguably reflect "facts."[8]

The district court seemed reluctant to protect the entirety of the typed notes on the basis that there was no way to "know if the attorneys were ever given this [*i.e.*, the notes]." (5 PA 1012:9-13). That, however, is not the test as there is no requirement that such notes actually be physically provided to counsel. *See, e.g., United States v. DeFonte*, 441 F.3d 92 (2d Cir. 2006).

In *DeFonte*, a former corrections officer charged with crimes committed during the course of that employment sought to discover a journal kept by a potential government witness, Collazos, who was incarcerated at the facility where DeFonte was a guard. *Id.* at 93-94. Collazos moved for a protective order to prevent disclosure based on the attorney-client privilege, which the district court denied on grounds the journal had not been provided by Collazos to her attorneys. *Id.* at 94. The Court of Appeals for the Second Circuit reversed:

> It is undisputed by the parties that the journal was never delivered to Collazos's attorney. The district court took that fact to be dispositive in determining that the journal was outside the cloak of privilege. Collazos argues that delivery of the journal itself is not necessary so long as the journal's entries did serve as an outline for an attorney-client conversation. Certainly, an outline of what a client wishes to discuss with counsel-and which is subsequently discussed with one's counsel-

[8] Although The Discovery Commissioner recognized this principle at the time of hearing (*see* 3 PA 456:24-457:1) ("facts [ ] contained in an attorney/client privileged communication, to make that communication remain privileged") she nevertheless failed to apply it.

> would seem to fit squarely within our understanding of the scope of the privilege.

Id. at 96; *see also United States v. Jimenez*, 265 F.Supp.3d 1348, 1352 (S.D. Ala. 2017) (finding defendant's e-mails to himself protected by the attorney-client privilege: "Jimenez has presented evidence that the contents of the Disputed Emails, while not delivered to [his attorney] or other counsel, did serve as an outline for attorney-client conversations regarding the present case."); *Cencast Servs., L.P. v. United States*, 91 Fed. Cl. 496, 505–06 (2010) ("[N]otes which a client makes to tell his attorney or to ask him regarding certain matters as to which he may be seeking legal advice would retain an attorney-client privilege aspect even if taken before an attorney was actually retained or possibly even if never communicated to an attorney directly. It should be sufficient if their purpose and intent was as an *aide memoire* for the client when meeting with the attorney.") (quoting 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* at 130 (2007)).

Here, Lubbers' attorneys have testified that they had a telephone communication with Lubbers on October 14, 2013 (and on other occasions) in which they discussed topics consistent with those reflected in Lubbers' typed notes. While this may not be direct evidence from Lubbers that he communicated the contents of his typed notes to attorneys Lee and Renwick, it is direct evidence from his counsel that they did in fact communicate about these issues with Lubbers—recognizing, of course, that attorneys are limited in what they can reveal about attorney-client

communications before running the risk of waiver. *Cf. Wynn Resorts*, 399 P.3d at 346 ("[A] client does not waive his attorney-client privilege merely by disclosing a subject which he had discussed with his attorney; rather, in order to waive the privilege, the client must disclose the communication with the attorney itself.") (quotations omitted).[9]

Even if the contents of the typed notes, the declarations from Lubbers' counsel, and the attorneys' contemporaneous billing records were only considered to be circumstantial evidence, they are still sufficient to uphold a finding of privilege. After all, if "circumstantial evidence alone may sustain a conviction" in a criminal proceeding, surely it can sustain a finding that the attorney-client privilege applies to a set of notes. *See Cunningham v. State*, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997) ("[c]ircumstantial evidence is entitled to the same weight as that given to direct evidence[.]") (quotation omitted).

C. Nevada Does Not Recognize a "Fiduciary Exception" to the Attorney-Client Privilege.

Despite finding (correctly) that two of the Group 1 Notes (*i.e.*, RESP0013284

[9] For similar reasons, the Former Trustees purposefully refrained from showing Lubbers' notes to the LHLGB attorneys prior to the preparation of their declarations as they did not want to face a claim that the use of privileged documents to refresh a witness's recollection prior to testifying resulted in a waiver of the privilege. *See Las Vegas Dev. Assocs.*, 130 Nev. at 340, 325 P.3d at 1263 ("Nevada courts lack discretion to halt the disclosure of privileged documents when a witness uses privileged documents to refresh his or her recollection prior to testifying.").

and RESP0013285) contained attorney-client privileged communications, the district court nevertheless determined that portions thereof are subject to production under a "fiduciary exception" to the attorney-client privilege. This is error.

1. *Recognition of a "fiduciary exception" to the attorney-client privilege is the province of the Legislature, not the courts.*

The attorney-client privilege in Nevada is a creature of statute. *See* NRS 49.095. It is not a common law privilege as in the federal courts and those states that have adopted a fiduciary exception to the privilege.[10] Nevada's statutory scheme expressly provides for five exceptions to the attorney-client privilege. *See* NRS 49.115. None of them embody the fiduciary exception relied upon by the district court.[11]

When engaging in statutory interpretation, Nevada has long followed the maxim *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another. *See, e.g., Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'expressio Unius Est Exclusio Alterius', the

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[10] *See, e.g.*, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del.Ch. 1976) ("Attorney client privilege is established in Delaware, not by statute but by application of common law principles[.]") (quotation omitted). Delaware has since codified the attorney-client privilege and the exceptions thereto. *See* D.R.E. 502.

[11] Succinctly stated, the fiduciary exception to the attorney-client privilege "provides that a fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration." *See Murphy v. Gorman*, 271 F.R.D. 296, 305 (D.N.M. 2010) (citations omitted).

expression of one thing is the exclusion of another, has been repeatedly confirmed in this State."). This Court has repeatedly concluded that where a statutory or constitutional provision provides a single exception, no additional exceptions exist beyond those expressly stated. *See, e.g., Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014); *Ramsey v. City of N. Las Vegas*, 133 Nev. Adv. Op. 16, 392 P.3d 614, 619 (2017) (collecting cases). Accordingly, the Legislature's failure to include a fiduciary duty exception within the framework of NRS 49.115 (or elsewhere) should be deemed an intentional omission. *See Ashokan*, 109 Nev. at 670, 856 P.2d at 249 (recognizing "legislature's demonstrated ability to draft privilege statutes within very precise parameters").

The Nevada Supreme Court has rejected previous attempts to engraft judicially-created exceptions onto statutory privileges. *See, e.g., State ex rel. Tidvall v. Eighth Judicial Dist. Ct.*, 91 Nev. 520, 539 P.2d 456 (1975). In *Tidvall*, a bank sued its customer to recover money and personalty in which it claimed a security interest. *Id.* at 522-23, 539 P.2d at 457-58. The customer served subpoenas and Rule 34 document requests seeking *inter alia* certain bank reports deemed absolutely privileged under NRS 665.055, *et seq*. *Id.* When the district court denied the bank's objections and ordered production, the bank sought writ relief. *Id.* In granting writ relief to the bank, the *Tidvall* court determined that NRCP 34 (governing production of documents in civil litigation) did not override

the legislative enactment of absolute privilege: "[t]he privilege at issue in the present case is a statutory privilege, and as such, is a pronouncement of public policy. The legislature or the people, as the case may be, formulate policy." *Id.* at 524, 539 P.2d at 459 (quoting *Grant and McNamee v. Payne*, 60 Nev. 250, 258, 107 P.2d 307, 311 (1940) (cautioning against "judicial legislation" as "[t]he courts are given no hand in [formulating policy].")).[12]

The same reasoning is persuasive here. While the attorney-client privilege is not absolute in its application, the salient point is that the five exceptions to the privilege under NRS 49.115 have already been codified by the Legislature and reflect the public policy of the State. Accordingly, if there is to be a sixth exception to the attorney-client privilege in the form of a "fiduciary exception," such a change must be enacted by the Legislature, not the courts. Indeed, if a fiduciary's disclosure obligations to the beneficiary trumped his right to engage in privileged

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[12] In the eight decades since *Grant and McNamee* was decided, this Court has consistently declined the invitations of litigants to expand or narrow statutory privileges through judicial fiat. *See, e.g.*, *Mitchell v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1100-01 (2015) ("[W]e cannot enlarge the doctor-patient privilege by judicially narrowing one of its principal exceptions without running afoul of NRS 49.015, which constrains nonconstitutional privileges to those the Legislature has authorized."); *Rogers v. State*, 127 Nev. 323, 326-330, 255 P.3d 1264, 1266-68 (2011) (observing that the "existence and scope" of the doctor-patient privilege "depend on statute," and declining to extend the scope of the privilege to include first responders based on defendant's policy arguments: "It is for the Legislature, not the court, … to extend the literal language of the [doctor-patient] privilege [statute] to include paramedics.") (quotation omitted).

communications with counsel, fundamental fairness would require advance notice of this trap for the unwary. The Legislature has never provided such notice. Its silence is telling.

Other jurisdictions with statutory attorney-client privileges nearly identical to Nevada's have refused to adopt the common law fiduciary exception. *See, e.g., Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 595-97 (Cal. 2000) ("What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification."); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014) (*en banc*) (concluding that "OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a 'fiduciary exception,' that exception does not exist in Oregon."); *Huie v. DeShazo*, 922 S.W.2d, 920, 924-25 (Tex. 1996) ("If the special role of a fiduciary does justify such an exception, it should be instituted as an amendment to Rule 503 through the rulemaking process, rather than through judicial interpretation."); *Murphy*, 271 F.R.D. at 318-19 (predicting the New Mexico Supreme Court "would not permit a judicially created expansion of the exceptions to the attorney-client privilege to add a fiduciary exception, which has not been recognized in the New Mexico Constitution or the New Mexico Rules of

Evidence."). This Court should do the same.[13]

2. *Public policy considerations disfavor adoption of the fiduciary exception.*

In addition to the inability of courts to adopt common law exceptions in the face of statutorily-enacted privileges, a variety of public policy considerations also favor rejection of the fiduciary exception. First, the exception would discourage trustees from seeking legal advice if they knew their communications with counsel would not remain confidential:

> The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.

Huie, 922 S.W.2d at 924-25. Even courts that recognize the fiduciary exception appreciate this danger. *See United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir.

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[13] The Nevada Supreme Court has addressed the fiduciary exception once in an unpublished opinion. *See Marshall v. Eighth Judicial Dist. Ct.*, 128 Nev. 915, 381 P.3d 637, 2012 WL 2366435 (2012) (unpublished). The Discovery Commissioner raised *Marshall sua sponte* below, but properly recognized it is not precedential. (3 PA 384:9-18) ("it's unpublished, it's an early decision, so technically is [sic] has no business being cited."). In any event, the *Marshall* court did not adopt a fiduciary exception but merely observed that "Nevada does not appear to have resolved the issue and its related work product implications." 2012 WL 2366435, at *2.

1999) ("an uncertain attorney-client privilege will likely result in [ ] trustees shying away from legal advice regarding the performance of their duties."). This is not in the best interests of beneficiaries as they should prefer "well-counseled trustees who clearly understand their duties." *Id.*

Second, attorneys representing trustees would be reluctant to provide the full and frank advice that is essential to the proper functioning of the attorney-client privilege if they knew the beneficiary could ultimately use that advice against the Trustee. Attorneys would instead be inclined to provide hedged advice given the likelihood it may be disclosed to the beneficiary and thereafter weaponized. This lowers the quality of the advice received by the trustee and, again, only hurts the beneficiary in the end. Of course, "a trustee's fear that her lawyer will be used against her may well translate into [ ] an unwillingness to serve at all[,]" *Mett*, 178 F.3d at 1065, thereby having the anomalous effect of diminishing the number of qualified individuals and institutions available to serve as trustees in the first place.

Finally, recognition of the fiduciary exception in Nevada will burden judicial resources by vastly increasing the need for *in camera* review to determine whether trustee-attorney communications relate to trust administration (which may, in certain cases, be subject to production under the exception) or the trustee's own protection (which would not). This line, however, is often blurred. The *Mett* court recognized the dilemma as well: "this view of the fiduciary exception threatens to

swallow the entirety of the attorney-client privilege for [ ] trustees. After all, any advice concerning [a trust] could be construed as relating, at least indirectly, to the administration of the [trust]." 178 F.3d at 1065. Given the lack of a bright line between distinguishing what is a protected communication and what is not, adoption of the fiduciary exception threatens to mire the district courts in endless discovery disputes. And because those disputes revolve around the issue of privileged communications, they will often be the subject of actual or attempted writ review, thus fostering yet more delay and uncertainty.

3. *NRS 49.115(5) does not justify disclosure of Lubbers' notes.*

In addition to the fiduciary exception, the DCRR also invokes NRS 49.115(5) as an additional basis for justifying partial production of Lubbers' typed notes. (3 PA 481:20-24). The district court affirmed this ruling. (5 PA 1035:24-27). This exception to the attorney-client privilege cannot apply as it is limited to situations where an attorney is employed by two or more clients to give advice on a matter in which they have a common interest. *See* NRS 49.115(5) (communication is not privileged when "relevant to a matter of common interest between ***two or more clients*** if the communication was made by any of them ***to a lawyer retained or consulted in common***, when offered in an action between any of the clients.") (emphases added).

Should the clients later become adverse, either client is then permitted to examine the lawyer as a witness regarding the communications made when the lawyer was acting for all. *See id.; see also Hall CA-NV, LLC v. Ladera Dev., LLC*, 2018 WL 6272890, at *6 (D. Nev. Nov. 30, 2018) ("Under Nevada law, 'when a lawyer acts as the common attorney of two parties, their communications to him are privileged as far as they concern strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations.'") (quoting *Livingston v. Wagner*, 23 Nev. 53, 42 P. 290, 292 (1895)).

Dual representation is the lynchpin to this exception. Scott, though, has never argued—and there is zero evidence in the record—that LHLGB was ever retained or consulted by Lubbers ***and*** Scott on any matter. That Lubbers was Family Trustee of the Trust and, thus, a fiduciary to Scott does not mean that LHLGB represented Scott or owed him any fiduciary duties by virtue of its status as Lubbers' counsel. *See* NRS 162.310(1) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal."). Because LHLGB represented Lubbers only, the lower court's reliance on NRS 49.115(5) to justify production of Lubbers' notes constitutes additional legal error.

D. Assuming *Arguendo* that a Fiduciary Exception Exists in Nevada, It Does Not Justify Production of Lubbers' Notes.

Even if Nevada recognized a fiduciary exception to the attorney-client privilege, and it does not, the district court nonetheless erred when it found that the exception required partial production of Lubbers' notes. Lubbers did not prepare his notes in connection with the administration of the Trust (routine or otherwise) or for Scott's benefit. Lubbers instead prepared them for his own protection ***after*** Scott filed his Initial Petition alleging that Lubbers (as well as Larry and Heidi) had breached fiduciary duties owed to Scott as the beneficiary of the Trust.

The fiduciary exception, even in those jurisdictions where it is recognized, has limited application. "The rationales underlying the fiduciary exception are not present when a trustee seeks legal advice in a personal capacity on matters not of trust administration." *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055, 1062 (Ariz. Ct. App. 2014); *see also Riggs*, 355 A.2d at 711 (requiring production of legal opinion where advice "was prepared ultimately for the benefit of beneficiaries of the trust ***and not for the trustees' own defense in any litigation***[.]") (emphasis added). Where, as here, a trustee retains counsel in order to defend himself against the beneficiary, the attorney-client privilege remains intact. *See Mett*, 178 F.3d at 1063-64; Restatement (Third) of Trusts § 82 cmt. f ("A trustee is privileged to refrain from disclosing to beneficiaries or cotrustees opinions obtained from, and other

communications with, counsel retained for the trustee's personal protection in the course, or in anticipation, of litigation[ ]."). [14]

The Discovery Commissioner correctly found that Lubbers anticipated litigation with Scott at the time he prepared his notes in October 2013. (3 PA 442:15-17) ("I agree that when the petition was filed, anticipation of litigation, including litigation of Mr. Lubbers, had to be considered."); (*id.* at 443:22-25) ("based on this typewritten document, 13285 dated 10/14/13, it appears to me that there were considerations of – of concern.")). Indeed, Lubbers was already in litigation with Scott at the time he prepared his notes in October 2013 as Scott filed his Initial Petition on September 30, 2013. (3 PA 440:24-25) ("I think the work product privilege does apply. I think it wasn't just anticipated. There was actual litigation.").

While Scott attempted below to recharacterize his Initial Petition as a benign pleading that sought nothing more than an accounting, the reality is that it contained multiple adversarial allegations, including that there had been a falling out between Scott and his parents, that hostility existed between them, that the Family Trustees

[14] Though not precedential, two Nevada courts have likewise recognized the limitations of the fiduciary exception. *See Marshall*, 2012 WL 2366435, at *2 ("when there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for the trustee's own protection, the beneficiaries are generally not entitled to inspect it."); *Haigh v. Constr. Indus. & Laborers Joint Pension Tr. for S. Nevada, Plan A & Plan B*, 2015 WL 8375150, at *4 (D. Nev. Dec. 9, 2015) ("Once the interests of the [ ] fiduciary and beneficiary diverge the fiduciary exception no longer applies[.]") (quotations omitted).

(including Lubbers) had breached their fiduciary duties to Scott, that the parties had a conflict of interest when entering into the Purchase Agreement at issue herein, and that the Purchase Agreement may have been designed to punish Scott or otherwise harm his financial interests. (2 PA 213:4-214:16) (summarizing allegations).[15]

The Initial Petition, moreover, had been preceded by a letter from Scott's counsel in November 2012 alleging that Lubbers' conduct toward Scott was "*per se* bad faith" and threatening to file suit to remove the trustees of the Trust as their "neutrality [was] compromised." (2 PA 211:16-212:3; 273-74). Lubbers specifically noted the threat of litigation in an agenda prepared the next day. (2 PA 212:4-8; 281-82). After filing his Initial Petition, Scott continuously reserved his right to challenge the appropriateness of the Purchase Agreement and the actions of the Trustees in connection therewith. (2 PA 298:26-299:7; 301). That Lubbers was reasonable in anticipating litigation when he retained LHLGB in October 2013 is not only borne out by the Initial Petition and the events that preceded it, but also because Scott expanded on his Initial Petition against Lubbers (and now his estate) in June 2017 and again in May 2018 to pursue claims premised on the very conduct

[15] Scott brought his Initial Petition pursuant to NRS 164.010, 164.015, 153.031 and 164.030, specifically referencing and relying on 153.031(1)(f). (2 PA 265:9-12). That statute and the Initial Petition refer to "settling the accounts and reviewing the acts of the trustee, including the exercise of discretionary powers." (*Id.*) A request by a beneficiary that the Court review the trustee's acts and exercise of discretionary powers is, by definition, adversarial.

he had reserved back in 2013—*i.e.*, "the actions of such Trustees, vis-à-vis the Purchase Agreement, dated May 31, 2013." (*Id.*).

While Respondents will not divulge the contents of Lubbers' notes in this public filing, the Court can review them *in camera* to see that they were not prepared for Scott's benefit. To the contrary—and generally described—the notes seek advice regarding how to respond to Scott's petitions, they contain Lubbers' mental impressions about the strengths and weaknesses of various legal positions, and they reflect Lubbers' beliefs as to how the Court may view the case. The notes, simply put, seek advice for Lubbers' own protection; they do not focus on Trust administration; and they were not prepared on Scott's behalf. The fiduciary exception is thus inapplicable—even if one existed in Nevada.[16]

E. Lubbers' Work Product-Protected Notes Are Not Discoverable Based on "Substantial Need."

NRCP 26(b)(3) "protects documents with 'two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative.'" *Wynn Resorts*,

[16] Again, the reality is that "any legal advice concerning [a trust] could be construed as relating, at least indirectly, to administration[.]" *Mett*, 176 F.3d at 1065. That does not mean, however, that all trustee-attorney communications are fair game just because they may relate to trust administration. When a trustee "seeks legal advice for his own protection, the legal fiction of 'trustee as representative of the beneficiaries' is dispelled, ***notwithstanding the fact that the legal advice may relate to the trustee's administration of the trust***." *Id.* (emphasis added).

399 P.3d at 347. "Under the 'because of' test," adopted by this Court in *Wynn Resorts*, "documents are prepared in anticipation of litigation when 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *Id.* at 348. While the rule protects any document prepared by or for a party "because of" litigation, it does *not* protect "records prepared in the normal course of business since those are not prepared because of the prospect of litigation." *Id.* To determine whether the "because of" test is met, the Court is to consider "the totality of the circumstances." *Id.* The person asserting work product protection has the burden of establishing its applicability. *See Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 699 (D. Nev. 1994).

The Discovery Commissioner correctly found that Lubbers anticipated litigation at the time he prepared his notes. (3 PA 479:23-25); *see also* Point VI.D, *supra*. And though the Commissioner found that Lubbers was not acting in his capacity as an attorney at the time he prepared his notes (*see id.* at 479:18-19) she properly found that non-attorneys can prepare protected work product. (*Id.* at 479:20-21); *see also Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 660 (D. Nev. 2007) ("It may be surprising to long-time practitioners that 'a lawyer need not be involved at all for the work product protection to take effect.'") (quotation omitted). The district court affirmed these findings. (5 PA 1036:20-21).

Despite finding that Lubbers' notes would be subject to work product protection because they were prepared in anticipation of litigation, the Discovery Commissioner and the district court determined that portions of the notes were subject to production because they contained "facts," and Scott had shown a substantial need to obtain them given that Lubbers passed away and was no longer able to be deposed. Respectfully, these findings are against the clear weight of the evidence and constitute mistakes in law.

1. *The principle of "substantial need" is irrelevant to the Group 1 Notes.*

The district court properly found that the Group 1 Notes (specifically, RESP0013284-85) are protected by the attorney-client privilege. That determination renders a discussion of substantia need beside the point as this principle does not apply in the context of privileged communications. *See, e.g., Gruss v. Zwirn*, 276 F.R.D. 115, 131 (S.D.N.Y. 2011) ("since any factual material contained in the interview notes and summaries at issue in this case is protected by the attorney-client privilege, plaintiff's showing of substantial need as to those portions of the interview notes and summaries is ultimately irrelevant."), *rev'd in part*, 2013 WL 3481350 (S.D.N.Y. July 10, 2013); *Salvation Army v. Bryson*, 273 P.3d 656, 660 (Ariz. Ct. App. 2012) (in contrast to the work product doctrine, "a claim of attorney-client privilege makes a discussion of substantial need and unavailability of the substantial

equivalent irrelevant. Rule 26(b)(1) recognizes that privileged material is not discoverable.") (quotations omitted).

Even if the Group 1 Notes contain "facts"—a proposition the Former Trustees dispute for reasons already stated—those facts are still contained in a communication with counsel that should remain privileged and protected from production. *See* Point VI.B.2, *supra* (citing *Wynn Resorts,* 399 P.3d at 341; *Wardleigh*, 111 Nev. at 352, 891 P.2d at 1184; *Upjohn,* 449 U.S. at 395-96). Moreover, any purported facts contained within the typed notes (RESP0013285) are inextricably intertwined with Lubbers' opinions—specifically Lubbers' mental impressions as to how the district court may view the instant litigation. The notes should not, therefore, be subject to production on even a limited basis. *Cf. SEC v. Roberts*, 254 F.R.D. 371, 382-82 (N.D. Cal. 2008) (refusing production of attorney's notes where "the facts contained within the notes are likely inextricably tied with the attorney's mental thoughts and impressions.").

2. *Neither the Group 1 Notes nor the Group 2 Notes are the substantial equivalent of the discovery Scott purports to need.*

Setting aside the privileged nature of the Group 1 Notes, Scott has nonetheless failed to show substantial need to overcome the work product protection that applies to both the Group 1 Notes and Group 2 Notes. In an effort to demonstrate a substantial need for Lubbers' notes, Scott recounted a laundry-list of issues that

Lubbers purportedly could have testified to but for his untimely death. (4 PA 763:21-764:18) (listing "(1) the circumstances of the Canarellis' resignation as Family Trustees; (2) [Lubbers'] acceptance as the successor Family Trustee; (3) Lubbers' execution of the Purchase Agreement; (4) [Lubbers] reasoning for executing the Purchase Agreement; (5) the due diligence [Lubbers] conducted, if any; (6) [Lubbers'] knowledge on the business and forecasts; (7) distribution requests and responses thereto.").

Scott's overreaching is his undoing as the "vast range" of issues he identifies extend well-beyond the actual subject matter reflected in any of Lubbers' notes. The principle of substantial need, by its terms, applies only when a party is unable to obtain the "substantial equivalent ***of the materials*** by other means." *See* NRCP 26(b)(3) (emphasis added). Because the subject materials—Lubbers' notes—do not encompass the seven categories of issues upon which Scott claims the need for discovery, the principle of substantial need cannot be used to compel their production.

3. *Scott can obtain his desired discovery by other means.*

To the extent any of Lubbers' notes do contain discoverable facts, Scott can obtain that information through other means. For example, insofar as Scott wants to conduct discovery into "the circumstances of the Canarellis' resignation as Family Trustees," he can simply depose Larry and Heidi. The same is true with respect to

"distribution requests and responses thereto" as Scott's complaints regarding the responses to distribution requests occurred when Larry and Heidi were Family Trustees.

Scott also has other means to obtain the substantial equivalent of the Group 2 Notes, which Lubbers prepared during a meeting on December 19, 2013. For starters, Scott should already know what occurred at the meeting because he attended it in person with his counsel. Additionally, Scott could also seek to depose Steve Nicolatus or Bob Evans, both of whom were also present at the meeting. *See In re Western States Wholesale Natural Gas Antitrust Litig.*, 2016 WL 2593916, at *8 (D. Nev. May 5, 2016) (denying access to work product materials where party could obtain the substantial equivalent without undue hardship). The simple truth is that Scott seems more interested in obtaining these notes so he can see what Lubbers considered to be significant during the subject meeting. That, obviously, is not a proper basis upon which to show substantial need.

VII. CONCLUSION

Lubbers' notes are not subject to production because they are protected by the attorney-client privilege, and Nevada does not recognize a fiduciary exception to said privilege. Regardless, any fiduciary exception has no application to Lubbers' notes as he prepared them for his own protection, not Scott's benefit. With respect to their status as protected work product, the notes are not subject to production

based on substantial need as any discoverable facts are contained in attorney-client privileged communications, are not the substantial equivalent of the discovery Scott seeks, and may be obtained by other means.

For all these reasons, the Court should (i) issue a writ of prohibition to prevent the district court from enforcing the portion of its May 31, 2019 Order compelling the production of Lubbers' notes, and (ii) issue a writ of mandamus requiring the district court to determine that all of Lubbers' notes are protected by the attorney-client privilege and/or work product doctrine, and that Scott must therefore return the documents to the Former Trustees or destroy them consistent with the terms of the parties' written ESI Protocol agreement.

DATED this 3rd day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this writ petition complies with 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,894 words.

I further certify that I have read this writ 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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. I understand that I may be subject to sanctions in the event that the accompanying reply does not conform with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 3rd day of June, 2019.

CAMPBELL & WILLIAMS

By **/s/ *J. Colby Williams***

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 3rd day of June, 2019, serve upon the following in this action a copy of the foregoing **Petition for Writ of Prohibition or Mandamus** by United States Mail, postage prepaid:

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